

STATE OF NEW HAMPSHIRE
REVIEW OF THE INDIGENT DEFENSE PROGRAM
JANUARY, 1989

TO THE FISCAL COMMITTEE OF THE GENERAL COURT:

We have conducted a review of the indigent defense program in the State of New Hampshire consistent with recommendations made to you by the joint Legislative Performance Audit and Oversight Committee. Our review was conducted in accordance with generally accepted governmental auditing standards and accordingly included such procedures as we considered necessary in the circumstances.

The objective of our review was to determine whether the program is operating as efficiently as can reasonably be expected and whether indigent defendants are receiving effective representation in the administration of justice throughout our court system. To accomplish these objectives we surveyed and interviewed defense attorneys, prosecutors, the judiciary, court clerks, the attorney general, the Judicial Council and program administrators. We compiled financial data and reviewed court opinions and prior reports related to the program. We believe our review was comprehensive and provided an objective understanding of the program upon which to base our conclusions.

This report results from our evaluation of all of the information noted above and is intended solely to inform the Legislative Fiscal Committee of our findings, and should not be used for any other purpose. This restriction is not intended to limit the distribution of the report, which, upon acceptance by the Fiscal Committee, is a matter of public record.

We wish to thank everyone involved, especially the New Hampshire Public Defender, the Judicial Council, the Court Clerks and the judiciary who so freely and generously contributed their time and expertise in a joint effort to improve the operation of the program.

Office of Legislative Budget Assistant
OFFICE OF LEGISLATIVE BUDGET ASSISTANT

January, 1989

**STATE OF NEW HAMPSHIRE
INDIGENT DEFENSE PROGRAM**

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STATE OF NEW HAMPSHIRE
INDIGENT DEFENSE PROGRAM

EXECUTIVE SUMMARY

The executive summary that follows through page twelve of this report summarizes the observations and recommendations resulting from our consideration and evaluation of information pertaining to the indigent defense program in New Hampshire. Our goal is to determine whether the program is meeting its responsibility to provide legal representation to the poor set forth in Part I, Article 15 of the Constitution of the State of New Hampshire:

Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.

The report examines, in detail, specific objectives and operations of indigent defense in the State such as organizational structure, administrative responsibilities, recoupment policies, sentencing statistics, and cost. We conducted interviews with prosecutors, defense attorneys, court administrators, the Judicial Council and New Hampshire Public Defender, a nonprofit corporation. We surveyed the judiciary, contract and assigned counsel and court clerks. We researched the legislative and financial history of the indigent defense program and compared it to the programs of other states. Our review summarizes sentencing data, per-capita costs, average-case costs and recoupment policies, and places them within the context of effective management. Our report balances the State's obligation to defend indigents against criminal charges with the needs of other components of the criminal justice system. The reader is encouraged to read the entire report for a complete understanding of our comments and the associated responses. Written responses to our report from the New Hampshire Public Defender, the Judicial Council and the Department of Administrative Services are contained in Appendices H, I, and J respectively.

EXECUTIVE SUMMARY (Continued)

COSTS

The cost of providing indigent defense services has escalated in the State of New Hampshire, primarily as a result of record growth in population and development. New Hampshire is the third fastest growing state in the nation, according to a recent U.S. Census Bureau report. Caseload for the indigent defense program has risen from approximately 7,000 cases in 1982 to over 13,000 cases in 1988, an 86% increase.

The rise in costs, analyzed in detail on page twenty-nine in this report, is due primarily to the increase in indigent caseload. Determining how costs can be controlled is an objective of this report. The following graph summarizes actual expenditures for attorneys' fees and other expenses paid by the State since 1966. Refer to Appendix A for more detailed information regarding appropriations and actual expenditures.

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EXECUTIVE SUMMARY (Continued)

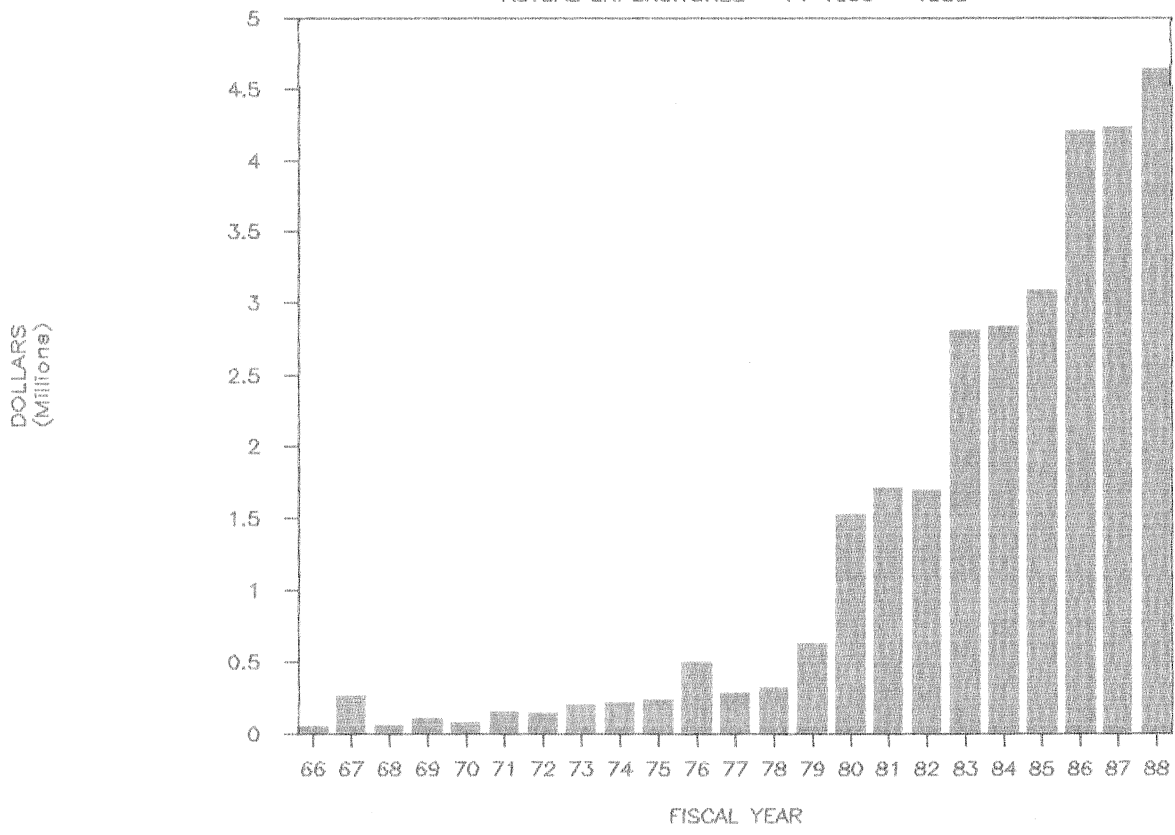
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INDIGENT DEFENDER PROGRAM

ACTUAL EXPENDITURES - FY 1966 - 1988



EXECUTIVE SUMMARY (Continued)

New Hampshire's increasing population and crime rate account for much of the uncontrollable cost of providing indigent defense. A 1980 report by the Attorney General states that "controlling the cost of the indigent defense system is not wholly within the power of the State...." However, some costs can be controlled. Public defender programs are generally recognized as the most cost-effective way to deliver indigent defense services to fulfill constitutional mandates. New Hampshire, like many states, supplements the work of the public defender program with other programs in order to carry out a viable and reasonable legal defense for all indigent defendants. Contract and assigned counsel assume cases which the public defender program must refuse because of conflicts of interest or unavailability.

FUTURE FUNDING REQUESTS

A supplemental budget request of \$300,000 for fiscal year '89 has been prepared by the Department of Administrative Services (DAS) for consideration by the 1989 legislative session to cover the rising caseload and associated costs of the indigent defense program during the '88/'89 biennium. Assigned counsel billings have averaged \$90,000 a month during fiscal year 89, up from a low of \$50,000 a month during the 86/87 biennium. The rise in assigned counsel billings is a direct result of the public defender's and contract attorneys' inability to maintain their share of the increasing caseload.

The Department of Administrative Services (DAS) has submitted the following budget request for the '90/'91 biennium in order to fully fund the Public Defenders Office so as to minimize the use of contract attorneys and assigned counsel. The projected caseloads are 15,280 in FY 90 and 16,044 in FY 91, based on a five percent increase over the estimated FY 89 caseload.

	<u>1988 ACTUAL</u>	<u>1989 ADJUSTED AUTHORIZED*</u>	<u>1990 TOTAL REQUEST</u>	<u>1991 TOTAL REQUEST</u>
ASSIGNED COUNSEL	834,700	450,000	1,000,000	1,000,000
PUBLIC DEFENDER	3,000,000	3,662,242	4,174,125	4,490,665
CONTRACT ATTORNEYS	<u>807,780</u>	<u>1,000,000</u>	<u>1,100,000</u>	<u>1,200,000</u>
TOTAL	4,642,480	5,112,242	6,274,125	6,690,665

* as of December 31, 1988

EXECUTIVE SUMMARY (Continued)

RECOMMENDATIONS

- o Minimize the use of assigned counsel in order to maximize the efficiency and effectiveness of the indigent defense program. Assigned counsel is the most expensive means of defending the poor. Full funding of the public defender program, based on caseload projections for the biennium, results in the most effective delivery of services. Less than full funding of the public defender program, in the face of an increasing caseload, results in reliance on the contract attorney and assigned counsel programs to such an extent that the delivery of service is frustrated because of the unavailability of contract counsel and the increased cost of using assigned counsel.
- o RSA 604-B:8 authorizes the Judicial Council to contract for an alternate public defender program in circumstances where, because of conflict of interest or otherwise, the public defender program is unable to provide representation to a defendant. We recommend that the Judicial Council should conduct a search for and pursue negotiations with an alternate public defender to provide services especially in Hillsborough and Rockingham Counties where the need is most acute. The introduction of an alternate public defender should alleviate the frustration expressed by court clerks and the judiciary when the public defender is unable to provide representation. An alternate public defender would also greatly reduce the need for assigned and contract counsel in those counties. The funds currently spent on assigned and contract counsel could then be used to fund the alternate public defender. During a transition from one method of delivery to another flexibility will be required in expending available funding.
- o RSA 604-A:1-a provides abused and neglected children in need of legal representation with counsel. Existing statutes require the indigent defense program to provide the service yet prohibit the public defender from defending these cases which, as a result, receive assigned counsel. The legislature should explore alternative delivery systems modeled after the public defender and contract attorney systems to provide representation in non-criminal abuse and neglect cases and consider such statutory amendments as necessary. Additionally, these costs should be separated from assigned counsel appropriations so that they can be clearly identified.
- o Establish a contract system to obtain services other than counsel, such as investigators, and court reporters, similar to the system currently in place for defense attorneys.

EXECUTIVE SUMMARY (Continued)

SENTENCING

Sentence reform is an area often suggested as a way to reduce the costs and size of the indigent caseload. The New Hampshire Constitution guarantees counsel to any defendant charged with a crime "at the expense of the state if need be shown." A defendant is not entitled to counsel in cases that do not carry a threat of imprisonment. Reducing the amount of offenses with potential jail sentences would, therefore, limit the number of indigent cases. This can be accomplished through various alternatives including the reduction of certain misdemeanors to violations, establishing two classes of misdemeanors and practicing diversion techniques that prevent an offender from entering the court system by agreeing to certain conditions rather than facing the possibility of imprisonment in court proceedings. The following tables summarize the ten most frequently occurring misdemeanors and felonies defended (and closed) by the Public Defender between April 1, 1987 and July 31, 1988. New Hampshire Public Defender handled approximately 55% of the indigent caseload during this period. These statistics are valuable for analyzing the degree to which the courts are imposing jail sentences for selected offenses in New Hampshire.

EXECUTIVE SUMMARY (Continued)

NEW HAMPSHIRE PUBLIC DEFENDER
 10 MOST FREQUENTLY OCCURRING MISDEMEANORS DEFENDED FOR THE PERIOD
 APRIL 1, 1987 TO JULY 31, 1988

Description	Number of Cases	Number Sentenced to Incarceration	Percent Sentenced to Incarceration	Number of Sentences			
				Suspended	Deferred	Committed	Suspended except for time served
Driving Aftr Revocation or suspension RSA 263:64	642	279	43.46%	141	12	107	19
Driving under influence of drugs/liquor 265:82	393	238	60.56%	7	2	217	12
Simple Assault 631:2-a	376	171	45.48%	118	4	38	11
Criminal Trespass 635:2	140	60	42.86%	34	6	16	4
Resisting arrest or detention 642:2	129	81	62.79%	57	2	19	3
Willful concealment & shoplifting 644:17	136	66	48.53%	49	1	10	6
Criminal Mischief 634:2	123	45	36.59%	35	2	6	2
Theft by unauthor taking or transfer 637:3	120	51	42.50%	29	4	13	5
Aggravated driving while intoxicated 265:82-a	112	22	19.64%	13		8	1
Disorderly conduct 644:2	102	21	20.59%	19		2	
Subtotal	2273	1034	45.49%	502	33	436	63
All other cases	761	331	43.50%	211	15	79	26
Terminated cases	376	--	--	--	--	--	--
Grand total	3410	1365	--	713	48	515	89

The above table and the table on page seven provide sentencing information based upon the charge as initiated by the state. This charge is not necessarily the charge upon which the case is ultimately resolved. For example, the case may be concluded by a dismissal, a finding of not guilty, a plea of guilty to the initial charge, or a plea of guilty to a lesser charge.

EXECUTIVE SUMMARY (Continued)

NEW HAMPSHIRE PUBLIC DEFENDER
 10 MOST FREQUENTLY OCCURRING FELONIES DEFENDED FOR THE PERIOD
 APRIL 1, 1987 TO JULY 31, 1988

Description	Number	Number	Percent	-----Number of Sentences-----			
	of Cases	Sentenced to Incarceration	Sentenced to Incarceration	Suspended	Deferred	Committed	Suspended except for time served
Burglary - 635:1	220	173	78.64%	68	23	77	5
Theft by unauthor taking or transfer - 637:3	143	108	75.52%	61	9	35	3
Forgery - 638:1	141	111	78.72%	54	16	38	3
Aggravated felonious sexual assault 632-A:2	94	56	59.57%	11	11	34	
Receiving stolen property 637:7	89	57	64.04%	27	7	22	1
Poss of narcotic drug RSA 318-B:26 I (b)(1)	71	38	53.52%	19	4	11	4
Oper Motor Veh After Dec Habtl Ofndr 262:22	66	59	89.39%	6	1	52	
Welfare Fraud RSA 167	76	65	85.53%	50	9	6	
Second Degree Assault RSA 631:2	70	41	58.57%	12	9	19	1
Robbery RSA 636:1	51	42	82.35%	8	2	32	
Subtotal	1021	750	73.46%	316	91	326	17
All other cases	611	456	74.63%	177	59	197	23
Terminated cases	511	--	--	--	--	--	--
Grand total	2143	1206	--	493	150	523	40

In order to determine whether sentencing data applicable to the disposition of cases defended by the New Hampshire Public Defender is representative of cases throughout the state, we designed a random sample of selections from the statewide court system for the fifteen month period ending June 30, 1988. Our sample of 300 randomly selected cases resulted in similar rates of incarceration, at a 95% rate of reliability. In the area of sentence reform we offer the following recommendations.

EXECUTIVE SUMMARY (Continued)

RECOMMENDATIONS

- o The legislature should consider reducing selected misdemeanors to violations.
- o The legislature should consider establishing two classes of misdemeanors that removes the possibility of imprisonment for minor misdemeanors or first offenses of certain crimes. The elimination of a potential jail sentence also removes the right to appointed counsel at state expense.
- o The legislature should consider encouraging the use of pre-trial "diversion techniques" in certain misdemeanor cases and first offenses to increase the number of cases that could be resolved with an alternative to incarceration like community service and restitution.

RECOUPMENT

Statutory provisions requiring repayment for defense services have existed since 1969. These statutes, however, also limit recoupment of expenses so that they make no significant contribution in funding the indigent defense program. RSA 604-A:9 requires repayment by "any defendant who is convicted of any offense whose sentence does not include actual incarceration in the State prison and who has had counsel or a public defender assigned to him at the expense of the State...." Limiting the obligation to repay the State to convicted defendants eliminates potential recovery from approximately 40% of the caseload, according to the statistics we compiled from New Hampshire Public Defender. Approximately forty percent of the caseload results in findings other than guilty convictions, such as conditional or unconditional discharges, continued sentences, sentences filed without a finding, dismissals, terminations or not guilty findings. The State requires the remaining defendants to repay only if they have not been committed to the State prison, and according to "the defendant's present or future ability to pay."

Data relating to total repayment orders and total collections prior to FY 88 is incomplete and therefore unreliable because of the various sources of collection and the use of a number of receipt accounts, some of which were not used exclusively for attorney fee recoveries.

However, the Office of Cost Containment (OCC) estimates it will recover approximately \$200,000, over and above the present recovery level of \$134,000 (FY 88) and its operating cost of \$200,000. According to OCC, it will recover 60% (\$525,000) of the total amount ordered for collection during FY 89. A complete discussion of recoupment efforts begins on page forty-two of this report. Our recommendations relative to recoupment are as follows.

EXECUTIVE SUMMARY (Continued)

RECOMMENDATIONS

- o Consider broadening the current statute to require repayment from more defendants than just those found guilty. Such a change could broaden the repayment-order base.
- o Consider placing temporary liens on property owned by defendants to ensure repayment. Create a policy that makes repayment a condition of probation or parole.
- o As required by RSA 604-A:9 and Chapter 225:3, Laws of 1988, include expenses for services other than counsel in all repayment orders. These expenses often amount to more than the amount paid to counsel and are not consistently included in repayment orders.
- o Various improvements and corrections need to be made to reports generated by Division of Information Services to clarify their meaning and enhance utilization by both the Office of Cost Containment and the Department of Corrections as discussed on page forty-five of this report.

EXECUTIVE SUMMARY (Continued)

ORGANIZATION

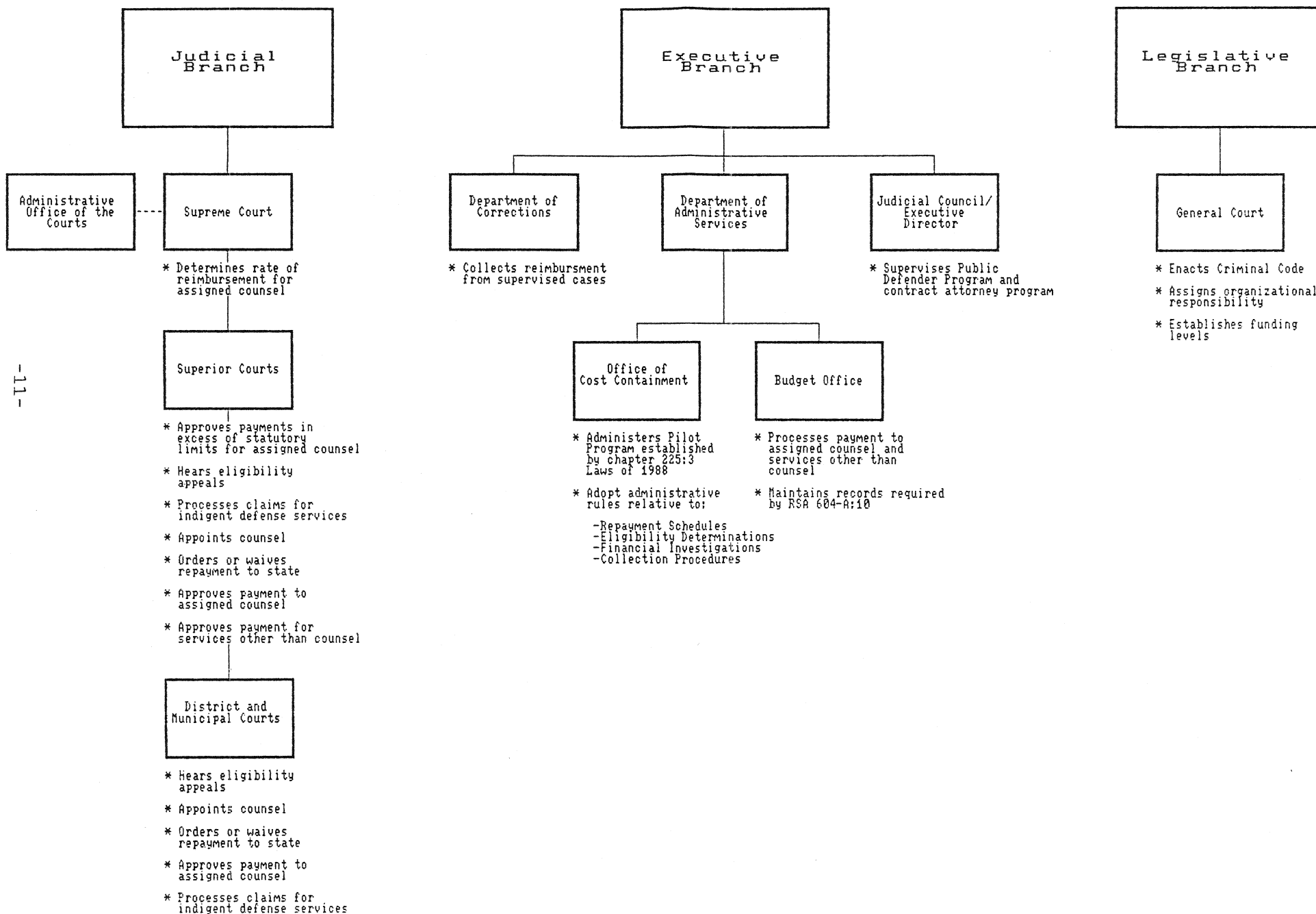
The Judicial Council has specific responsibility to contract for the public defender program, contract attorneys and for an alternate public defender program. It also has specific responsibility for the general supervision of these programs. The Commissioner of Administrative Services shares contractual authority but has not exercised it to date. The Department of Administrative Services also performs various other administrative tasks relative to the indigent defense program pursuant to RSA 604-A:10. The Department of Corrections collects reimbursements from supervised cases under a memorandum of understanding with the Department of Administrative Services. Because administrative responsibilities are shared between various agencies, gaps in accountability have occurred as evidenced by a lack of historic caseload statistics, incomplete recoupment data, and imprecise average cost per case for assigned counsel cases including abuse and neglect cases. Information systems have not been developed that focus on providing complete and accurate management information useful for evaluating the overall effectiveness of all components of the program. The chart on the following page illustrates the degree to which administration of the program is spread throughout various state agencies.

RECOMMENDATIONS

- o The various agencies involved in the administration of the program should coordinate their efforts to ensure that consistent, coordinated, complete and accurate accountability is maintained over all aspects of the program including systems to capture case costs for all delivery systems, sentencing data, repayment orders and the related recovery rates, the cost of providing representation for abuse and neglect cases and the cost for services other than counsel.
- o The legislature should consider if both the Judicial Council and the DAS should continue to have the authority to contract for the same indigent defense program services.

STATE OF NEW HAMPSHIRE

ORGANIZATIONAL RESPONSIBILITIES GOVERNING ADMINISTRATION OF THE INDIGENT DEFENDER PROGRAM



EXECUTIVE SUMMARY (Continued)

SURVEYS

Part of our research involved separate surveys of court clerks, the judiciary and defense attorneys. We mailed approximately one hundred surveys to each group. About half of each group responded. Our purpose was to solicit comments and criticisms on the effectiveness of the indigent defender program. An overriding concern reported by each of these groups is the difficulty the courts have in appointing counsel to indigent defendants when the public defender is unavailable to assume the case. According to the surveys returned the unavailability of assigned counsel, especially in the southern part of the state, is due to the substandard rate of reimbursement the state pays these attorneys to represent indigent defendants. A complete summary of the responses we received to our surveys begins on page fifty-one of this report.

RECOMMENDATION

- o Due to the uniform response concerning the substandard rate of reimbursement paid to assigned counsel, we recommend that the New Hampshire Supreme Court consider raising the rate of reimbursement to assigned counsel. The prevailing rate of \$30 per hour in-court and \$20 per hour out-of-court has not been raised since 1978.

CONCLUSION

To conclude, our review has resulted in the realization that the State of New Hampshire is not alone in examining the issues and costs surrounding the delivery of counsel to indigent defendants. It has been the subject of considerable debate and controversy both in our state and throughout the nation. In 1982, the U.S. Department of Justice conducted a study which was updated in 1988 using data compiled from 1986 statistics. We have extracted items of interest to New Hampshire policy makers and included them in the body of this report. In addition, a summary of various reports concerning the program in New Hampshire appears in Appendix C of this report. We have provided the current status of each recommendation resulting from prior reports to illustrate that several of the issues are recurring in nature. Most address important ideas worthy of considerable thought. Among the most important have been two proposals to amend the New Hampshire Constitution, once in 1981 and again in 1988. Suggestions to decriminalize certain statutes in order to reduce the number of defendants eligible to receive counsel at the expense of the State are among other proposals. These issues, among others, are discussed in this report with the objective of providing the General Court with information necessary to make insightful legislative decisions.

OBJECTIVES, SCOPE AND METHODS

OBJECTIVES AND SCOPE

We have completed a review of the indigent defense program consistent with recommendations made to the Fiscal Committee by the joint Legislative Performance Audit and Oversight Committee. Our review included comprehensive analysis and comparison of the three current types of delivery systems. They are: the public defender program, the contract counsel program and assigned counsel. We analyzed the cost and perceived quality of representation that each system provides. We also reviewed the fiscal impact statement relevant to rules established by the Office of Cost Containment, to evaluate the likelihood that it will achieve its intended objectives. Our review satisfies the following objectives:

1. To make appropriate recommendations to increase the cost effectiveness and efficiency of the indigent defense program, in the areas of organizational structure, administrative responsibility, contracts, repayment orders, and funding levels.
2. To summarize available data concerning sentences imposed by the courts, by particular RSA, comparing sentences available to the courts to those actually imposed. The utilization of this information becomes more critical to legislative decisions as the cost of providing indigent defense services escalates.
3. To determine the cost effectiveness of repayment systems, particularly, the collection of lawyers' fees and other expenses not originally covered in a repayment order by the court.
4. To provide the Legislative Fiscal Committee with a listing of the prior studies of the indigent defense program, including a synopsis of the reports issued as a result of these studies and the status of prior recommendations.
5. To provide a comparison of the indigent defense program in New Hampshire with similar programs in other states.
6. To provide a legislative and financial history of the indigent defense program since its inception, including appropriations, expenditures and repayments.

METHODS

Surveys and Interviews

To accomplish our objectives we sent out approximately 300 questionnaires to contract and appointed counsel, District, Municipal and Superior Court Clerks, and the judiciary. We interviewed the executive director of the New Hampshire Public Defender's Office and the executive director of the Judicial Council at length. We also conducted interviews with prosecutors, the Chairman of the Indigent Defense Committee of the New Hampshire Bar Association, the New Hampshire Attorney General and various program administrators and support staff at the Department of Administrative Services and the Department of Corrections. We communicated with the U.S. Department of Justice, which, through its Bureau of Justice Statistics, has compiled information at the national level, providing an interesting perspective and a basis for comparing similar programs throughout the nation.

Statistical Sampling - Sentencing Statistics

Sentencing statistics related to misdemeanor and felony charges heard by the courts drew our interest at the outset of our review. None of the organizations currently involved in the indigent defense program summarize sentencing statistics. However, the New Hampshire Public Defender was able to provide this information upon our request which necessitated additional programming on their part. Consequently, in order to draw some conclusions related to sentences imposed by the courts in New Hampshire, we designed a random sample of 300 charges drawn from docket numbers issued by Superior, Municipal and District courts between April 1, 1987 and June 30, 1988. This level of testing results in a 95% reliability level. During that period, the courts assigned approximately 383,000 docket numbers to offenders charged with either a violation, a misdemeanor or a felony. A breakdown of the number of dockets related to criminal charges (misdemeanors or felonies) is unavailable at this time because the courts are not required to maintain these statistics. Also, the Biennial Report of the Judicial Council, which has summarized this type of information in the past, was last published for the period ending December 31, 1984.

A further complication surrounding sentencing statistics relates to the manner in which the courts maintain their records versus the manner in which they ultimately dispose of these charges. The courts keep track of offenses by individual charges. Each charge is assigned a docket number as it enters the court system. Typically, however, a number of individual charges are related to one defendant and these charges are defended by counsel and heard by the courts together as one "case." The courts are not required to maintain records recording the number of cases by individual defendant which, in reality, is a truer measure of

METHODS (Continued)

workload for the court prosecutor and the defense attorney. In addition, the imposition of any given sentence routinely corresponds to the "dispositional charge" in each case. Presumably, the most serious charge in the case is what drives the imposition of a sentence, and all lesser charges are dismissed or subordinated to the dispositional charge. Additionally, when plea bargaining between the prosecutor and the defense results in a defendant pleading guilty to a lesser charge, the sentencing statistics are also skewed if one is interested in tracking the original charge to the ultimate disposition of the case. Nevertheless, in an initial attempt to form some conclusions regarding sentencing in the state, we reviewed a selection of charges and traced them through to their ultimate disposition.

We were able to obtain much more complete sentencing information for the cases closed by the New Hampshire Public Defender for the sixteen month period ending July 31, 1988 because the New Hampshire Public Defender has included sentencing data in their data base which tracks all cases (by defendant) handled by their office.

During this period, the New Hampshire Public Defender represented approximately 55% of all cases (open and closed) defended through the indigent defense program. The remainder was handled by contract attorneys or assigned counsel. The sentencing statistics resulting from cases defended by the New Hampshire Public Defender are summarized on pages thirty-six and thirty-seven and Appendix D of this report.

Based upon the results of our sample, we found that approximately 45% of the defendants statewide waived their right to counsel, 32% obtained private counsel, and 23% required publicly appointed defense. Of the clients represented by counsel, our sample showed that 42% were publicly defended and 58% were defended by private counsel.

RELIABILITY OF DATA

The information presented in this report is largely the representations of various program administrators responsible for the direct administration of the indigent defense program. We have summarized the information presented to us, throughout this report. We did not perform specific audit procedures to verify the accuracy of the data. However, nothing came to our attention in the course of our review to cause us to question the accuracy of the data.

INTRODUCTION

The Sixth Amendment to the United States Constitution provides a right to counsel in federal prosecutions for those unable to afford a lawyer. This right has been made applicable to the states through the 14th Amendment.

A series of Supreme Court cases has defined the scope of this right in state criminal proceedings for individuals financially unable to hire an attorney. Beginning with Powell v. Alabama in 1932,¹ the Supreme Court held that an indigent person charged with a capital offense must be afforded the right to counsel. In 1963, this right was extended to all state felony prosecutions by the Court's decision in Gideon v. Wainwright.² Less than ten years later, Argersinger v. Hamlin³ held that the right to counsel was to be afforded in non-felony criminal cases in which the accused suffers a loss of liberty.

In New Hampshire, a poor person has the right to appointed counsel in any case in which the threat of imprisonment is authorized under the law.⁴ New Hampshire thus affords its citizens greater constitutional and statutory protection than does the Federal Constitution.

Part I, Article 15 of the Constitution of the State of New Hampshire reads as follows:

[Art.] 15th. [Right of Accused.] No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel. No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must

¹ 287 U.S. 45 (1932)

² 372 U.S. 335 (1963)

³ 407 U.S. 25 (1972)

⁴ New Hampshire Revised Statutes Annotated 604-A:2

INTRODUCTION (Continued)

be established. Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.

The last sentence of Article 15 was added as an amendment that became effective on November 16, 1966. It is this sentence that has resulted in an expanding indigent defender program in the State, with its associated costs.

The Journal of the Constitutional Convention of 1964, at which the resolution proposing the amendment to Article 15 was adopted, indicates the resolution was proposed in response to the March 16, 1963 decision of the United States Supreme Court in the case of Gideon v. Wainwright. In Gideon, the court extended to the states a defendant's right to counsel in felony cases through the Fourteenth Amendment to the United States Constitution. Prior to this decision, the states were required under the Sixth Amendment to provide counsel to indigent defendants only in capital cases, or in cases where a particular injustice could be shown to result from a lack of representation.

Since 1901, New Hampshire has required the assignment of counsel in capital cases and, until 1965, had required the assignment of counsel to other felony cases, varying the requirement only upon the duration of possible imprisonment. From 1901 to 1965, responsibility for the payment of legal services provided at the expense of the public rested with the counties. RSA 604-A, adopted in 1965, extended the right to counsel to certain misdemeanors and, for the first time, appropriated state funds to provide counsel to indigent defendants in criminal cases. It also relieved the counties of this responsibility. With the passage of the amendment to the State Constitution in 1966, the right to counsel was extended to all crimes "punishable by deprivation of liberty."

New Hampshire's system for providing legal defense services to indigents is an area that has received considerable study and attention almost since its inception in 1965. The primary reason for this attention is the program's escalating costs and its requirement for frequent supplemental appropriations. Appendix C provides a synopsis of the prior reports that have been issued on the indigent defense program, and Appendix A provides a history of indigent defense expenditures and associated appropriations from fiscal year 1966 to 1989.

A NATIONAL PERSPECTIVE

TRENDS

The State of New Hampshire is not alone in facing the burden of caseload growth and the associated increased expense of providing indigent defendants with legal representation. A report released by the U.S. Department of Justice in November, 1988, entitled Criminal Defense For the Poor, 1986 (an update of a 1982 survey), reported that the nation spends almost \$1 billion to represent indigent criminal defendants, an increase of 60% from \$625 million reported in 1982. Additional national findings include the following:

- o The caseload of indigent defendants has increased 40% from 3.2 million cases reported in 1982 to 4.5 million reported in 1986.
- o The average cost per case increased from \$196 in 1982 to \$224 in 1986. The average cost per case in 1986 ranged from a low of \$63 in Arkansas to a high of \$698 in Alaska.
- o The primary means of delivering services is by assigned counsel, however the percentage of use has dropped from 60% to 52%. Public defender programs have increased from 34% to 37% and contract defense programs have increased from 7% to 11%.
- o Twenty states fund their programs at the state level; ten states are funded at the county level and the remaining states use a combination of state and county funding.
- o Nationally, per capita costs increased from \$2.76 to \$4.13, ranging from a low of \$.69 in Arkansas to \$29 in the District of Columbia.

The survey identified national trends such as a shift from county to state funding, an increase in the rate of compensation paid to private attorneys, expanded use of contracts and a dramatic rise in caseload. New Hampshire shares in these trends.

<u>National Trend</u>	<u>New Hampshire's Position</u>
Shift from county funding to increased state funding	Fully funded by state since 1966.

A NATIONAL PERSPECTIVE (Continued)

<u>National Trend</u>	<u>New Hampshire's Position</u>
Increased compensation paid to private attorneys	In 1978, assigned counsel fees increased from \$10/hr out-of-court and \$15/hr in-court to a prevailing rate of \$20 out-of-court, \$30 in-court. A maximum rate of \$25 out-of-court, \$35 in-court can be requested, under exceptional circumstances.
Expanded use of Contract attorneys for delivery of representation	New Hampshire introduced the contract attorney program in 1985.
Rise in caseloads	Caseload growth of 86% from 1982 - 1988.
Increased level of funding	180% increase in funding between fiscal year 1982 and fiscal year 1988.

The costs associated with indigent defense services are best understood by examining the costs borne by the nation to administer the criminal justice system as a whole. According to the Bureau of Justice Statistics' Sourcebook, 1987, public defense received only 1.8% of State and local criminal justice dollars, whereas prosecution services received 6.1%; the judiciary - 12.3%, corrections - 30.9% and law enforcement - 48.2%. The Bureau of Justice Statistics also estimates national per capita spending on criminal justice approached \$167 in 1985, while per capita indigent defense spending during the same year averaged \$2.98.

Criminal justice spending at the state level in New Hampshire suggests a similar pattern of spending. Public defense received 6% of the total resources devoted to the criminal justice system from state appropriations in the 1988 budget. Since indigent defense is funded entirely by state appropriations, the percentage of funds allocated to indigent defense becomes smaller when local resources are taken into consideration. The level of local spending for law enforcement, prosecution and corrections, reported to the U.S. Department of Justice, Bureau of Justice Statistics for fiscal year 1985 (the latest data available) reduces the percentage of funds allocated to indigent defense in relation to total justice spending to 2.4% of total spending.

A NATIONAL PERSPECTIVE (Continued)

The following graph illustrates the allocation of state and local expenditures to the various components of the criminal justice system in New Hampshire during 1985.

SOURCE: U.S. Department of Justice Sourcebook, 1987, page 4.

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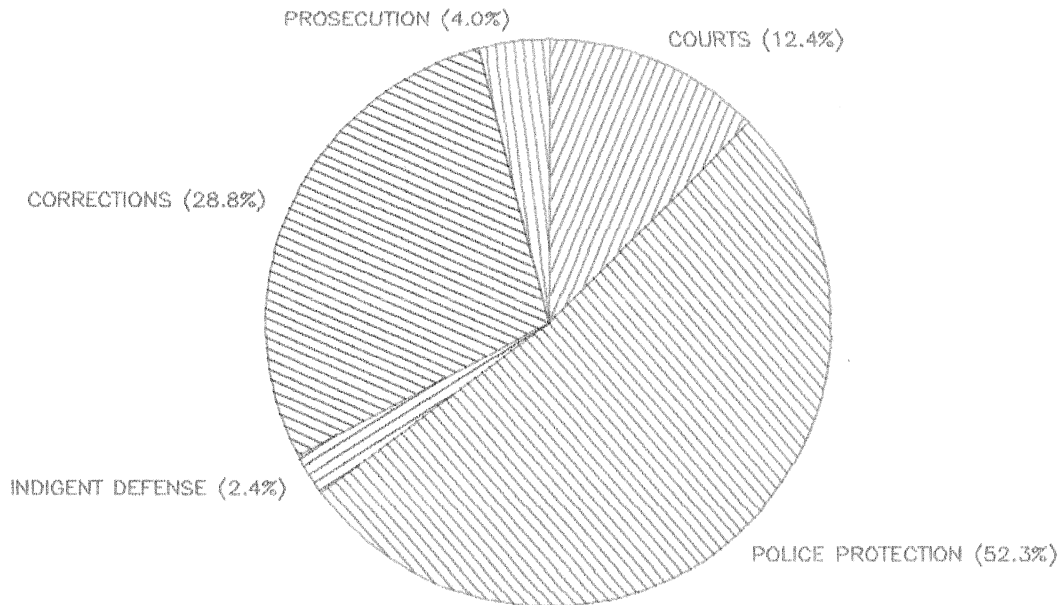
A NATIONAL PERSPECTIVE (Continued)

The following graph illustrates the allocation of state and local expenditures to the various components of the criminal justice system in New Hampshire during 1985.

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- X = black
- A = green
- B = magenta
- C = black
- D = violet
- E = cyan

CRIMINAL JUSTICE SYSTEM
STATE AND LOCAL EXPENDITURES - FY 1985



SOURCE: U.S. Department of Justice Sourcebook, 1987, page 4.



A NATIONAL PERSPECTIVE (Continued)
NATIONAL SURVEY PER CAPITA COSTS AND AVERAGE COST PER CASE

A comparison of New Hampshire's level of spending on indigent defense services with other states provides information with which to judge our level of commitment to the program. The data also leads us to question our relatively high ranking of per capita costs and average cost per case. The following table, extracted from Criminal Defense for the Poor, 1986, presents total expenditures for indigent defense programs, per capita costs, caseload estimates, average cost per case and each state's ranking among the fifty states.

Per capita and average cost per indigent defense case, by State, 1986						
State	Total expenditures	Per capita cost		Caseload estimates	Average cost per case	
		Amount	Ranking		Amount	Ranking
Total	\$991,047,250	\$4.11		4,441,000*	\$223*	
Alabama	6,153,292	1.52	44	32,000	192	29
Alaska	6,892,400	12.91	2	15,000	468	2
Arizona	16,240,654	4.89	10	71,000	230	20
Arkansas	1,636,500	.69	51	26,000	63	51
California	251,504,768	9.32	3	886,000	284	10
Colorado	12,126,270	3.71	21	53,000	229	21
Connecticut	9,251,316	2.90	25	67,000	138	45
Delaware	2,750,000	4.34	14	18,000	153	40
District of Columbia	18,089,976	28.90	1	54,000	334	7
Florida	82,133,008	7.03	5	307,000	268	13
Georgia	8,318,500	1.36	47	60,000	138	44
Hawaii	4,382,609	4.13	18	20,000	219	22
Idaho	2,622,000	2.62	28	16,000	164	35
Illinois	33,101,784	2.87	26	255,000	130	46
Indiana	10,966,497	1.99	37	68,000	162	36
Iowa	11,536,008	4.05	20	42,000	274	11
Kansas	4,262,333	1.73	41	26,000	165	34
Kentucky	7,664,000	2.06	36	65,000	118	47
Louisiana	10,842,017	2.41	34	69,000	158	38
Maine	1,962,694	1.67	42	10,000	187	31
Maryland	20,042,024	4.49	13	102,000	196	27
Massachusetts	20,761,822	3.56	22	145,000	143	43
Michigan	43,612,176	4.77	11	138,000	316	8
Minnesota	14,165,242	3.36	24	54,000	261	14
Mississippi	2,912,000	1.11	50	27,000	107	49
Missouri	6,746,272	1.33	49	37,000	183	32
Montana	4,220,507	5.15	8	10,000	413	4
Nebraska	4,335,000	2.71	27	29,000	152	42
Nevada	6,382,795	6.63	6	22,000	291	9
New Hampshire	4,329,960	4.22	16	11,000	402	5
New Jersey	31,025,000	4.07	19	57,000	540	1
New Mexico	6,283,700	4.25	15	23,000	269	12
New York	111,671,160	6.28	7	457,000	244	17
North Carolina	16,480,870	2.60	29	70,000	235	19
North Dakota	1,225,963	1.81	39	6,000	198	26
Ohio	26,518,090	2.47	32	141,000	188	30
Oklahoma	4,496,538	1.36	48	44,000	102	50
Oregon	22,432,300	8.31	4	141,000	160	37
Pennsylvania	28,636,000	2.41	33	148,000	193	28
Rhode Island	2,083,091	2.14	35	8,000	254	16
South Carolina	4,699,868	1.39	46	31,000	152	41
South Dakota	1,781,804	2.52	31	5,000	367	6
Tennessee	7,792,823	1.62	43	38,000	206	24
Texas	32,897,000	1.97	38	213,000	154	39
Utah	2,327,765	1.40	45	12,000	198	25
Vermont	2,777,798	5.13	9	16,000	177	33
Virginia	10,122,671	1.75	40	87,000	116	48
Washington	21,190,420	4.75	12	101,000	209	23
West Virginia	4,848,921	2.53	30	20,000	242	18
Wisconsin	20,061,508	4.19	17	77,000	261	15
Wyoming	1,749,543	3.45	23	4,000	431	3

Note: Sampling error may affect the precision of the ranking of States in this table. Per capita estimates based on 1986 population data are from the Statistical Abstract of the United States, 1988, table 26. Caseload estimates include the

following casetypes: felony, misdemeanor, juvenile, appeals, mental commitments, probation/parole revocations, postconviction relief, and other criminal matters.
 *Average calculated on unrounded data.

A NATIONAL PERSPECTIVE (Continued)

AVERAGE COST PER CASE

The reported average cost per case of \$402 in New Hampshire in 1986 places us fifth highest in the nation according to the survey conducted by the U.S. Department of Justice. This average compares with \$319, ranked 6th highest in the nation, reported by New Hampshire in the 1982 survey. This represents a 26% increase in New Hampshire compared with a national increase of 15% for the same period. The following table lists the ten states with the highest average cost per indigent defense case in 1982 and 1986. Six of the ten states with the highest costs per case in 1982 retained that position in 1986. They are: Alaska, New Jersey, Wyoming, Montana, New Hampshire, and District of Columbia. New Hampshire is one of two northeastern states in this listing.

TEN STATES WITH THE HIGHEST COST PER INDIGENT DEFENSE CASE
1982 AND 1986

1982		1986	
STATE	COST PER CASE	STATE	COST PER CASE
Hawaii	\$ 567	New Jersey	\$ 540
District of Columbia	434	Alaska	468
New Jersey	362	Wyoming	431
Alaska	338	Montana	413
Wyoming	332	New Hampshire	402
New Hampshire	319	South Dakota	367
Iowa	283	District of Columbia	334
Oregon	282	Michigan	316
Montana	266	Nevada	291
Rhode Island	259	California	284

TEN STATES WITH THE LOWEST COST PER INDIGENT DEFENSE CASE
1982 AND 1986

1982		1986	
STATE	COST PER CASE	STATE	COST PER CASE
Oklahoma	\$ 85	Arkansas	\$ 63
Connecticut	105	Oklahoma	102
Louisiana	111	Mississippi	107
Virginia	111	Virginia	116
Maine	112	Kentucky	118
Arkansas	115	Illinois	130
Nebraska	117	Connecticut	138
Idaho	121	Georgia	138
Mississippi	123	Massachusetts	143
Illinois	130	Nebraska	152

A NATIONAL PERSPECTIVE (Continued)

Seven of the ten states with the lowest average cost per case in 1982 retained their position in 1986. Connecticut is the only northeastern state to do so consistently, although Massachusetts joined the list in 1986 and Maine dropped off the list in 1986.

COST PER CAPITA

When examined on a per capita basis, New Hampshire compares more favorably with national statistics. Per capita costs reported by the U.S. Department of Justice are summarized below:

	<u>Lowest Cost per Capita</u>	<u>Highest Cost per Capita</u>	<u>National Average</u>	<u>New Hampshire Cost/Capita</u>
1982	\$.71 (Ark)	\$13.00 (D.C.)	\$ 2.76	\$ 2.33
1986	.69 (Ark)	29.00 (D.C.)	4.13	4.22

In 1982 New Hampshire ranked 21st in cost per capita. In 1986, the State rose to the 16th highest rank in the nation. Just below the national average of \$2.76 per capita in 1982, New Hampshire moved above the national average of \$4.13 to \$4.22 in 1986. This eighty-one percent increase exceeds the national increase of fifty percent.

A NATIONAL PERSPECTIVE (Continued)

The following chart narrows the comparison of costs down to the northeastern region of the nation, to determine if New England states share common cost characteristics.

INDIGENT DEFENSE PROGRAMS
COMPARISON OF NEW ENGLAND STATES

<u>STATE</u>	<u>PRIMARY DELIVERY SYSTEMS</u>	<u>1986 TOTAL EXPENDITURES</u>	<u>COST/ CAPITA</u>	<u>RANKING OF PER CAPITA COST (OUT OF 50 STATES)</u>	<u>CASELOAD ESTIMATE</u>	<u>AVERAGE COST/CASE</u>	<u>AVERAGE COST/CASE OUT OF 50 STATES RANKING</u>
Maine	Assigned	\$ 1,962,694	\$ 1.67	42	10,000	\$ 187	31
R.I.	Public Defender	2,083,091	2.14	36	8,000	254	16
Conn.	Public Defender	9,251,316	2.90	25	67,000	138	45
Mass.	Public Defender & Assigned Counsel	20,761,822	3.56	22	145,000	143	43
N.H.	Public Defender, & Contract Attorney	4,329,960	4.22	16	11,000	402	5
Vermont	Public Defender & Contract Attorney	<u>2,777,798</u>	<u>5.13</u>	<u>9</u>	<u>16,000</u>	<u>177</u>	<u>33</u>
NEW ENGLAND TOTAL		\$ 41,166,681	\$ 3.27	--	257,000	\$ 217	--
NATIONAL TOTAL		\$ 996,105,048	\$ 4.13	--	4,448,000	\$ 224	--

Similar economic conditions unique to New England do not appear to have a bearing on the cost of providing defense services. Although seven of the ten states with the lowest per capita costs were located in the south, geography, generally, does not appear to be a factor affecting costs. More telling criteria appear to be the level at which the program is funded and the manner in which it is delivered. Five of ten states with the highest percentage increase in costs were funded at the state level while five of ten states with the lowest per capita costs were funded at the county level. Southern states with lower case costs used the assigned counsel system. The fee schedules and maximum rates for appointed counsel are among the lowest in the country, according to the U.S. Department of Justice, Criminal Defense for the Poor, 1986.

The cost of providing indigent defense in New Hampshire is discussed in greater detail beginning on page twenty-nine of this report.

DELIVERY SYSTEMS

Indigent defense services in New Hampshire are delivered in three ways:

- 1) Public Defender Program,
- 2) Contract Attorney Program, and
- 3) Assigned Counsel.

RSA 604-B:5 gives the fourteen-member Judicial Council responsibility for the general supervision of the public defender program, the primary means of delivering indigent defense services in the State. RSA 604-A:2-b also gives the Council authority to contract with attorneys to provide indigent defense services, in addition to those provided by the public defender program, as explained more fully below. Implicit in this authority is responsibility to provide general supervision over the contract attorney program.

The Judicial Council was established in 1945 to continuously study the administration of justice in the State and to recommend changes in that administration at its discretion, among other related duties. The Council consists of a justice from each court level, the Attorney General, the President of the New Hampshire Bar Association, a Clerk of the Superior Court, and seven other members appointed by the Governor and Council, including at least one lay person.

The Judicial Council has an administrative office located at the State House Annex in Concord. The office consists of a full-time executive director and a full-time administrative assistant, with the majority of the Council's general supervision of indigent defense services accomplished through its executive director. The Judicial Council has been instrumental in accomplishing many improvements in the indigent defense program including the enactment of the contract attorney program, statutory authorization for an alternate public defender program, and improvements in recordkeeping.

PUBLIC DEFENDER PROGRAM

New Hampshire Public Defender is a nonprofit corporation organized under the laws of the State of New Hampshire in May, 1985. Through the Judicial Council and with the approval of the Governor and Council, the State entered a two-year contract with this corporation in June, 1987, to operate the public defender program for fiscal years 1988 and 1989. A similar contract was in effect with New Hampshire Public Defender for fiscal years 1986 and 1987.

State appropriations limited the contract to \$3,000,000 in fiscal year 1988, with funds advanced to the corporation on a quarterly basis in equal amounts. In addition, the State holds a reversionary interest in

DELIVERY SYSTEMS (Continued)

all equipment owned by New Hampshire Public Defender with a useful life of greater than two years. As of June 30, 1987, the cost of this equipment amounted to approximately \$375,000. Any amount by which the quarterly payments advanced to New Hampshire Public Defender exceed the total expenses of operating the program must be returned to the State at the end of the second year of the contract. In fiscal year 1988, New Hampshire Public Defender returned \$216,007 to the State for the contract that covered fiscal years 1986 and 1987.

New Hampshire Public Defender is headquartered at 117 North State Street in Concord, with other offices in Manchester, Stratham, Dover, Keene and Orford. An executive director administers the program according to the terms of the contract, employing not less than the equivalent of 49.2 full-time attorneys, subject to staff turnover and the availability of attorneys with whom the corporation may contract for services. The Judicial Council and New Hampshire Public Defender renegotiate this contract every two years depending upon the level of funding appropriated by the General Court to the public defender program in the biennial budget. New Hampshire Public Defender is the primary provider of indigent defense services in the State and must be the first organization the courts look to when appointing counsel (per RSA 604-A:2, II). According to a January 4, 1988 Report to the Fiscal Committee on the Public Defender and Contract Attorney Programs, submitted by the Executive Director of the Judicial Council, New Hampshire Public Defender handled 8,161 cases out of a total indigent defense caseload of 12,955 in fiscal year 1987, or 63.0% of all indigent defense cases.

We note that RSA 604-B:4 directs the Judicial Council to "... contract with any organization or groups of lawyers approved by the board of governors of the New Hampshire Bar Association to operate the public defender program ...". While this language implies that more than one organization may have a contract to operate the public defender program, the Judicial Council has chosen to operate this program exclusively through New Hampshire Public Defender.

CONTRACT ATTORNEY PROGRAM

The state also delivers indigent defense services through the contract attorney program authorized by Chapter 342 of the Laws of 1985 (an amendment to RSA 604-A). RSA 604-A:2-b authorizes the Judicial Council to contract with any qualified attorney in the State, with the approval of the Governor and Council, to provide legal representation to indigent defendants when the public defender program is unavailable to provide representation. This RSA also authorizes the Commissioner of Administrative Services to enter into similar contracts, however, this authority has not been exercised to date.

DELIVERY SYSTEMS (Continued)

The Judicial Council currently has approximately twenty-five attorneys, or law firms, under contract throughout the State to provide legal representation. To participate in the program, an attorney must apply to the Judicial Council. The Public Defender Committee of the Judicial Council interviews the attorney and decides whether the applicant is qualified to participate in the program.

All attorneys under contract are paid on a fixed fee-per-case basis, with the contract stated in "units" of service. Each unit is equal to \$146.50, with a misdemeanor case being 1.2 units (\$175.80), a felony case being 3.35 units (\$490.78) and "other" cases being .98 of a unit (\$143.57). Additional units of credit may be requested and approved by the Judicial Council for a particular case in extraordinary circumstances, under guidelines included in the contract. Payments are generally made by the Judicial Council in twelve equal, monthly installments, regardless of the number of units earned during the month. However, any funds paid under the contract that have not been earned must be returned to the State within sixty days of written notification from the Judicial Council. The Executive Director of the Council monitors these contracts, receives records and reports from all attorneys under contract, and generally supervises the program.

As stated earlier, the courts appoint a contract attorney only when the public defender is not available. In fiscal year 1987, the contract attorney program handled 3,465 cases out of a total caseload of 12,955, or 26.7% of all indigent defense cases.⁵

ASSIGNED COUNSEL

The final means of delivering indigent defense services is through assigned counsel. Appointing counsel in criminal cases is a last resort of the court. If neither New Hampshire Public Defender nor one of the twenty-five contract attorneys can take the case (for any reason including staff shortages, conflict of interest, lack of available contract units, or physical location), the court will assign any qualified attorney of its choosing, irrespective of any available appropriations with which to pay for these services. The interests of justice for the defendant are prevailing.

⁵ Orcutt, Jo Ellen, Executive Director, Judicial Council.
Report to the Fiscal Committee on the Public Defender and Contract Attorney Programs. January, 1988. p.2.

DELIVERY SYSTEMS (Continued)

Although assigned counsel are used by the courts as a last resort in criminal cases, they are the only choice in noncriminal abuse and neglect cases (juvenile cases) pursuant to RSA 169-C,⁶ because the public defender and contract counsel are limited by statute to defending criminal cases.

Assigned counsel are paid on an hourly basis and, in accordance with RSA 604-A:4, at the conclusion of representation, "... shall be reasonably compensated therefor and shall be reimbursed for expenses reasonably incurred." Supreme Court Rules 47 and 48, New Hampshire Court Rules Annotated, set maximum counsel fees for indigent criminal cases and for other indigent cases, respectively. According to the Rules, time spent in preparation shall be compensated at a prevailing rate of \$20.00 per hour. Time spent in court is compensated at \$30.00 per hour, with maximum fees of \$25 out-of-court and \$35 in-court under exceptional circumstances. Per case, maximum levels are set as follows: misdemeanors - \$500; juvenile cases - \$500; felonies - \$1,500; and homicides - \$7,500. However, the rules also permit the courts to exceed these maximums for good cause and under exceptional circumstances.

In fiscal year 1987, assigned counsel handled 1,329 cases out of 12,955 total indigent defense cases, or 10.3%. Of the 1,329 cases, approximately 415 involved noncriminal abuse and neglect. The cost to the State for these 1,329 cases was \$800,060⁷, or \$602 per case. This per case cost compares to \$242 for the contract attorney program and \$248 for the public defender program. Obviously, assigned counsel is the most expensive way to deliver indigent defense services.

RECENT DEVELOPMENTS

During the 1988 session of the legislature, an amendment to RSA 604-B was adopted. The amendment authorizes the Judicial Council to contract for an alternate public defender program to be used when the public defender program is unable to provide representation to an indigent defendant. As of the date of this report, an alternate public defender program has not been established and alternative funding arrangements have yet to be explored.

This same legislation created a pilot program, until June 30, 1989, to recover all attorney fees and costs incurred by the State, to the fullest extent possible, under the Department of Administrative Services. This pilot program is discussed in greater detail in the section relating to recoupment of indigent defense fees on page forty-two.

⁶ Ibid., p.2.

⁷ General Court, State of New Hampshire. Report of the Indigent Defender Program Study Committee, "Overview." December, 1987. p.7.

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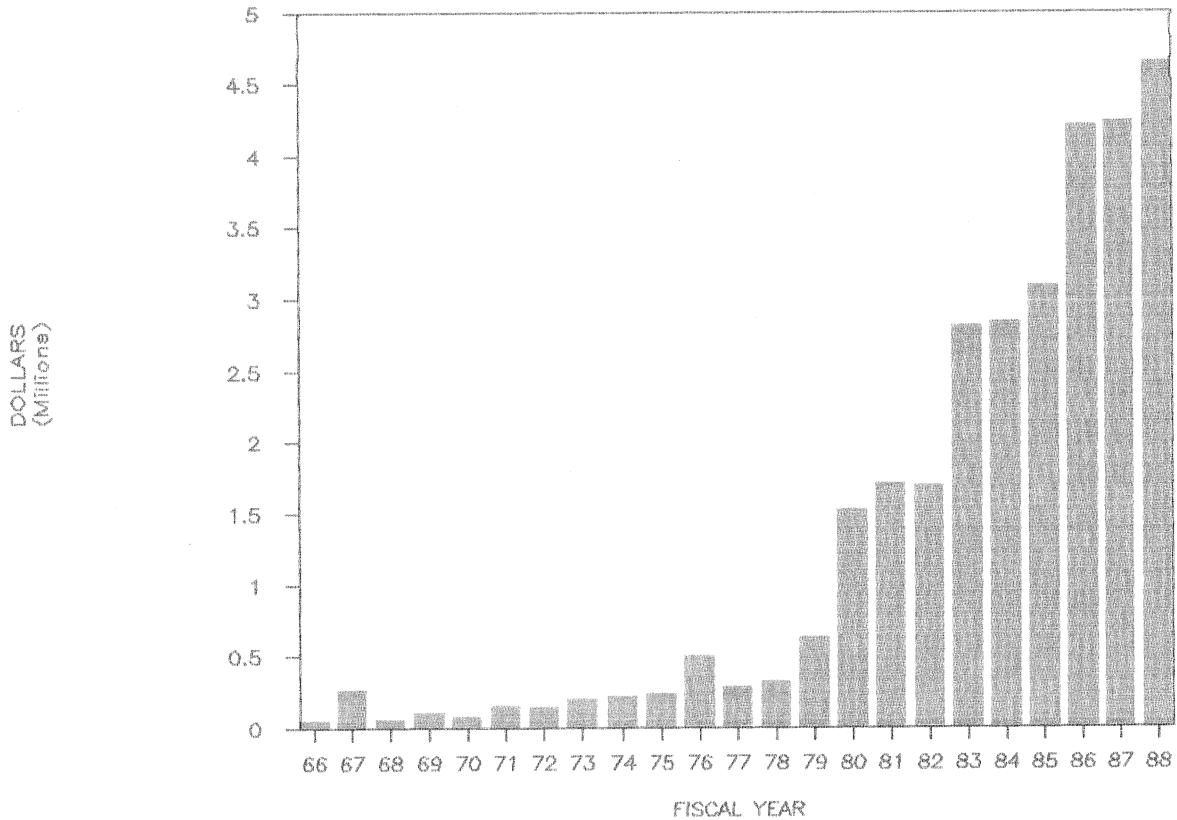
INDEX. PIC

COST OF THE INDIGENT DEFENSE PROGRAM

The cost of providing indigent defense services has risen dramatically since the inception of the program resulting from factors both within and outside the control of the State. The following graph provides a history of actual expenditures for attorneys' fees and other expenses paid by the State since 1966. Appendix A presents a complete history of these expenditures and associated appropriations.

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X = black
A = year

INDIGENT DEFENDER PROGRAM
ACTUAL EXPENDITURES - FY 1966 - 1988



UNCONTROLLABLE COSTS

Determining the specific reasons for the escalation of costs is difficult, primarily because of the multitude of factors involved. A report issued in November, 1980 by the Statistical Analysis Center of the State Office of Attorney General indicated a high correlation between crime and population. In 1970, New Hampshire's population was

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COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

738,000 compared to 1,027,000 in 1986, an increase of 39%.⁸ This growth in population is expected to continue in New Hampshire according to recent projections released by the U.S. Census Bureau.⁹ The Census Bureau estimates that New Hampshire will grow by 11.5% over its 1986 level by 1990, making it the third-fastest growing state in the nation, and the only northeastern state to make the top-ten growth list. The fastest growing states in the nation are Arizona and Nevada according to the bureau.

The report also cites crime rates as a factor affecting costs. In 1979, the State had the 17th lowest crime rate in the country, with the second lowest rate of violent crime. In 1986, New Hampshire's crime rate was the sixth lowest in the country, with the third lowest rate of violent crime. While New Hampshire's position relative to other states has improved, the rates themselves continue to increase. In 1972, New Hampshire's total crime rate was 1,377.7 per 100,000 of population compared to 3,330.1 in 1986. Similarly, the rate of violent crime was 63.7 in 1972 versus 139.5 in 1986.¹⁰

The Statistical Analysis Center's report also addressed the following issues: increases in rate schedules in 1978 for the payment of assigned counsel, judicial attitudes toward assigning counsel, statutory provisions requiring counsel during juvenile proceedings, (RSA 169-B), and general economic conditions. The report concluded, and we concur, that "Controlling the costs of the indigent defense system is not wholly within the power of the State..." because of these factors. An increasing population and the related increase in crime rates account for most of the increased caseload of the indigent defense program. The following graph illustrates the number of cases assigned to the public defender, contract attorneys and assigned counsel between fiscal year 1985 and fiscal year 1989. The caseload for fiscal year 1989 is projected based on the actual caseload experienced in the first half of fiscal year 1989.

⁸ U.S. Bureau of the Census, Statistical Abstract of the United States: 1988 (108th edition.) Washington, DC, 1987

⁹ Concord Monitor, State Predicted to Grow 11.5 Percent in Next Two Years, November 30, 1988 by Maria Speidel.

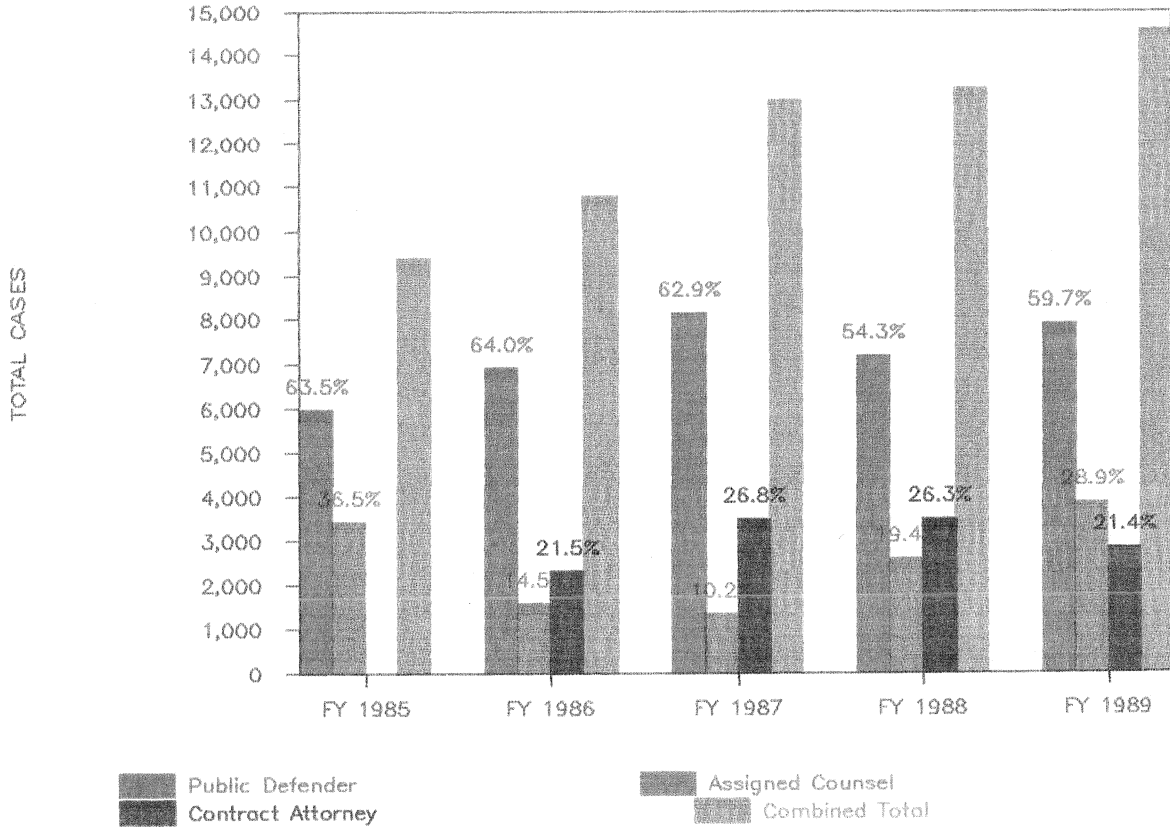
¹⁰ U.S. Department of Justice, Federal Bureau of Investigation, Crime in the United States: 1986 Washington, D.C. 1987 and State of New Hampshire, Office of Attorney General, Statistical Analysis Center.

COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

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 X = black
 A = Orange
 B = green
 C = violet
 D = cyan

INDIGENT DEFENSE PROGRAM

Caseload Growth



Total caseload has grown from 9,375 cases in FY 1985 to 13,230 in FY 1988. This is a 41% increase during a four year period, 35% of which occurred during FY 1986 and FY 1987. Using a four year average system cost of \$350 per case times 3,855 additional cases between FY 1985 and FY 1988, eighty-five percent of the increase in actual expenditures for the indigent defense program can be explained. In large part, caseload growth alone, explains the escalating costs illustrated in the graph on page twenty-nine of this report.

Factors other than an increasing population also explain dramatic caseload growth. In the 1960's, rehabilitation, alternative punishments and decriminalization were largely accepted by society. Throughout the 1970's and 1980's, however, the renewed emphasis on "law and order" has encouraged the criminalization of a greater number of offenses. Local expenditures on law enforcement have increased by approximately 66% since 1982. The result, according to a recent review by the Judicial Council, is more arrests and caseload growth.

COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

Total caseload has grown from 9,375 cases in FY 1985 to 13,230 in FY 1988. This is a 41% increase during a four year period, 35% of which occurred during FY 1986 and FY 1987. Using a four year average system cost of \$350 per case times 3,855 additional cases between FY 1985 and FY 1988, eighty-five percent of the increase in actual expenditures for the indigent defense program can be explained. In large part, caseload growth alone, explains the escalating costs illustrated in the graph on page twenty-nine of this report.

Factors other than an increasing population also explain dramatic caseload growth. In the 1960's, rehabilitation, alternative punishments and decriminalization were largely accepted by society. Throughout the 1970's and 1980's, however, the renewed emphasis on "law and order" has encouraged the criminalization of a greater number of offenses. Local expenditures on law enforcement have increased by approximately 66% from 1982 through 1987. The result, according to a recent review by the Judicial Council, is more arrests and caseload growth.

COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

CONTROLLABLE COSTS

FUNDING PRIORITIES

A previous section of this report explained the ways in which indigent defense services are delivered in the State. It is generally recognized that public defender programs are the most cost effective means of consistently delivering quality representation to indigent defendants. A study of New Hampshire's indigent defense program by the National Center for State Courts, in 1976, suggested the quality of services provided by the public defender program was comparable to that provided by assigned counsel and private counsel. The quality of service provided by New Hampshire Public Defender continues to be highly regarded by members of the bar and by the judiciary. The results of our survey of court clerks and judges indicate a very high degree of satisfaction with the quality of service delivered by the New Hampshire Public Defenders office, exceeding the quality provided by contract counsel or assigned counsel. (Refer to Appendix G for a comparison of New Hampshire's public defense provisions with standards issued by the American Bar Association.)

Keeping the quality of representation in mind, any analysis of cost and average cost per case between providers of indigent defense services must be examined with an understanding of case mix. The New Hampshire Public Defender provides representation for homicides and supreme court appeals because of the complexity and high cost of defending these cases. The public defender also tends to defend more of the complex felony cases such as aggravated felonious sexual assaults (2.94 times the felony average) than do contract attorneys. These types of cases are not referred to contract attorneys or assigned counsel except when a conflict of interest occurs with New Hampshire Public Defender.

Both the public defender and contract attorney programs use a case weighing system, based on the average number of hours it takes to complete a case, to develop workload plans and reimbursement rates for contract attorneys. On average, a homicide case impacts the system 39.5¹¹ times greater than the average felony case while a supreme court appeal requires more than twice the time it requires to complete an average felony. Obviously, the cost associated with these time consuming cases impacts the average cost per case depending on the case mix in any given year. If homicides, supreme court appeals and certain administrative costs (investigators and indirect administrative personnel) are excluded from the expenditures of the public defender program, the average cost per case for the public defender program and

¹¹ Orcutt, page 4.

COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

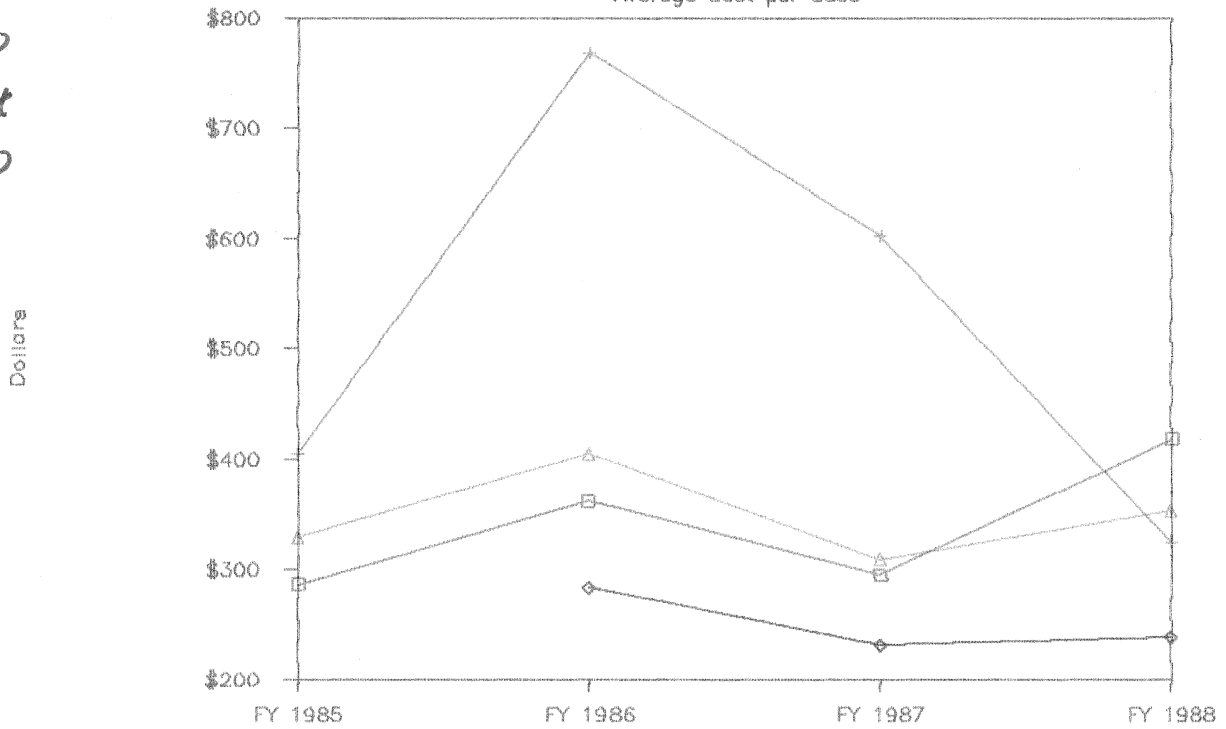
contract attorney program are nearly identical. According to a report prepared by the Executive Director of the Judicial Council dated January 4, 1988, given the particular case mix in fiscal year 1987, the average per case cost for the public defender was \$247.52 and \$242.00 for the contract attorney program. This compares with an average cost per case of \$602 for assigned counsel in fiscal year 1987.

The following graph illustrates the average cost per case, by fiscal year, for the public defender program (including homicides, Supreme Court appeals and administrative costs), contract attorneys, assigned counsel and the average cost per case for the entire system. The wide swing in average cost per case for assigned counsel does not reflect a true average cost per case but instead is a function of when funds have been available to pay for the costs of assigned counsel.

left margin - 1,000
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X = black
A = orange
B = green
C = violet
D = cyan

INDIGENT DEFENSE

Average Cost per Case



- Public Defender
- ◇ Contract Attorney
- + Assigned Counsel
- △ Combined Total

COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

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COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

RECOMMENDATIONS AND CONCLUSIONS

- o The priority of assignments set forth in RSA 604 A&B is the most cost effective means of distributing the indigent defense caseload to providers of defense services in this state. We recommend that the public defender program be funded to support the projected caseload in each biennium with the objective of minimizing the use of contract and assigned counsel. Failure to fund the public defender at realistic levels, based on caseload projections provided by program management, does not result in minimizing costs for the overall system. On the contrary, inadequate funding of the program forces the system to use secondary providers to a greater extent. As assigned counsel become more difficult to attract, at current rates of reimbursement, more cases are continued until counsel can be retained. Under extreme circumstances, there is a possibility that a case would be dismissed because of the state's inability to provide a speedy trial.
- o RSA 604-B:8 authorizes the Judicial Council to contract for an alternate public defender program, in circumstances where, because of conflict of interest or otherwise, the public defender program is unable to provide representation to a defendant. We recommend that the Judicial Council conduct a search for and pursue negotiations with an alternate public defender to provide services especially in Hillsborough and Rockingham counties where the need is most acute. The introduction of an alternate public defender should alleviate the frustration expressed by court clerks and the judiciary when the public defender is unable to provide representation. An alternate public defender would also greatly reduce the need for assigned and contract counsel in those counties. The funds currently spent on assigned and contract counsel could then be used to fund the alternate public defender. During a transition from one method of delivery to another flexibility will be required in expending available funding.
- o The legislature should explore alternative delivery systems modeled after the public defender and contract attorney systems to provide representation for noncriminal abuse and neglect cases and consider such statutory amendments as necessary. This is discussed more completely on page forty-one in our discussion of abused and neglected children. In addition, these cases should be accounted for in a separate line item in order to isolate the cost of representing these cases.

SENTENCE REFORM

Perhaps the single most significant cost factor within the control of the State relates to the criminal code enacted by the General Court. The New Hampshire Constitution guarantees counsel to any defendant charged with a crime "at the expense of the state if need be shown." The issue of decriminalizing certain offenses has been suggested by

COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

various parties interested in reducing the number of defendants eligible to receive public defense. If the potential punishment for an offense does not include incarceration, the defendant is not entitled to counsel at State expense under either the New Hampshire or Federal Constitution. Therefore, reducing the number of offenses that carry a potential jail sentence would reduce the indigent defense caseload.

While reducing the number of eligible offenses appears to be an effective way of containing the escalating cost of providing indigent defense services, several other issues need to be examined before decriminalization takes place. The following issues are among the most fundamental:

- o Given that a basic function of the legislature, as an elected representative body, is to define antisocial behavior by enacting legislation imposing the potential consequences of engaging in anti-social behavior, what message would the General Court be sending to society by decriminalizing certain behavior previously regarded as criminal?
- o Assuming that the threat of incarceration provides a deterrent, thus reducing the number of crimes committed against society at large, how many additional occurrences of a particular offense is society willing to accept in the interest of reducing the cost of providing defense to indigents?

If these issues can be resolved, then the following information summarizing the disposition of sentences may be of assistance in deciding what particular offenses should be decriminalized. We caution however, that it may be inappropriate for the General Court to make these decisions based on sentencing statistics handed down in the courts. Theoretically, at least, the courts are imposing the range of sentences made available to them as enacted by the General Court at the will of its electorate.

SENTENCING STATISTICS

The following tables summarize the ten most frequently occurring misdemeanors and felonies defended (and closed) by the New Hampshire Public Defender between April 1, 1987 and July 31, 1988. During this period New Hampshire Public Defender defended approximately 55% of the indigent defense caseload. We prepared these tables from data provided by New Hampshire Public Defender showing the sentence that was imposed according to the dispositional charge of each case during the sixteen month period. In gathering these statistics we intended to isolate, by specific RSA, the number of cases resulting in incarceration. We also tracked the number of sentences that were committed (served), suspended or deferred. Appendix D includes a complete analysis of sentencing statistics.

COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

NEW HAMPSHIRE PUBLIC DEFENDER
 10 MOST FREQUENTLY OCCURRING MISDEMEANORS DEFENDED FOR THE PERIOD
 APRIL 1, 1987 TO JULY 31, 1988

Description	Number of Cases	Number Sentenced to Incarceration	Percent Sentenced to Incarceration	Number of Sentences			
				Suspended	Deferred	Committed	Suspended except for time served
Driving Aftr Revocation or suspension RSA 263:64	642	279	43.46%	141	12	107	19
Driving under influence of drugs/liquor 265:82	393	238	60.56%	7	2	217	12
Simple Assault 631:2-a	376	171	45.48%	118	4	38	11
Criminal Trespass 635:2	140	60	42.86%	34	6	16	4
Resisting arrest or detention 642:2	129	81	62.79%	57	2	19	3
Willful concealment & shoplifting 644:17	136	66	48.53%	49	1	10	6
Criminal Mischief 634:2	123	45	36.59%	35	2	6	2
Theft by unauthor taking or transfer 637:3	120	51	42.50%	29	4	13	5
Aggravated driving while intoxicated 265:82-a	112	22	19.64%	13		8	1
Disorderly conduct 644:2	102	21	20.59%	19		2	
Subtotal	2273	1034	45.49%	502	33	436	63
All other cases	761	331	43.50%	211	15	79	26
Terminated cases	376	--	--	--	--	--	--
Grand total	3410	1365	--	713	48	515	89

The above table and the table on page thirty-seven provide sentencing information based upon the charge as initiated by the state. This charge is not necessarily the charge upon which the case is ultimately resolved. For example, the case may be concluded by a dismissal, a finding of not guilty to the initial charge, or a plea of guilty to a lesser charge.

COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

NEW HAMPSHIRE PUBLIC DEFENDER
 10 MOST FREQUENTLY OCCURRING FELONIES DEFENDED FOR THE PERIOD
 APRIL 1, 1987 TO JULY 31, 1988

Description	Number of Cases	Number Sentenced to Incarceration	Percent Sentenced to Incarceration	Number of Sentences			
				Suspended	Deferred	Committed	Suspended except for time served
Burglary - 635:1	220	173	78.64%	68	23	77	5
Theft by unauthor taking or transfer - 637:3	143	108	75.52%	61	9	35	3
Forgery - 638:1	141	111	78.72%	54	16	38	3
Aggravated felonious sexual assault 632-A:2	94	56	59.57%	11	11	34	
Receiving stolen property 637:7	89	57	64.04%	27	7	22	1
Poss of narcotic drug RSA 318-B:26 I (b)(1)	71	38	53.52%	19	4	11	4
Oper Motor Veh After Dec Habtl Ofndr 262:22	66	59	89.39%	6	1	52	
Welfare Fraud RSA 167	76	65	85.53%	50	9	6	
Second Degree Assault RSA 631:2	70	41	58.57%	12	9	19	1
Robbery RSA 636:1	51	42	82.35%	8	2	32	
Subtotal	1021	750	73.46%	316	91	326	17
All other cases	611	456	74.63%	177	59	197	23
Terminated cases	511	--	--	--	--	--	--
Grand total	2143	1206	--	493	150	523	40

In order to determine whether sentencing data applicable to the disposition of cases defended by the New Hampshire Public Defender is representative of cases throughout the state, we designed a random sample of selections from the statewide court system for the fifteen month period ending June 30, 1988. Our sample of 300 randomly selected cases resulted in similar rates of incarceration.

COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

RECOMMENDATIONS AND CONCLUSIONS

Limiting the number of people eligible for indigent defense services is the only effective way of controlling the cost of the indigent defense program. To achieve this objective the legislature needs to enact systemic changes to reduce the number of people entering the court system who face potential jail sentences. The legislature should consider implementing one or more of the following alternatives:

- o Reduce selected misdemeanors to violations.
- o Encourage the use of pretrial "diversion techniques" in certain cases. This practice prevents an offender from ever entering the court system by agreeing to accept an alternative prior to bringing a case to trial. Some alternatives, commonly acceptable to both the prosecutor and the defendant, include performing some form of public service or paying restitution to the victim.
- o Establish two classes of misdemeanors that removes the possibility of imprisonment for minor misdemeanors or first offenses of certain crimes. The elimination of a potential jail sentence also removes the right to appointed counsel at State expense.

COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

CONSTITUTIONAL AMENDMENT TO ADOPT FEDERAL STANDARD

Another proposal to reduce eligibility for public defense services in New Hampshire has been the introduction of amendments to change the New Hampshire Constitution to conform with the Federal Constitution. Article 15 of the New Hampshire Constitution presently provides counsel at State expense to every defendant held to answer in any crime punishable by imprisonment. The federal constitution guarantees the right to counsel only in cases actually resulting in deprivation of liberty. Proposals to narrow New Hampshire's constitutional right to counsel have been made in CACR 13 (1981) and CACR 24 (1988). Both attempts have been defeated, after study by the legislature, the Judicial Council, and delegates to the New Hampshire Constitutional Convention in 1981. Most recently, the House Constitutional and Statutory Revision Committee voted CACR 24 inexpedient to legislate and reported "in the area of constitutionality, cost-effectiveness and fairness to all participants, CACR 24 leaves many questions unanswered."

Our inquiries surrounding this controversial issue have resulted in the understanding that while the federal constitution guarantees counsel only when a defendant is actually deprived of liberty, the Federal Rule of Criminal Procedure (F.R. Crim P 44) followed by Federal Courts sets a higher standard that provides defense to an indigent defendant charged with a felony or misdemeanor irrespective of the potential penalties with which he is faced. (Refer to Appendix E) If this is true, then, in practice, the federal courts do not abide by a lower standard than that of New Hampshire, and, as a result, undermine the reason for adopting the federal standard.

COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

SERVICES OTHER THAN COUNSEL

According to the Department of Administrative Services, payments for services other than counsel amounted to \$287,486 in calendar year 1986 and \$294,655 in calendar year 1987. These payments will exceed \$300,000 for calendar year 1988.

As a result of the suggestions we received from surveys sent to court clerks and defense attorneys we believe the State can reduce these expenses by adopting a contract system (similar to that used for attorneys) for such services. The contract system should consider court reporters, transcript services, expert investigators, psychiatric evaluations and any other service required to defend a case. Several people responding to our survey claimed that there are many instances where court reporters are paid more than the attorney representing the case because of the limits established through the contract attorney program and hourly limits established by Court Rule for assigned counsel.

RECOMMENDATIONS

- o We recommend that the Judicial Council investigate the feasibility of establishing contracts for providers of services other than counsel and proceed expeditiously in an effort to reduce these expenses.
- o Additionally, we recommend that the appropriation for services other than counsel be separated from the assigned counsel line item, so that they are clearly identified and more easily monitored.
- o As required by RSA 604-A:9 and Chapter 225:3, Laws of 1988, include expenses for services other than counsel in all repayment orders. These expenses often amount to more than the amount paid to counsel.

COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

ABUSED AND NEGLECTED CHILDREN

RSA 604-A:1-a provides abused and neglected children in need of legal representation with counsel, including access to investigators and expert services. Funds to pay for these cases are appropriated in the assigned counsel line under the indigent defense program. Since these are civil cases, the public defender and contract attorneys are precluded from accepting them because these lawyers are authorized by statute to represent only criminal cases. Abuse and neglect cases are always defended by assigned counsel, the most expensive type of representation.

RECOMMENDATIONS

- o The legislature should explore alternative delivery systems modeled after the public defender and contract attorney systems to provide representation in noncriminal abuse and neglect cases, and consider such statutory changes as necessary.
- o Abuse and neglect cases should be identified and budgeted in a separate line item, rather than grouping them together with criminal cases, in order to provide for improved identification and management control of these cases.

COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

RECOUPMENT

Since 1969, statutory provisions have existed for the repayment (recoupment) of expenses paid by the State on behalf of a convicted defendant. Subsequent laws strengthened the repayment provisions. RSA 604-A:9, I states "Any defendant who is convicted of an offense whose sentence does not include actual incarceration in the state prison and who has had counsel or a public defender assigned to him at the expense of the state shall, at the time of sentencing, be ordered by the court to repay the state, through the department of corrections, all fees and expenses paid on his behalf on such terms as the court may order, consistent with the defendant's present or future ability to pay." The State may also seek recovery from a defendant who is released from the state prison within six years of his release. Similarly, the State has six years to seek recovery from a defendant originally found not able to make payments to the State at the time of sentencing.

The State has never sought recovery under either of the latter provisions mentioned above. The primary reasons for this appear to be that the statute is permissive rather than mandatory and, more importantly, the statute did not fix responsibility for these recoupment efforts until Chapter 225, Laws of 1988, became effective on April 30, 1988.

Chapter 225, Laws of 1988, assigned recoupment responsibilities to the commissioner of administrative services. It authorizes temporary full-time personnel to administer a pilot program intended to recover the costs of providing indigent defense services to the fullest extent possible. The pilot program is scheduled to terminate on June 30, 1989, unless authorized to continue by the legislature. The commissioner has formed the Office of Cost Containment (OCC), staffed by five full-time personnel to accomplish the goals set forth in Chapter 225. OCC assumed collection responsibilities for all cases that do not involve probation or parole, commonly referred to as "collection only" cases, beginning in July, 1988.

DEPARTMENT OF CORRECTIONS (DOC)

Prior to July, 1988, DOC was collecting all attorney fees ordered to be repaid by the courts. DOC breaks down collection cases between collection only cases and those requiring direct supervision as a condition of probation or parole. Supervisory cases require more time and present a potential threat to society if they are not closely supervised. Collection only cases were pursued by initial personal contact, written notifications and ultimate referral back to the court of jurisdiction if collection efforts proved unsuccessful.

COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

DOC has retained collection responsibility for all active cases that originated prior to July 1988 and all future cases involving probation or parole supervision pursuant to a memorandum of understanding between OCC and DOC dated July 11, 1988. (Appendix F)

DOC provided us with the following collection information for attorney fees recovered directly by DOC and through municipal probation offices. Beginning in fiscal year 1988, DOC assumed collection responsibilities previously performed by municipal probation offices. This accounts for the dramatic increase in collections by DOC in FY 88. DOC while able to provide information relative to total amounts ordered is unable to provide an aging report of outstanding balances.

Attorney Fee Recoveries
By the Department of Corrections and Municipal Probation Offices
Fiscal Years 1982 - 1988

<u>Fiscal Year</u>	<u>DOC</u>	<u>Amount Collected*</u>	
		<u>Municipal Probation Offices</u>	<u>Total</u>
1982	\$ 22,244	\$ 3,759	\$ 26,003
1983	37,479	34,257	71,736
1984	36,760	26,866	63,626
1985	45,041	26,874	71,915
1986	32,954	21,966	54,920
1987	31,544	26,893	58,437
1988	<u>81,835</u>	<u>16,940</u>	<u>98,775</u>
TOTAL	\$ 287,857	\$ 157,555	\$ 445,412

*Does not include recoveries collected by the courts or the Department of Administrative Services.

Source: Department of Corrections, Division of Field Services, Client Tracking and Offender Collection System.

OFFICE OF COST CONTAINMENT (OCC)

Since April 1988, when the legislation authorizing the formation of a pilot program was passed, the Office of Cost Containment has developed an operative and responsive data base (accounting system) to manage the collection of fees for unsupervised cases.

COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

Between July 1, 1988 and December 16, 1988, OCC was assigned 691 collection cases, averaging \$180.00 per case and totalling \$124,544. OCC has collected 18% of the cases in full and 20% of the total outstanding balance as of December 16, 1988. In total, forty-three percent of the cases have committed to repay the state within fiscal year 1989. Fifteen percent (\$17,309) of the total amount ordered is not collectible within FY 89 for various reasons pursuant to a specific court order. This kind of detailed management information was unavailable before OCC assumed collection responsibilities in July, 1988.

ELIGIBILITY DETERMINATIONS

Initial indications regarding changes in eligibility suggest fewer people are found eligible and more people are found partially eligible since new administrative rules were adopted on October 3, 1988. The following table is used as a bench mark because it summarizes eligibility determinations, made by the courts, prior to the enactment of new administrative rules by the OCC effective October 3, 1988. Notifications of Eligibility issued between January 1, 1988 and September 30, 1988 indicated that 87.5% of the applicants were found eligible, 12.5% were found partially eligible and one case out of 6245 cases was found ineligible. These percentages have changed since the adoption of new rules on October 3, 1988, to 80.9% found eligible, 18.4% partially eligible and .7% ineligible, also summarized below.

NOTIFICATIONS OF ELIGIBILITY
PRIOR TO ADOPTION OF RULES ISSUED BY DAS
JANUARY 1, 1988 - SEPTEMBER 30, 1988

<u>ELIGIBILITY TYPE</u>	<u>MISDEMEANOR</u>	<u>FELONY</u>	<u>HOMICIDE</u>	<u>OTHER</u>	<u>TOTAL CASES</u>	<u>% POPULATION</u>
ELIGIBLE	2850	2399	19	197	5465	87.5%
PARTIAL	467	312	0	0	779	12.5%
INELIGIBLE	0	1	0	0	1	0.0%
TOTAL CASES	3317	2712	19	197	6245	

COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

NOTIFICATIONS OF ELIGIBILITY
OCTOBER, 1988

<u>ELIGIBILITY TYPE</u>	<u>MISDEMEANOR</u>	<u>FELONY</u>	<u>HOMICIDE</u>	<u>OTHER</u>	<u>TOTAL CASES</u>	<u>% POPULATION</u>
ELIGIBLE	304	269	4	39	616	80.9%
PARTIAL	99	40	0	1	140	18.4%
INELIGIBLE	1	2	0	2	5	0.7%
TOTAL CASES	404	311	4	42	761	

* Source: Department of Administrative Services, Office of
Cost Containment

DIVISION OF INFORMATION SERVICES (DIS)

The Division of Information Services (DIS) has played a role in DOC recoupment efforts for nearly twenty years. DIS serves DOC in a custodial capacity with computer technical support and information systems. Recently, DOC replaced its existing computer data base with another, also created by DIS, to monitor probation, parole and collection caseload. The Client Tracking and Offender Collection System (CTOC), in place since January 1987, provides DIS with data from which various DOC reports and tables are drawn. The DIS produces the reports often and distributes them widely among district probation offices throughout the state.

DIS reports show sophistication and effort in their attempt to accumulate available information. However, their accuracy, meaning and significance have been called into question during our review. Two separate but related issues account for the problem: computer programming and communication.

The computer distinction between supervised and "collection only" cases fails to account for a number of cases that are neither supervised nor solely collections; this is true of cases in which the offender flees or is missing. In addition, summary reports concerning attorney fee collections often vary from their companion reports because a different computer program must be used in both cases. Finally, report titles and headings lack consistency and precision and can confuse the reader.

COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

Programming errors are notable, but a larger problem comes from poor communication between DOC, DIS and OCC. Many DIS reports go unread because their meaning and usefulness are unclear and because they are too time consuming to analyze. Indeed, the conclusions reached in many DIS reports differ significantly from those found in other DOC documents. For example, DOC reports that in fiscal year 1988 it collected \$81,834.63 in attorney fees. A report produced by DIS for that same year shows the recovery of \$90,629.74 in attorney fees.

Similarly, despite the shared mission of DOC and OCC in collecting outstanding fees from indigent defendants, little communication occurs between the two bodies. While the scope of each's activity distinguishes them, OCC relies on DOC to provide some computer data with which to measure its effectiveness. Every month, DIS is authorized by DOC to mail OCC a summary of attorney fees ordered and received by the State. But without an accurate definition from DIS or DOC, OCC has mistaken the "collections only" category of the summary to indicate cases for which attorney fees alone are due, and which, as a result, belong to OCC.

RECOMMENDATIONS

- o Revise computer programs in order to make DIS reports representative of actual caseload and DOC financial records and to control the variation in data in summary and companion reports.
- o Clarify the meaning of DIS report terms, titles, headings and categories for consistency and precision.
- o Explain the purpose and meaning of individual DIS reports in appropriate cover letters explaining the methods used in generating the reported information.
- o DIS reports should follow consultation with, and requests by, DOC, in order to better satisfy the interests and needs of the department.
- o Consider broadening the current statute to require repayment from more defendants than just those found guilty. Such a change could broaden the repayment order base.
- o Consider placing temporary liens on property owned by defendants to ensure repayment.

COST OF THE INDIGENT DEFENSE PROGRAM (Continued)

- o Create a policy that enforces RSA 604-A:9 so that repayment of attorneys fees and services other than counsel are a condition of parole.
- o As required by RSA 604-A:9 and Chapter 225:3, Laws of 1988, include expenses for services other than counsel in all repayment orders. These expenses often amount to more than the amount paid to counsel.

ORGANIZATIONAL AND FUNCTIONAL RESPONSIBILITIES OF THE
INDIGENT DEFENSE PROGRAM

The Judicial Council has specific responsibility to contract for the public defender program, contract attorneys and for an alternate public defender program. It also has specific responsibility for the general supervision of these programs. The Commissioner of Administrative Services shares contractual authority but has not exercised it to date. The Public Defender Program may also contract with attorneys, in addition to its full time employees, under agreed terms with the State. Finally, courts assign and supervise counsel in indigent cases, approve bills for services, and set rates of reimbursement for assigned counsel. The Administrative Office of the Courts is involved to the extent that it provides administrative direction to District, Municipal and Superior Courts throughout the State.

The legislature passed HB 847-FN-A in the 1988 session which created a pilot program under the auspices of the Commissioner of Administrative Services to make eligibility determinations, subject to court appeals, for defendants claiming indigence and to recover the costs incurred by the State in providing criminal defense. The pilot program took effect on April 30, 1988.

RSA 604-A:9 provides for repayment orders to be issued by the courts when an indigent defendant is convicted. Responsibility for recovering repayment orders has been assigned to the Department of Administrative Services, Office of Cost Containment, under the pilot program, who has signed a memorandum of understanding with DOC to split collection responsibilities between supervised and unsupervised cases.

Because the administration of the indigent defense program is shared among several responsible parties, a single, consistent management information reporting system has not been developed. The Commissioner of Administrative Services keeps records of all cases in which courts appoint counsel to a defendant. These records include the name of the court, the type of case, (homicide, other felony, misdemeanor, juvenile or other), and indicate whether a public defender, contract counsel or private attorney received the case. The Department of Administrative Services also tracks payment to assigned counsel and payment for services other than counsel. Similar but separate records maintained by the Judicial Council and New Hampshire Public Defender do not agree with those of DAS.

The statutes do not require the Commissioner to maintain a reporting system that tracks individual case statistics such as plea, attorney time spent, charges and sentence dispositions. New Hampshire Public Defender, however, includes this information in the data it collects on its own computer system. The information is useful to both Public Defender Program management and the Judicial Council. In fact,

ORGANIZATIONAL AND FUNCTIONAL RESPONSIBILITIES OF THE INDIGENT DEFENSE PROGRAM (Continued)

the Council has modeled its reporting system for contract attorneys after that of New Hampshire Public Defender and uses many of the same input documents.

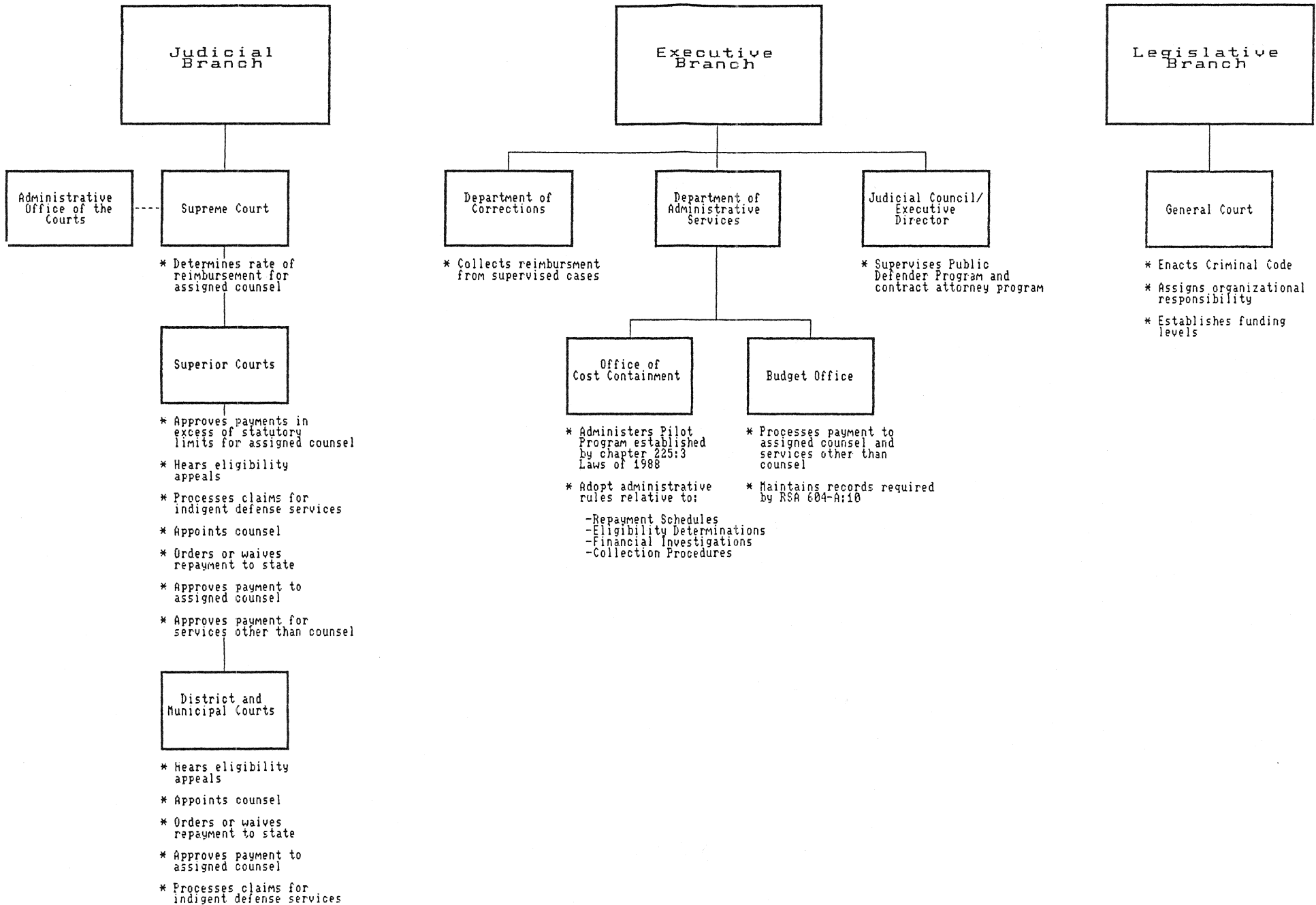
Because administrative responsibilities are shared between various agencies, gaps in accountability have occurred as evidenced by a lack of historic caseload statistics, incomplete recoupment data, and imprecise average cost per case for assigned counsel cases including abuse and neglect cases. Information systems have not been developed that focus on providing complete and accurate management information useful for evaluating the overall effectiveness of all components of the program. The chart on the following page illustrates the degree to which administration of the program is spread throughout various state agencies.

RECOMMENDATIONS

- o The various agencies involved in the administration of the program should coordinate their efforts to ensure that consistent, coordinated, complete and accurate accountability is maintained over all aspects of the program including systems to capture case costs for all delivery systems, sentencing data, repayment orders and the related recovery rates, the cost of providing representation for abuse and neglect cases and the cost for services other than counsel.
- o The legislature should consider if both the Judicial Council and the DAS should continue to have the authority to contract for the same indigent defense program services.

STATE OF NEW HAMPSHIRE

ORGANIZATIONAL RESPONSIBILITIES GOVERNING ADMINISTRATION OF THE INDIGENT DEFENDER PROGRAM



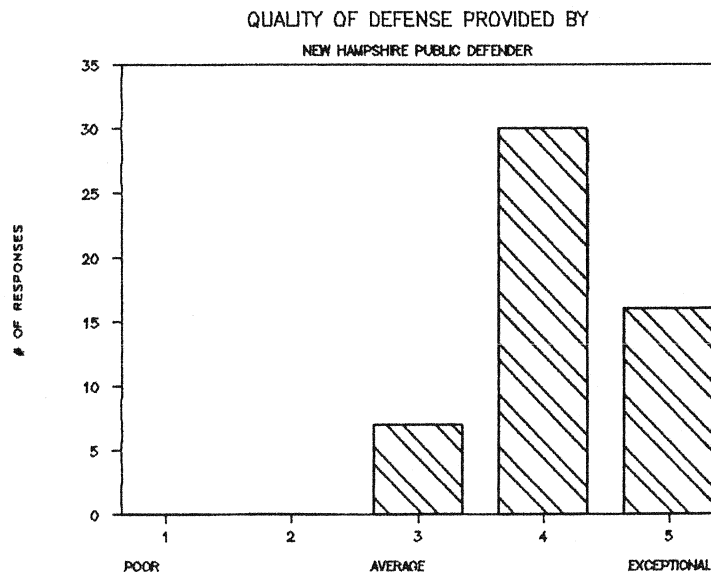
SUMMARY OF SURVEYS

THE JUDICIARY

Our office mailed approximately 100 surveys to the judges of New Hampshire's superior, municipal and district courts, with the intention of determining whether judges are satisfied with the legal defense provided indigent defendants. We solicited their criticisms and recommendations for improving the present system and invited respondents to evaluate the various components that comprise the indigent defense program. About half of the judges we surveyed responded to the survey. Respondents generally approve of the present program while registering some complaints and offering solutions for marginal change.

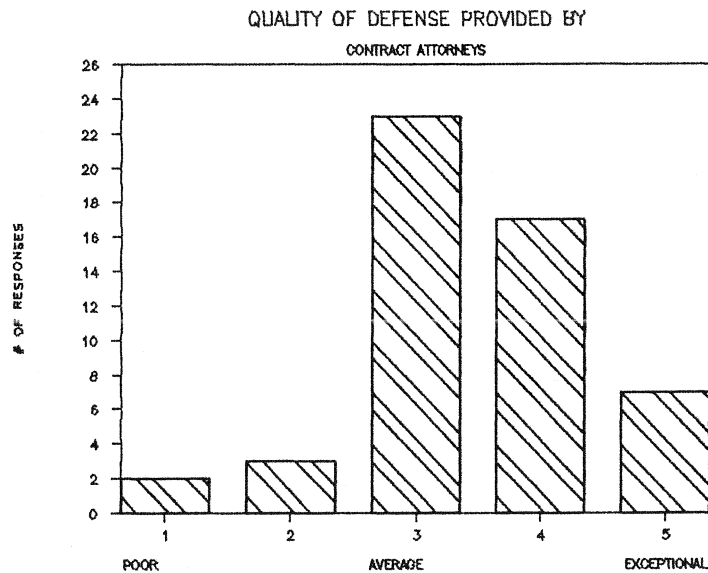
Thirty-four (64%) of the fifty-three judges who answered the survey believe New Hampshire is adequately discharging its constitutional responsibility to provide legal defense services to indigent defendants. Only six judges think the State drastically fails in its obligation. These judges cite the prohibitively low rate of compensation for attorneys as the main reason for inadequate representation. The rate, they say, encourages negotiated pleas and discourages thorough case preparation by defense attorneys. They also believe the rate accounts for the difficulty courts have in assigning counsel.

All but one judge in our survey favor the public defender program as the key provider of indigent defense services. Most of them think admirably of the program calling public defenders cooperative, willing, capable and professional. They deliver services consistently and effectively despite the caseload they maintain and are well versed in the motions and techniques of criminal defense. Nearly half of those who support the Public Defender say it offers exceptional quality when compared to private counsel. The one judge who does not support the Public Defender Program considers it "mainly a learning system" for attorneys who are "unable to attack employment in more traditional settings." The following graph illustrates the opinions expressed by judges about the Public Defender Program. The average response is 4.2.



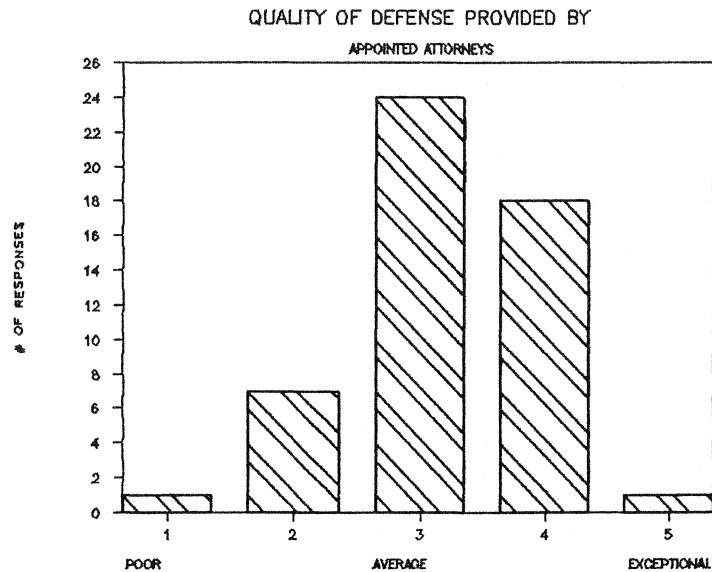
SUMMARY OF SURVEYS (Continued)

The judges offer less enthusiastic support to contract and assigned counsel but say they are necessary when public defenders face conflicts over cases and scheduling. Many judges reiterate their concern that noncompetitive fees limit the number of contract and appointed attorneys willing to take indigent cases. Forty-three percent of those surveyed believe the quality of contract counsel is average. Twenty-four respondents consider their service above average, while five say it is below average. The average response in the following graph is 3.5.



The quality of assigned counsel services is average, say 44% of the judges. Eighteen of the judges (33%) indicate that assigned counsel can be expected to provide above average legal defense to the poor while, ironically, 72% say they are pleased with the amount of case preparation of assigned counsel. Only one judge called their work exceptionally good. In the following graph, the average response is 3.2.

SUMMARY OF SURVEYS (Continued)



When asked whether compensation paid to assigned counsel is sufficient, forty-four judges (83%) respond negatively. They claim that attorneys are increasingly difficult to retain with a fee of \$20 to \$30 per hour. Although they agree that fees are inadequate, the judges differ over whether this is a burden for those involved. Forty percent think low fees constitute a serious burden to attorneys while 36% consider it only a minor one. Notwithstanding this disagreement, the distribution of indigent cases among the bar is inequitable, according to over half (55%) of the judges we surveyed. While those questioned recognize indigent defense as a duty of the bar, many, in corresponding comments, say that most attorneys lack experience in criminal law and, thus, are ill-equipped to handle trials in indigent criminal cases. The best civil lawyers do not participate, one respondent points out, while another says sharing the burden among more bar members jeopardizes fair representation since it involves appointing lawyers whose legal experience is limited to civil or corporate law, or who have not tried a case for years. Conversely, several judges express a desire to compel attorneys to participate regardless of remuneration but realize the constitutional constraints of such a suggestion. One of these suggestions involves a revolving list of lawyers including those with more experience and higher fees. Most of those surveyed are resigned to the need for volunteers and two advocate some form of public relations to inspire more of them.

SUMMARY OF SURVEYS (Continued)

We asked the judges whether they favor an alternate Public Defender Program. Half embrace the idea of another organization providing specialized criminal defense but 23% say the expansion would not lead to more effective administration of justice nor result in greater savings. In the words of one of those objecting, conflicts of interest and the evident financial strains on the system still do not justify "building another bureaucracy." Other judges not favoring an alternative Public Defender Program say such a program will never remove the need for contract and assigned counsel and will raise costs not reduce them.

The survey also considered the new eligibility standards and recoupment policies recently issued by the Office of Cost Containment by asking the judges to state whether they believe these changes will realize significant savings without jeopardizing the state's constitutional obligation to assist indigents with legal representation. Forty percent think the Department of Administrative Services' policy changes will improve cost-effectiveness and advance justice while 35% disagree. A large number of respondents (25%) withheld comment stating the program has not functioned long enough to tell. But some say the change can improve a process wrought with administrative problems. On the other hand, one judge strongly disagrees, charging that recouping money from the "patently penniless" engenders a "bureaucratic morass" that will result in a waste of time and resources and, he concludes, could "spawn a costly lawsuit against the State."

The judges register some degree of frustration with the amount of support provided the courts, administratively and otherwise. While 27% say the overall administration of the indigent defense program by the Judicial Council is slightly above satisfactory, another 27% believe its performance is less than satisfactory. One judge is not aware the Council exists. At lower administrative levels, 40% of the respondents believe the lack of assistance in court operations hinders fair representation of the indigent. They say court support staff are not only burdened with an increasing caseload but also must act in a collections capacity which retards other more important responsibilities. A slightly higher percentage of respondents (42%) answer negatively to this question citing, in their opinion, a displeasing trend toward more bureaucracy.

Asked to respond whether the fragmented relationship among the courts, the Department of Administrative Services and the Judicial Council renders it less effective, 40% say it does not. Thirty percent say that it does, but another thirty percent declined to answer. Most of the judges recognize fragmentation as the natural shape of a program involving so many missions. One judge reminds us that the arrangement intends to check and balance potentially arbitrary executive power; inefficiency is, to some extent, the goal. Many who fault the ineffectiveness of the relationship say one of the most debilitating

SUMMARY OF SURVEYS (Continued)

aspects of the system is the need for courts to manage financial and collection matters under severe time limits and with few resources. However, those who believe the system does hinder the administration of justice think communication among parties is still successful in resolving any confusion.

SYSTEM STRENGTHS

The majority of judges find strength in the resilience of the system, which, despite an increasingly demanding caseload, competing interests and a limited legal work force, still meets its constitutional obligation to defend the indigent against criminal charges. Most recognize the public defender program as the backbone of indigent defense services and accept the need and relative value of the contract counsel program and assigned counsel. Others say the level of cooperation, sacrifice and professionalism of the participants define New Hampshire's system. Clerks and support staff constitute another strength, say the judges, because they carry out their many tasks with speed and skill under substantial pressure.

SYSTEM WEAKNESSES

The lack of funds and of lawyers are the most evident weaknesses in New Hampshire's indigent defense program, according to most judges surveyed. Appropriations for administration and attorney compensation fail to attract the necessary number of qualified attorneys to represent the poor in criminal matters. For those that do participate, especially public defenders, scheduling conflicts, by no fault of their own, frequently force entire court schedules to be postponed. The backlog of cases and procedural confusion also slow prosecution. One judge warns that as more cases accumulate more will be dismissed for lack of a speedy trial. When this happens, he says, the public and police lose confidence.

Administration is plagued by the same caseload and scheduling problems, the judges agree. The bureaucratic demands are often too much for under-staffed courts responsible for processing endless legal and financial documents associated with indigent defendants. In addition, one judge points out they fulfill these responsibilities without the aid of the technology common to other governmental operations.

Finally, the low compensation rate for lawyers leads to a loss of responsiveness and commitment of many contract and assigned counsel. A few judges say their focus can shift to the financial sacrifice associated with many cases rather than on the quality of service they provide, and they resort to protecting against charges of ineffective counsel.

SUMMARY OF SURVEYS (Continued)

RECOMMENDATIONS OF THE JUDICIARY

The following recommendations were made by the judges who responded to our survey. These recommendations are presented solely to inform the legislature of the opinions expressed by individual judges. While we thank the judges for taking the time necessary to respond to our survey, these recommendations are not necessarily endorsed by the OLBA or the Judicial Branch as a whole.

- o Expand the staff and appropriations of the Public Defender Program. Develop training programs for prospective public defenders and for contract attorneys and assigned counsel.
- o Expand court staff to administer the increasing caseload throughout the state. Improve the scheduling of trials and hearings.
- o Increase the rate of compensation afforded contract and assigned counsel to provide a fair market value for their services.
- o Streamline and clarify the guidelines on financial affidavits. Intensify investigations into the assets and income of defendants including those of their parents if necessary. Require more documentation of financial claims made by indigent defendants.
- o Divert "weak" cases away from the Attorney General and county attorneys in order to eliminate a series of cases likely to fail prosecution.
- o Consider reclassifying certain misdemeanor offenses as violations for cases in which the potential for incarceration is slight but which still require the appointment of counsel. Statutory revision of offenses such as shoplifting under \$500, operating after suspension, possession of a controlled substance (small amount of marijuana) etc., would result in a substantial reduction in caseload.
- o Consider amending the statutory requirement to provide counsel in RSA 169-C:10 & 169-C:27; RSA 169-D:12 & 169-D:29 (juvenile cases) under the Child Protection Act.
- o Limit the time allotted for pre-trial discovery, as in federal criminal cases, in order to reduce the amount of time and resources expended before trial.
- o Place "reminders" of the obligation of the Bar to serve the indigent in New Hampshire law journals and related periodicals. Recruit interested bar members to a pro bono type association which will provide criminal defense to indigents on a consistent basis.
- o Distribute the indigent caseload throughout a broader base of attorneys including those more experienced.

SUMMARY OF SURVEYS

COURT CLERKS

Our office distributed approximately 60 surveys to the clerks of every superior, municipal and district court in New Hampshire. The purpose of the survey was to determine the extent to which court administrators are satisfied with existing indigent defense services and to encourage suggestions for improvement. Of the twenty-seven responses we received, reservations accompany mostly favorable assessments of current practices.

Sixteen of twenty-seven court clerks responding (59%) believe the State adequately discharges its responsibility to provide indigents with legal defense. Other clerks, however, cite the frequent unavailability of public defenders and contract attorneys as the reason for their unfavorable responses. When circumstances prevent these lawyers from taking cases, court clerks are forced to contact private counsel who, because of such low fees, often cannot afford to take them. Clerks in Southern New Hampshire express the greatest concern and frustration over the unavailability of public defenders to accept cases. One clerk states the public defender program has not accepted cases in over a month and, before that, took on only one in four adult cases and no juvenile cases.

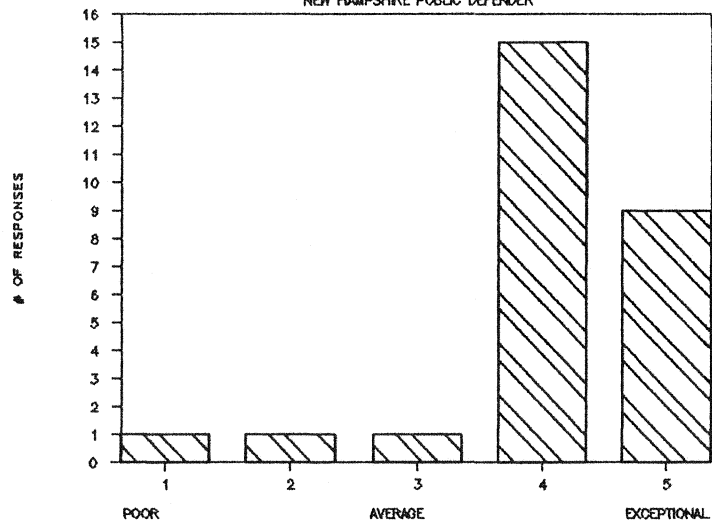
Once defendants obtain counsel, however, most clerks (70%) believe indigent defendants receive quality services and fair representation. Ninety-six percent of those surveyed support the New Hampshire Public Defender as the primary provider of legal defense for the poor. According to the clerks, public defenders are trained specialists in criminal defense and a valuable timesaving resource when assigning counsel.

On the other hand, four of the twenty-seven respondents (15%) say indigents do not receive adequate representation. Heavy caseloads for public defenders and contract attorneys and low pay for assigned counsel are the chief reasons cited for inconsistent, rushed and, consequently, unfair legal service to the poor. Eight percent of the clerks comment that attorneys often meet their clients for the first time on the day of trial. The same respondents criticize the propensity of lawyers to plead a case guilty rather than go to trial.

In the survey, we asked the clerks to rate the overall quality of defense provided by the public defenders, contract attorneys and assigned counsel. The following graphs illustrate how clerks rated each group on a scale of 1 to 5 with 5 being highest. The average rank in each graph is 4.0, 3.5 and 3.6 respectively.

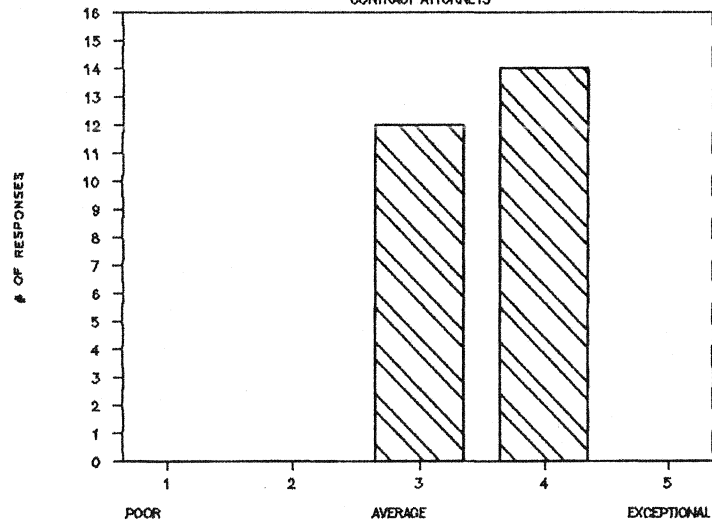
SUMMARY OF SURVEYS (Continued)

QUALITY OF DEFENSE PROVIDED BY
NEW HAMPSHIRE PUBLIC DEFENDER



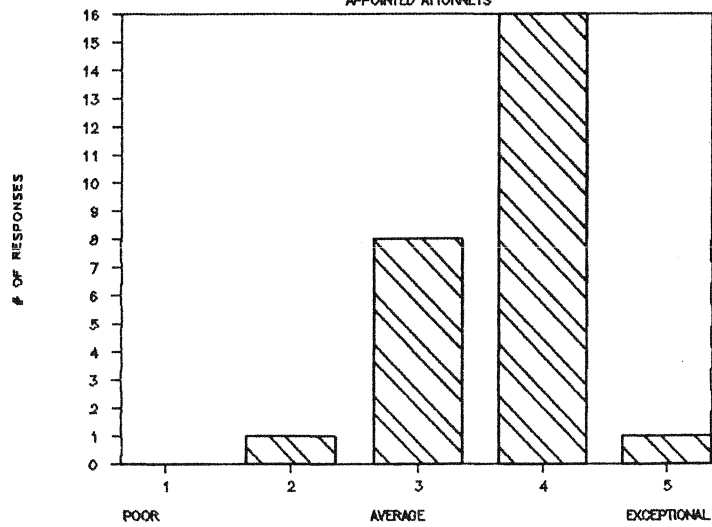
QUALITY OF DEFENSE PROVIDED BY

CONTRACT ATTORNEYS



QUALITY OF DEFENSE PROVIDED BY

APPOINTED ATTORNEYS



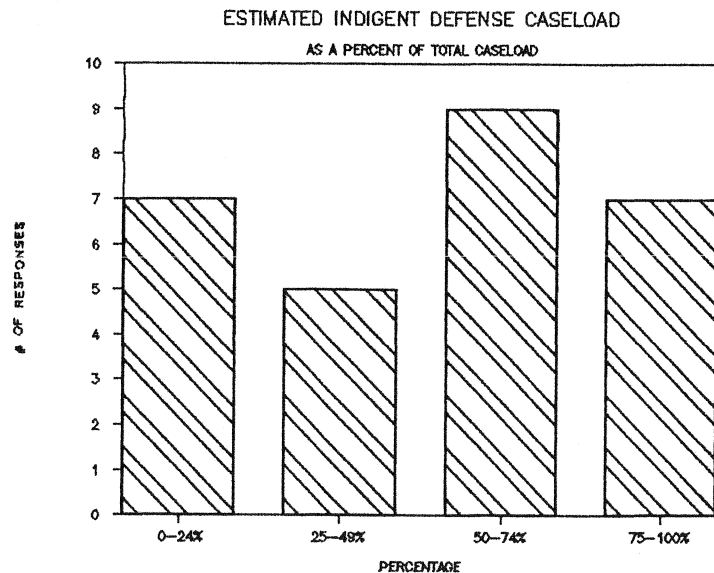
SUMMARY OF SURVEYS (Continued)

Almost all court clerks surveyed (96%) support the use of contract and appointed counsel as a means of defending the indigent in criminal matters when the public defender program is unavailable. Conflicts of interest as well as unavailability make alternative sources of representation necessary, but relying on assigned counsel on a routine basis is impractical and even counterproductive. Pay rates are not sufficient to consistently attract competent attorneys willing to take time-consuming cases, according to the clerks. Those surveyed also consider the small number of specialized criminal lawyers a liability in indigent legal representation.

Most clerks favor an alternative public defender program conceived in RSA 604B:8, but 11% think it would only duplicate the existing system. Twelve percent offer no opinion on the question. One clerk showed particular interest in an alternative program as a further means of saving funds, especially in areas of the State in which the volume of cases justifies the expense. Most clerks agree that an alternative program would increase the effectiveness of indigent legal services by concentrating expertise in criminal defense. They favor a separate public defender program as a better guarantee of quality and service. Only those clerks who believe an alternative program would cost the State too much money do not favor it.

When questioned about the new eligibility standards and recoupment policies recently issued by the Office of Cost Containment through the Department of Administrative Services, 52% of the clerks say the new policies will not succeed in screening out ineligible defendants. Indeed, many believe the new guidelines broaden eligibility standards. The policies cannot realize significant savings without jeopardizing the legal representation of indigent defendants, according to the clerks, who also predict that the cost of recoupment will exceed the monetary benefits of the program. But a significant number of court clerks, 32%, favor the new standards and policies but offer no explanation. The remaining 16% say the policies have not been in effect long enough to support an opinion.

Because New Hampshire does not have a means of determining the percentage of cases requiring indigent defense funds, we asked the clerks to estimate the percentage of cases in their courts that are eligible for indigent services. They responded as follows:



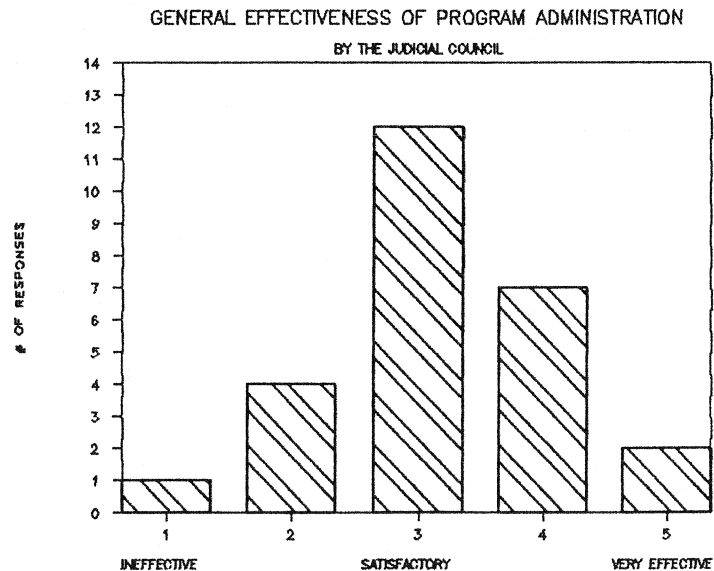
SUMMARY OF SURVEYS (Continued)

We find that a higher percentage of the caseload of indigents is in the more populous southern region of the state.

More indigent defendants should be ordered to reimburse the state for the cost of their cases, say 72% of the clerks questioned in the survey. According to them, the state orders about 45% of poor defendants to repay services rendered to them in criminal matters.

The administrative and financial support courts receive to fulfill their constitutional mandate to provide indigent legal representation is insufficient, according to 56% of the clerks. The unavailability of public defenders and contract attorneys strains the efforts of existing court staff who must search for alternative counsel. New administrative requirements imposed on court employees also present difficulties for these clerks. For instance, they believe new financial affidavits are cumbersome, requiring additional clerical procedures which consume more time and staff.

For most court clerks interviewed in our study, the Judicial Council, as it relates to the indigent defense program, performs satisfactorily. The following graph illustrates the ratings accorded the Judicial Council by the clerks. The average response is 3.5.



SUMMARY OF SURVEYS (Continued)

The Judicial Council, Department of Administrative Services and the courts share in the complex administration of the indigent defense program. Fifty-three percent of the clerks argue that this fragmentation generates excessive paperwork and inhibits communication among the parties. One clerk suggests a State-wide Public Defender program, in which reimbursement is managed directly by the Office of Cost Containment and eligibility is determined initially by judges, as one way to reduce fragmentation and increase communication. Most clerks agree the courts should reduce their involvement in indigent defense repayment procedures.

SYSTEM STRENGTHS

Our survey shows that court clerks think those entitled to counsel in indigent defense cases receive excellent legal representation from dedicated lawyers. They especially admire the public defender program for the quality of legal service it provides to indigent defendants. The clerks also cited the willingness of a number of State Bar members to represent criminal defendants at considerable financial loss to themselves. Notwithstanding the frequent unavailability of counsel in criminal defense proceedings, clerks surveyed regard attorneys throughout the indigent defender program as highly competent. Quantity, not quality, is the overriding concern of New Hampshire's court clerks in the effective administration of indigent criminal defense.

SYSTEM WEAKNESSES

The weaknesses of the system stem primarily from the lack of resources and available personnel throughout the administration of the indigent defender program, according to the clerks. They say efforts should concentrate more on methods of funding and on increasing the pool of accessible attorneys rather than on recoupment and paperwork. The State also does not adequately compensate attorneys. Financial forms and eligibility procedures are too complicated and, thus, frustrate defendants. They consume time which is better spent in other areas, say the clerks.

The process of determining eligibility in indigent cases, in particular, would be improved by involving judges more directly, argue many clerks. As it stands, clerks use a chart to make determinations of eligibility. In addition, the State requires no proof of statements made by defendants in financial affidavits; no investigation is conducted to ensure the veracity of financial claims. Screening of applicants is generally ineffective, as is the method of notifying involved parties of essential court information such as court dates, case status and incarceration/treatment schedules.

SUMMARY OF SURVEYS (Continued)

When the public defender program reaches maximum caseload, an insufficient number of attorneys exists to absorb the overflow. Payment rates are too low to attract enough contract and assigned counsel to meet increasing demands, most clerks indicate in our survey. It is simply neither competitive nor, for many private attorneys, affordable to represent indigent defendants. Low pay rates often pressure attorneys to process cases as quickly as possible rather than commit to a trial.

Finally, according to the clerks we surveyed, no formal process exists for servicing indigent juvenile abuse and neglect cases. Children in Need of Services (CHINS) cases also lack procedures necessary for the effective delivery of justice.

RECOMMENDATIONS OF THE COURT CLERKS

The following recommendations were made by the court clerks who responded to our survey. These recommendations are presented solely to inform the legislature of the opinions expressed by individual court clerks throughout the state.

- o Establish a bidding procedure for the indigent defense fund to assure full service at a fixed rate and adequate compensation to the servicing agency or firm. Create a similar bidding procedure for abuse and neglect and CHINS cases.
- o Increase the hourly pay rate for court appointed attorneys to cover overhead costs associated with indigent cases. In many instances, firms virtually subsidize the State's legal defense costs. Increase the speed with which attorney services are reimbursed.
- o Amend appropriate statutes to provide reimbursement for all cases in which the defendant is acquitted or in which the sentence does not exceed five years.
- o Create a separate agency to collect reimbursement based on the ability of defendants to pay. Employ full-time investigators and contract with investigative firms to verify financial affidavits before trial, especially when fraudulent information is suspected. Require up-to-date receipts to check the monthly expenses reported by defendants and seek reimbursement before representation from those who can afford it.
- o Eliminate the present contract system while providing high volume courts with lists of approved attorneys who will represent indigent defendants on a regular basis.

SUMMARY OF SURVEYS (Continued)

- o Require larger law firms, through the Supreme Court, to participate more readily in the indigent defense program.
- o Exercise the provision in RSA 604-B:8 which allows for an alternative public defender program. Start an apprenticeship for prospective public defenders.
- o Review more closely the credentials of lawyers within the system. Train and coordinate assigned and contract counsel.
- o Return eligibility determinations and the appointment process to the courts by involving judges in monetary decisions and paperwork, but remove the responsibility for reimbursements from the court system.
- o Expand court staff to administer the demands of the OCC and direct the OCC to work more closely with the public defender program in recoupment matters.

SUMMARY OF SURVEY RESULTS

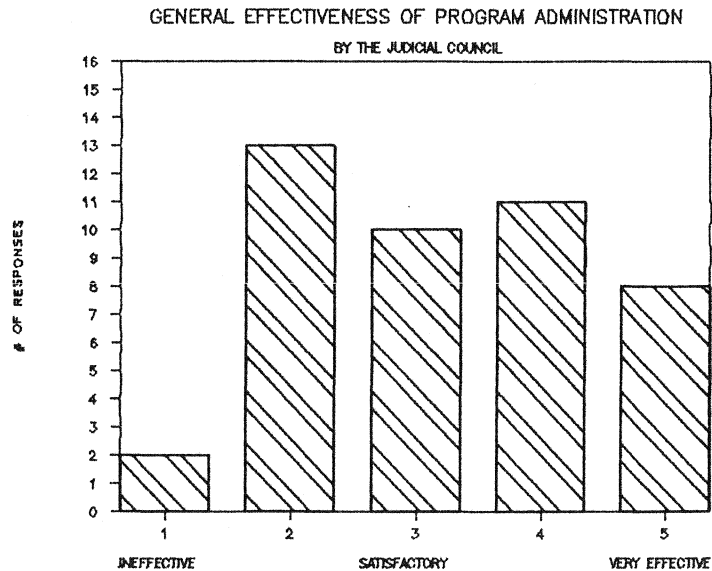
CONTRACT ATTORNEYS AND ASSIGNED COUNSEL

Approximately one hundred attorneys received our survey regarding the indigent defense program. Our purpose was to solicit comments and opinions on the effectiveness of the program. About half of the attorneys responded.

Twenty-four percent of the responding attorneys indicate they have participated in the program for ten years or longer, 27% have participated between five to ten years, 40% have participated between one to five years and 7% have provided services for less than one year. Of these attorneys, 11% participate on a contract basis, 49% are appointed counsel and 40% participated as both.

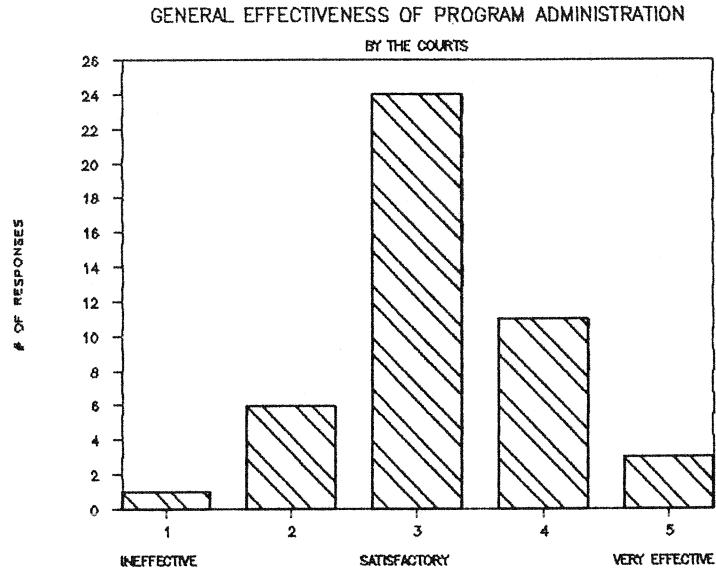
Thirty-eight of the fifty respondents are current providers of indigent defense services. The reasons given for discontinuing services include dissatisfaction with the level of compensation, excessive delays in receiving payment, and excessive paperwork to obtain services other than counsel (ie. investigators). One attorney reported that he never receives payment for his services even though the court approves it. Many also cited scheduling conflicts and the apparent indifference of the courts regarding the amount of time attorneys spend waiting for court appearances. Many suggest that attorneys representing indigent defendants be given priority in courtrooms because of the severe financial constraints under which they are forced to operate. Three attorneys say they will no longer provide services because such low compensation rates are a serious financial burden, especially in complex cases.

The survey asked attorneys to evaluate the effectiveness of the Judicial Council in administering the indigent defense program. The following graph shows their responses. The average response is 3.2 scaled from one to five, with one being ineffective, five being very effective.



SUMMARY OF SURVEYS (Continued)

The survey also asked counsel to comment on the administration of the program by the courts. The following graph illustrates the perceived effectiveness of court administration of the indigent defense program on a scale of one to five, with one being ineffective, and five being very effective.



Fifty-seven percent of the attorneys surveyed believe indigent defendants receive fair representation and quality services in New Hampshire. Those that do not believe the State is delivering fair representation cited monetary constraints and the large volume of cases as the main reasons for their answers. Many claim that attorneys tend to plead cases rather than try them in order to circumvent expected financial losses. They add that low compensation rates deter more experienced and better qualified attorneys.

A good number of attorneys suggest the State could realize more savings without compromising quality through closer scrutiny of indigent defense applications. These attorneys think many undeserving defendants receive indigent defense and argue in favor of using investigators to verify information on financial affidavits. But while most agree verification would result in fewer eligible determinations, many believe the cost of such an effort will not justify the savings that may result. Many of those surveyed advocate an increase in partial eligibility determinations as a way to decrease costs and caseload (under the new guidelines issued by OCC, partial eligibility determinations have increased) and ask for greater efforts to recoup attorney fees ordered by judges.

SUMMARY OF SURVEYS (Continued)

Several respondents suggested the State may realize increased savings without compromising quality by contracting for services other than counsel. They believed contracts with investigators, psychiatrists, court reporters, forensic experts and deposition transcribers would reduce the cost of these services without compromising the quality of service.

Attorneys in our survey suggested a more efficient system of scheduling cases for hearings and reducing reporting requirements would reduce waiting time and paper-filing in the courts. One attorney suggests scheduling cases for a specific time of day rather than simply scheduling them for a particular day. A reduction in reporting requirements and more consistent forms and procedures are necessary according to some lawyers we surveyed.

The contract attorneys indicate that the principal strength of the indigent defense program is the New Hampshire Public Defender. The public defender along with the contract counsel program assure that the poor receive quality legal representation. Those who do assist the indigent in criminal defense are dedicated and diligent, according to those surveyed. The willingness of a number of the New Hampshire Bar to represent the poor at significant loss is also highly prized by these attorneys.

Contract attorneys in our survey believe much of the strength of New Hampshire's program is in the skill, hard work and generosity of court administrators and staff who labor under the pressures of deadlines and tremendous paperwork. Their assistance in coordinating the caseload of hundreds of attorneys helps to increase cooperation and communication throughout the court system.

SYSTEM WEAKNESSES

The lack of funding, low compensation, huge caseloads and excessive paperwork are the most recurring complaints of the defense attorneys in our survey. These problems are compounded, they say, by an uneven distribution of cases among the Bar, an imprecise eligibility screening process and inefficient methods of notifying attorneys and clients about all essential information including appointments, court dates, case changes and incarceration.

Other criticisms address the areas of competence and professionalism. Many of those surveyed say that although the calibre of counsel is usually high, courts often appoint attorneys with little or no criminal law experience. They also point to the lack of specialized training in criminal law for prospective and present contract attorneys. Legal defense of the indigent is adversely affected by the lack of criminal trial experience of many practicing attorneys.

SUMMARY OF SURVEYS (Continued)

Finally, many of those surveyed believe that certain misdemeanor offenses should be processed as violations in order to reduce the caseload of the courts. The attorneys we surveyed want the quantity of forms reduced and want their contents to be more concise, consistent and readable. They claim many clients have difficulty understanding the paperwork associated with their cases. The same papers slow the legal process for court clerks and other administrators trying to manage the growing number of indigent cases.

RECOMMENDATIONS OF DEFENSE ATTORNEYS

The following recommendations were made by the defense attorneys who responded to our survey. These recommendations are presented solely to inform the legislature of the opinions expressed by individual defense attorneys throughout the state.

- o Increase funding and staff to New Hampshire Public Defender.
- o Encourage, through the Supreme Court, the Bar and other bodies, some degree of participation from all attorneys in the State, in order to better distribute the workload carried by a fraction of practicing attorneys.
- o Provide training and seminars to prospective defense attorneys in order to improve the services offered under the indigent defense program.
- o Review more closely the credentials of lawyers within the system. Control eligibility determinations and defendant financial investigations.

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STATE OF NEW HAMPSHIRE
INDIGENT DEFENSE PROGRAM
APPROPRIATIONS AND EXPENDITURES
FISCAL YEARS 1966 - 1989

<u>FISCAL YEAR</u>	<u>SESSION LAW</u>	<u>ORIGINAL APPROPRIATION</u>	<u>SUPPLEMENTAL APPROPRIATION</u>	<u>TOTAL APPROPRIATION</u>	<u>TOTAL EXPENDITURES</u>
1966	CH 296, 1965	\$ 50,000		\$ 50,000	\$ 44,101
1967	CH 296, 1965 CH 422, 1967	50,000	\$ 15,000	65,000	255,548
1968	CH 422, 1967	50,000		50,000	49,997
1969	CH 422, 1967 CH 545, 1969	50,000	60,000	110,000	103,988
1970	CH 367, 1969	75,000		75,000	75,000
1971	CH 367, 1969 CH 402, 1971	75,000	75,000	150,000	150,000
1972	CH 557, 1971 CH 60, 1972	100,000	35,000	135,000	134,999
1973	CH 557, 1971 CH 60, 1972 CH 442, 1973	100,000	40,000 52,000	192,000	190,691
1974	CH 376, 1973 CH 522, 1978	215,000	15,000	230,000	209,832
1975	CH 376, 1973 CH 522, 1978	215,000	15,000	230,000	229,974
1976	CH 505, 1975 CH 19, 1976	242,000	250,000	492,000	491,939
1977	CH 505, 1975 CH 19, 1976	254,000	23,000	277,000	277,000
1978	CH 600, 1977 CH 52, 1978	316,000	275,000	591,000	315,994
1979	CH 600, 1977	345,000		345,000	619,999

STATE OF NEW HAMPSHIRE
INDIGENT DEFENSE PROGRAM
APPROPRIATIONS AND EXPENDITURES
FISCAL YEARS 1966 - 1989

<u>FISCAL YEAR</u>	<u>SESSION LAW</u>	<u>ORIGINAL APPROPRIATION</u>	<u>SUPPLEMENTAL APPROPRIATION</u>	<u>TOTAL APPROPRIATION</u>	<u>TOTAL EXPENDITURES</u>
1980	CH 434, 1979 CH 499, 1980	\$ 645,000	\$ 854,000	\$ 1,499,000	\$1,505,428
1981	CH 434, 1979 CH 85, 1981	675,000	994,537	1,669,537	1,704,318
1982	CH 568, 1981 CH 42, 1982	1,700,000	600,000	2,300,000	1,685,853
1983	CH 568, 1981 CH 120, 1983	1,800,000	633,465	2,433,465	2,801,657
1984	CH 469, 1983	2,650,000		2,650,000	2,832,721
1985	CH 469, 1983 CH 4, 1985	2,300,000	780,000	3,080,000	3,084,199
1986	CH 406, 1985	4,383,500		4,383,500	4,207,730
1987	CH 406, 1985	4,200,000		4,200,000	4,230,108
1988	CH 400, 1987 CH 254, 1988 CH 400, 1987	4,200,000	500,000 100,795	4,800,795	4,642,480
1989	CH 400, 1987 CH 254, 1988	3,990,927	1,121,315	5,112,242	

Source: Laws of the State of New Hampshire, 1965 - 1988
Statements of Appropriation, 1965 - 1988
Includes appropriations for public defender
contract attorneys and assigned counsel programs

STATE OF NEW HAMPSHIRE
LEGISLATIVE AND JUDICIAL HISTORY
INDIGENT DEFENSE PROGRAM

1901 - 1988

- 1901 Chapter 104 provided for the assignment of counsel for murder cases at the defendant's request and for any other offense punishable by thirty years imprisonment, if the defendant is "unable to defray the expense of procuring their attendance." Such expenses were to be paid by the county.
- 1907 Chapter 106 amended Chapter 104, Laws of 1901, reducing the requirements for assignment of counsel to any offense that is punishable by five years imprisonment.
- 1937 Chapter 368:2 of the Public Laws (Chapter 104, Laws of 1901 and Chapter 107, Laws of 1907) was amended to allow any person held for the grand jury for any offense, the punishment for which may be three years imprisonment, to have counsel assigned to him by the court, if the court finds the defendant is "unable to defray the expense of obtaining counsel."
- 1955 Chapter 428:3 of the Revised Laws (RSA 604:3) set counsel fees at a maximum of \$500, plus expenses, to be paid by the county.
- 1963 The case of Gideon v. Wainwright, 372 U. S. 335 (1963), was decided by the U.S. Supreme Court on March 18, 1963. This case extended to state courts a defendant's right to counsel in felony cases through the Fourteenth Amendment of the U.S. Constitution. Previously, the right to counsel was determined by the individual states in felony cases.
- 1963 RSA 604 was amended to make counsel available at public expense to an indigent charged with a felony, eliminating the three years imprisonment requirement established in 1937.
- 1965 New RSA Chapter 604-A was to "provide adequate representation to indigent defendants in criminal cases," including misdemeanors for which the penalty exceeds 6 months imprisonment and/or a fine of \$500. RSA 604 sections, as amended in 1955 and 1963 (above), were repealed. The new chapter set limits on compensation of counsel at \$500 for felonies and \$200 for misdemeanors. Payments in excess of these amounts in extraordinary circumstances were subject to

court approval. The new chapter also gave the courts authority to establish rules and regulations necessary to implement the provisions of the chapter. For the first time, the chapter appropriated state funds to provide counsel to indigent defendants. \$50,000 was appropriated in each year for fiscal years 1966 and 1967.

- 1966 Amendment to Part I, Article 15 of the New Hampshire Constitution became effective on November 16, 1966. The amendment provides that "every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown..."
- 1967 RSA 604-A was amended to extend the right to counsel at state expense to juveniles charged with being delinquent. The RSA was also amended to limit compensation of counsel to \$100 in such cases, and extended the right to counsel in all misdemeanors that provided for any imprisonment. Previously, the penalty needed to exceed 6 months imprisonment to qualify for counsel at state expense.
- 1969 RSA 604-A limited compensation of counsel to reasonable and necessary charges. Also, compensation limits were revised.
- 1969 The operating budgets for fiscal years 1970 and 1971 included a footnote requiring indigent defendants to pay 10% of the fees of legal counsel, with a \$5 minimum and a \$20 maximum. Chapter 475, Laws of 1969, amended RSA 604-A to require a defendant who awaits sentencing, who receives a suspended sentence, or who is placed on probation, to repay all of fees (attorneys etc.) and expenses paid on his behalf. Failure to comply would be considered a violation of probation, and punishable.
- 1971 Chapter 522 established a Public Defender System for Merrimack County under a two-year contract, to be entered into with New Hampshire Legal Assistance, a nonprofit corporation, effective July 1, 1971. Funding for the contract was to be a charge upon the appropriation to the Department of Administration & Control for indigent defense, not to exceed \$21,000 in each year for fiscal years 1972 & 1973.
- 1972 U.S. Supreme Court issued its opinion in Argersinger v. Hamlin, 407 U.S. 25 (1972), which extended the right to counsel under the U.S. Constitution to prevent imprisonment for any offense, whether felony, misdemeanor or petty, without the representation of counsel at trial.

- 1973 Chapter 463 continued the pilot program established in 1971 for Merrimack County for indigent defendants in criminal cases and established a similar program for Hillsborough County. Funding for the two-year contract with New Hampshire Legal Assistance was to be a charge to the amount appropriated for indigent defense, not to exceed \$65,000 in fiscal year 1974 and \$70,000 in fiscal year 1975.
- 1975 The operating budgets for fiscal years 1976 and 1977 contained a footnote that set maximum fees to be paid to attorneys for indigent defense services at \$10 per hour for case preparation and \$15 per hour for time in court, with a minimum of \$25 in any one case.
- 1975 The State Supreme Court issued its opinion in the case of State of New Hampshire v. Edward K. Clough, 115 NH 7 (1975). In the opinion, the Court and the language of the State Constitution extended the right to counsel in criminal cases "punishable by deprivation of liberty." This standard is more stringent in its protection of an individual's rights than the standard set by the United States Supreme Court in its 1972 Argersinger decision.
- 1977 Chapter 296 established RSA 604-B. RSA 604-B, titled "Public Defender Program," continued the programs for Merrimack and Hillsborough Counties established originally in 1971 and 1973, respectively, and extended a similar program to Rockingham County to provide legal representation to indigent defendants. All three programs were administered by New Hampshire Legal Assistance under a two-year contract entered into by the Comptroller, with the approval of the Governor and Council. Funding was to be a charge upon the appropriation for indigent defense, not to exceed \$210,637 in fiscal year 1978 and \$226,621 in fiscal year 1979.
- 1977 The operating budgets for fiscal years 1978 and 1979 contained a footnote that set maximum fees to be paid to attorneys for indigent defense services at \$10 per hour for case preparation and \$15 per hour for time in court, with a minimum of \$25 in any one case.
- 1977 Chapter 600:23 transferred the indigent defendant legal expense payment processing from the Comptroller to the Judicial Council, and authorized the Judicial Council to make rules and regulations for processing payments to attorneys.

- 1979 Footnotes to the operating budgets for fiscal years 1980 and 1981 required judges to certify attorneys' statements prior to payment and to authorize the Judicial Council to enter into a two-year contract with an "appropriate provider" to establish public defender offices in Belknap, Hillsborough, Merrimack and Rockingham Counties for fiscal years 1980 and 1981. Funding was to be a charge upon the appropriation provided for this purpose in the respective operating budgets.
- 1979 Chapter 499, which made certain changes to the operating budgets for fiscal years 1980 and 1981, contained a footnote which required attorneys to submit bills for payment to the court within 60 days of the disposition of a case. The court, in turn, was required to certify and forward the bills for payment processing by the Judicial Council within 30 days of receipt.
- 1981 RSA 604-B, Public Defender Program, was amended to extend the program to all counties in the state. The amendment also authorized the Judicial Council to "contract with any organization or groups of lawyers approved by the board of governors of the New Hampshire bar association to operate the public defender program... ." The Judicial Council was made responsible for "general supervision" of the Public Defender Program, including approval of the caseload plan adopted by the program. In addition, the amendment also required the court to make an additional inquiry of defendants to determine if any person is liable for the support of the defendant and, if so, if that person is financially able to pay for the defendant's legal services. The amendment further changed the repayment provisions established in 1969 by requiring the court to order repayment by any defendant convicted, whose sentence does not include actual incarceration in the state prison. Finally, the amendment required the defendant to sign a petition that specifies that, if convicted without actual incarceration being imposed, repayment would be required and that, if unable to repay, the defendant would have to work for the state at the rate of \$25 per day until the debt was repaid. The court was also given the authority to order any employer to deduct from wages amounts due, for payment to the state through the Board of Probation, should any repayment ordered become overdue.
- 1982 RSA 604-A was amended to add exceptions to be applied by the court when conducting the additional inquiry for the determination of financial liability by any person other than the defendant. These exceptions included any person who was the victim of the crime.

- 1983 A new section was added to RSA 604-A that required the Comptroller to keep records of the notification of eligibility and assignment of counsel form, as submitted by the courts to the Department of Administrative Services. These records were to include the name of the court, type of case (homicide, other felony, misdemeanor, juvenile or other), whether the case was assigned to the public defender program or a private attorney, and the amount of the attorneys' fees and other expenses.
- 1983 RSA 604-A was amended to change the wording of the petition required to be signed by each indigent defendant. The change deleted the requirement to work for the state if repayment could not be made and also deleted the requirement for probation or conditional discharge if repayment was not made.
- 1983 Chapter 321 amended RSA 604-A to give the Superior Court authority to approve payments for services other than counsel it considered necessary to an adequate defense, such as investigative and expert services. The compensation to any one person or association is limited to \$300, subject to higher amounts at the discretion of the court.
- 1985 Chapter 342 amended RSA 604-A to establish the Contract Attorney Program. The Judicial Council was authorized to contract with any attorney in the state, with the approval of the Governor and Council, to provide representation of indigents. The courts were required to appoint counsel in the following order: 1) Public Defender Program, 2) Contract Attorney Program, and 3) any qualified attorney. The chapter again modified the petition signed by indigent defendants for the appointment of counsel and required the courts to make a determination of financial ability to obtain counsel "by comparing the defendant's assets and incomes with the minimum cost of obtaining qualified private counsel." The chapter further authorized the state to seek repayment from a defendant whose sentence included actual incarceration in the state prison, within 3 years from the time the person is released.
- 1985 The operating budgets for fiscal years 1986 and 1987 contained a footnote that directed the Commissioner of Administrative Services to request an "additional appropriation as deemed essential" in the event the liability for indigent defenders exceeds the amount appropriated. Prior approval of the Fiscal Committee was necessary for these requests before submission to the Governor and Council. Another footnote reiterated the General Court's intent that repayment provisions "be implemented to the fullest extent possible."

1987 Chapter 406 amended RSA 604-A to require the court to order repayment if the defendant's sentence does not include actual incarceration, consistent with the defendant's present or future ability to repay. These payments were to be made to the state through the Department of Corrections. It also authorized the state to seek repayment within 6 years from the time a person was released from the state prison (formerly 3 years) and extended this 6-year provision to any defendant convicted of any offense. The chapter further authorized the Commissioner of Administrative Services to enter into contracts to collect these fees and expenses and to contract with attorneys to provide representation to indigents, in addition to the contracts entered into by the Judicial Counsel. Finally, a footnote to the operating budgets for fiscal years 1988 and 1989 continually appropriated any cost recoveries to the indigent defense program. Formerly, these recoveries were unrestricted revenue to the general fund.

1988 Chapter 225 established a pilot program for indigent defense, until June 30, 1989, administered by the Commissioner of Administrative Services. The program includes provisions which make the Commissioner responsible for: 1) making a decision relative to a defendant's eligibility for counsel appointed at state expense, subject to review on appeal by the court, 2) collecting court-ordered reimbursements with the assistance of a cooperative agreement with the Commissioner of Corrections, and 3) establishing rules governing eligibility determinations, repayment schedules and collections procedures, with the approval of the Attorney General. The chapter also authorized temporary positions to implement the pilot program. Finally, the Commissioner of Administrative Services is required to make an interim report on or before December 1, 1988 and a final report on or before June 30, 1989 on the pilot program's activities, findings and recommendations.

The chapter further authorized the Judicial Council to "contract for an alternate public defender program to represent indigent defendants in circumstances where, because of conflict of interest or otherwise, the public defender program is unable to provide representation to a defendant."

A final section required the prosecutor in every misdemeanor case to make an affirmative statement to the court as to whether the state intends to prosecute the misdemeanor as a violation (as permitted by RSA 625:9). If the state prosecutes the case as a violation, the defendant is not entitled to counsel at the expense of the state.

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<u>NAME OF REPORT</u>	<u>RESULTANT OBSERVATIONS</u>	<u>RECOMMENDATIONS</u>	<u>CURRENT STATUS OF RECOMMENDATIONS</u>
<p><u>1988 - Indigent defense program</u> <u>OVERVIEW OF PROCEDURES,</u> <u>PROBLEMS AND RECOMMENDATIONS</u></p> <p>10 pages, plus appendices prepared by Department of Administrative Services</p>	<ul style="list-style-type: none"> - Inconsistent application of eligibility criteria. - Financial affidavits filed by defendants are not verified, encouraging potentially fraudulent applications for defense services. - Orders for repayment are based on original applications for defense. Only 40% are being ordered to repay. - Collection efforts for collection only cases assigned to DOC are given low priority considering the probationary parole caseload they must supervise - The assignment of collection responsibilities for small unsupervised cases to parole officers is misplaced given their primary responsibility for monitoring potentially dangerous or non-conforming probationers/ parolees. - Basic collection tools such as accounts receivable aging reports are not used by DOC to monitor payment performance in a systematic manner. 	<ul style="list-style-type: none"> - Implement effective, consistent pre-trial and pre-sentence screening methods to maximize recoveries. - Assist DOC in improving "collection policies, procedures, practices and tracking methods to increase size and speed of collections from unsupervised defendants." - Create and staff a pilot collection function at DOC field offices - Improve cash management and cash flow from the courts, DOC, DAS to the Treasury. 	<ul style="list-style-type: none"> - HB 847 passed in 1988 Session which established Office of Cost Containment (OCC) under DAS. - Rules and procedures have been adopted as of October 3, 1988 transferring collection responsibility for unsupervised cases and eligibility determinations to OCC. OCC expects to tighten eligibility criteria and improve recoveries by \$200,000 (in its first year) over and above its costs and current recovery levels according to the Fiscal Impact Statement (Rule # Ch Adm 1000, filed 9/12/88).

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<p>1988 <u>Report to the Fiscal Committee on the Public Defender and Contract Attorney Program.</u></p> <p>8 pages, plus appendices prepared by Executive Director of the Judicial Council pursuant to Chapter 400, Laws of 1987.</p>	<p>In 1985 the contract attorney program was established to reduce use of assigned counsel.</p> <p>The 86/87 biennium was the first year where indigent defense did not require a supplemental appropriation. Assigned counsel was used in only 7% of the cases. Insufficient funding in 88/89 biennium has resulted in less use of contract counsel and increased use of assigned counsel to 15% of caseload as of October, 1988.</p> <p>Supplemental appropriations for public defender program are not effective because staffing decisions need to be coordinated with law school graduations and the semi-annual bar examination. Supplemental appropriations occur too late in the year to impact current year hiring plans.</p> <p>The report also discusses the size and composition of grouping caseloads, weighing analysis, case turnover, cost analysis and allocation of caseload among delivery systems.</p>	<p>- The public defender program should be funded to meet 75% of anticipated caseload with the Contract attorney program picking up the remainder. Use of assigned counsel should be minimized.</p>	<p>The 88/89 supplemental appropriation passed in May 1988 for an additional \$1.6 million, 20% over the original appropriation of \$8,190,927. The original appropriation was <u>31%</u> below the requested level of \$11,895,333 for the biennium.</p> <p>Use of assigned counsel has increased in the 88/89 biennium from under 10% of the caseload to approximately 20%.</p>

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<p><u>1987</u> <u>Report of the Committee to Study the Indigent Defense Program</u></p> <p>3 pages, plus attachments prepared by Legislative Committee chaired by Donna Sytek</p>	<ul style="list-style-type: none"> - Questions surrounding adoption of the federal standard for indigent defense should be examined to reduce the number of defendants eligible to receive public defense. - The public defender and contract attorney programs are the most cost effective means of delivering defense services. - Indigent defense has been the subject of considerable study since 1981. Recently introduced improvements (during 1987) are believed to result in tightened eligibility, increased recoveries and greater use of contract counsel. 	<ul style="list-style-type: none"> - Upon resolution of the issues surrounding the federal standard, a constitutional amendment should be proposed to the voters in 1988. - Use of assigned counsel should be kept to a minimum by adequately funding the public defender and contract counsel programs. - The Committee advised against expending \$25,000 for a proposed study concerning indigent defense. 	<p>Adoption of the federal standard was proposed in CACR 13 to the New Hampshire Constitutional Convention in 1981 and also in the 1988 Legislative Session in CACR 24. Both attempts to change the standard have failed and the proposal to amend the New Hampshire Constitution has not been brought before the electorate. Recent correspondence with the U.S. Attorney, U.S. Department of Justice (Appendix E) has further clouded the issue after learning that although the U.S. Constitution guarantees defense only upon an actual sentence of imprisonment, the federal court actually operates under the Federal Rule of Criminal Procedure (44) which provides "representation upon request to an indigent defendant whenever the defendant is charged with a felony or a misdemeanor." This Rule is identical to the one followed in New Hampshire today.</p> <p>Use of assigned counsel has risen from a low of 7% of caseload in 86/87 to current rate of 20% due to reduced funding of the public defender and contract counsel in the original 88/89 budget.</p> <p>Intended improvements introduced in 1987 have not resulted in improved cost recovery or an application of</p>

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<u>1987</u> <u>Report of the Committee to Study</u> <u>the Indigent Defense Program</u> <u>(Continued)</u>			tightened eligibility criteria. Changes resulting from the introduction of the pilot program (Chapter 225, Laws of 1988) are more promising, although they have been in effect only since October 1988. Use of the contract attorney program is limited to the amount appropriated by the General Court.

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<p>1981 <u>Providing Legal Counsel to Indigent Defendants as a Condition of Imprisonment</u></p> <p>5 pages Submitted by the Judicial Council</p> <p>Judicial Council's position on the enactment of CACR 13 which proposes to make New Hampshire's Constitution consistent with the U.S. Constitution for the right of counsel.</p>	<p>CACR 13 would require the appointment of counsel only in those instances where the defendant is actually imprisoned, as opposed to requiring appointment of counsel in all cases involving crimes which authorize imprisonment.</p>	<p>The Judicial Council does <u>not</u> <u>recommend</u> the change in the guarantee of a right to counsel in the New Hampshire Constitution as proposed by CACR 13 because of the following arguments:</p> <ul style="list-style-type: none">- The proposal involves numerous and serious questions of public policy- Although designed to reduce financial costs of the current criminal justice system, serious questions arise regarding the impairment of the quality of justice in our courts.	<p>CACR 13 was defeated in 1981.</p>

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<p>1981 <u>Providing the Poor with Legal Representation</u> 32 pages, plus Appendix Submitted by the Committee on Constitutional Revision</p>	<p>CACR 13 would, if enacted, bring the State Constitution in line with the Federal Constitution regarding counsel for indigent defendants. By Adopting CACR 13, the State would have to rescind all of the criminal statutes which provide for an enhanced penalty for subsequent offenses. An indigent could not be given a prison term for second and subsequent offenses if the court did not provide counsel during the first offense. If the accused could afford counsel but did not obtain such representation or waived the right to counsel, that person would be subject to the enhanced penalties for later offenses.</p> <p>Another concern arises with the logistics of deciding who would receive counsel and when would that decision be made. A hearing would have had to be held before the trial in order to determine the necessity of counsel. If the judge making that determination is also the judge who will try the case, a question of unconstitutionality becomes notable.</p> <p>CACR 14, if enacted, would create two problems. The first deals with the Legislature's power to establish the fees for indigent defenders. The Legislature would be responsible for producing a fee schedule. That does not mean any schedule produced would be constitutional.</p>	<p>It appears that the subcommittee has seven alternatives to choose from.</p> <ol style="list-style-type: none"> 1. Pass CACR 13 - The effect of this amendment passing would be one of two results. The amendment would pass and nothing would change. Judges would continue to appoint counsel when there existed a possibility of imprisonment. There would be no savings to the State. Or, the amendment would pass and judges will determine before the trial who would be imprisoned on conviction and would require legal representation. The State could possibly lose money by having to provide two justices for each case, one to determine the need for counsel and one to try the case. 2. Pass CACR 14 - Enactment of this amendment would not solve the controversy which now exists. It's unknown if the State would realize a savings by passing this amendment. 3. Pass CACR 13 and CACR 14 - If the subcommittee decides to recommend passage of both amendments, the amendments should be integrated into one amendment since the two, as they now exist separately, contradict each other. 4. Wait a reasonable amount of time in order to review the 1981 program. During 1981, the Legislature established a statewide Public 	<p>CACR 13 was defeated in 1981.</p> <p>CACR 14 was defeated in 1981.</p>

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<u>1981</u> <u>Providing the Poor with Legal</u> <u>Representation (Continued)</u>	<p>The second problem deals with the statutes requiring an indigent to repay the entire cost of counsel. The statutes now require an indigent to repay the entire cost of counsel either through monetary payments or actual service performed for a government body unless the court finds defendant unable to pay the cost and is physically unfit to perform service.</p>	<p>defense program by establishing offices of salaried attorneys in the more populous counties and by contracting for set fees with private firms in the remaining counties.</p> <p>5. A study by The National Center for State Courts, in 1976, reviewed available legal defenses in New Hampshire that included several recommendations concerning repayment, some of which were incorporated in 1981. Those which were not adopted should now be reconsidered.</p> <p>6. A possible solution - The subcommittee could amend the present statute to reflect the proposed amendments.</p> <p>7. The subcommittee may recommend any other solution which materializes in its deliberations.</p>	<p>Refer to synopsis on page eighty-six for the status of these recommendations.</p>

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<p><u>1980</u> <u>New Hampshire's Indigent Defense</u></p> <p>34 pages, plus appendices Prepared by Statistical Analysis Center, New Hampshire Office of Attorney General</p>	<ul style="list-style-type: none"> o At least six factors have contributed to the increase in the cost of indigent defense: <ol style="list-style-type: none"> 1) increase in population 2) increase in criminals 3) increased reimbursement to assigned counsel 4) Judicial Policy 5) Juvenile Entitlement 6) General Economic Conditions o The cost/unit for public defender is approximately 30% less than cost/unit for assigned counsel. o The cost-effectiveness of the public defender is affected by demographic and geographic factors, which should be taken into account. 	<ul style="list-style-type: none"> o Cost Containment is not wholly within the power of the State given population growth and increased crime rates. Failure to anticipate cost increases, whether or not they are controllable, stresses the system. Additional funding of \$904,000 was recommended to address a shortfall for FY 1981. o Consideration should be given to the possibility of allocating a greater proportion of the workload to the public defender, thus effecting substantial savings. o Consideration should be given to changing public defender caseload control and management procedures in order that the agency may defend a higher proportion of juvenile cases. 	<ul style="list-style-type: none"> o A supplemental appropriation of \$994,537 was passed for FY 1981. o Required according to RSA 604-A:2 II. o This issue has not been addressed to date. Juvenile caseload is spread among several funding sources throughout the State.

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<p><u>March 6, 1980</u> <u>Report on Funding Requirements of the Indigent Defense Program</u></p> <p>7 pages Submitted by The Office of Legislative Budget Assistant</p>	<ul style="list-style-type: none"> o The Indigent Defense fund appropriations have not met expenditure requirements. This has resulted in the deferral of payment of over \$31,000 in claims each year to the following year since 1971. o A class action suit was filed during January 1980 by three attorneys because of the FY 1980 Indigent Defense Fund money running out in September 1979. o The New Hampshire requirement for appointment of counsel is broader than the Federal Constitution. New Hampshire must appoint counsel when cases have a potential for imprisonment. o Juveniles accounted for more than 1/3 of the assigned cases. All a juvenile has to do is to fill out an affidavit in support of a petition for assignment of counsel. No attempt is made to require the parents or guardians to pay. 	<ul style="list-style-type: none"> o Reduce some misdemeanors to violations in order to decrease the need to appoint counsel since violations do not carry a potential for imprisonment. o Expand the public defender program to encompass other areas of the State. Study shows that a public defender program costs less. o Require parents, guardians, or others so obligated, to pay for the defense of the juvenile. 	<p>No statutory relief has been passed to date.</p> <p>Statewide public defender program was established beginning in FY 1986.</p> <p>Required pursuant to Rules established by OCC and previously required by Court Rule.</p>

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<u>1980</u> <u>Report on Funding Requirements</u> <u>of the Indigent Defense Program</u> <u>(Continued)</u>	<ul style="list-style-type: none">o Few defendants are ordered to repay. When they are ordered it is usually to pay the attorney. Inadequate controls exist to detect whether the attorney deducts money from his claim to the State.	<ul style="list-style-type: none">o The court could begin ordering more defendants to repay, if an investigation of the defendant indicates that he can afford it. In addition the payment should be sent to the State, not the attorney.	<p>The courts have not had the resources to verify financial affidavits and applications have been taken at face value for the most part. Chapter 225, Laws of 1988, has removed eligibility determination from the Courts and placed it under the control of DAS with emphasis on verifying claims of indigency. The rate of repayment orders issued by the courts is rising, however it appears to be less than 10% up until FY 1989.</p>

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NAME OF REPORT	RESULTANT OBSERVATIONS	RECOMMENDATIONS	CURRENT STATUS OF RECOMMENDATIONS
<p>1976 <u>Defense Services in New Hampshire</u></p> <p>166 pages, plus appendices Prepared by National Center for State Courts</p>	<p>This report was prepared by the National Center for State Courts under contract with the Administrative Committee of District and Municipal Courts. The purpose of the report was "... to study the manner in which assistance of counsel is provided at public expense for eligible defendants in criminal cases to determine whether improvement is needed in the provision of such services, and to make recommendations for improvement." The report "...sought to view the provision of defense services from the perspective of the court system..." and made forty-one recommendations covering virtually all aspects of indigent defense services in New Hampshire.</p> <p>Several of the most significant recommendations affecting policy level decisions and costs are summarized herein. The report also made several recommendations regarding administrative procedures to improve internal controls at the individual courts, which are largely outside the scope of our current review, and therefore excluded from this synopsis. Recommendation numbers and parenthetical page numbers following each recommendation refer to the original report dated February 27, 1976.</p>	<p><u>TYPE OF DELIVERY SYSTEMS</u></p> <p><u>RECOMMENDATION 41:</u> The staffs and locations of public defender offices should be extended for statewide service. Although greater reliance should be placed on this means of delivering defense services, a continuation of the assigned counsel system in some locations and for some matters will be essential. Thus the system should be characterized as mixed, although emphasizing public defender representation. (p. 165)</p>	<p>The adoption of a statewide public defender system occurred in stages. It started as a pilot program in Merrimack County and was gradually expanded to include the most populous areas of the State. New Hampshire Public Defender, a non-profit corporation, was organized in May, 1985 and has entered into contracts since FY 1986 with the State of New Hampshire to provide defense services as the primary provider under RSA 604-A:2 II through the 88/89 biennium. Negotiations are taking place currently for the 90/91 biennium. A contract attorney program, unrelated to the New Hampshire Public Defender, was also introduced in FY 1985 as a secondary means of delivering services primarily for conflict cases or excessive caseload demand. An Assigned Counsel system has been retained over the years as back up when both the public defender and contract systems are unavailable. The objective is to limit the use of assigned counsel.</p>

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<p>1976 <u>Defense Services in New Hampshire</u> <u>(Continued)</u></p>	<p><u>ASSIGNED COUNSEL - COMPENSATION ISSUES</u></p> <p><u>RECOMMENDATION 10:</u> Constraints as to minimum and maximum amounts of compensation should be lifted. (p.20)</p> <p><u>RECOMMENDATION 11:</u> The distinction between compensation rates for preparation time and court time should be abolished. A flat rate of \$25 per hour in assigned counsel cases should be established. (p.20)</p>	<p>Assigned counsel fees were raised in 1978 from an hourly rate of \$10 out-of-court, \$15 in-court to a prevailing rate of \$20 out-of-court and \$30 in-court with hourly maximums of \$25 out-of-court/\$35 in-court upon a showing of good cause and under exceptional circumstances. (Supreme Court Rules 47 and 48) The prevailing rate of \$20/\$30 per hour is approximately 30% below the hourly national average paid to assigned counsel according to a survey taken in December 1987 by NYS Defenders Association. Significant dissatisfaction has been expressed by assigned counsel regarding the level of compensation they are receiving, and we believe an increase in fees will be necessary to attract qualified counsel to continue to accept indigent defense cases upon request of the courts. Maximum fees for each type of case have been set by Supreme Court Rule as follows:</p> <table style="margin-left: auto; margin-right: auto;"> <thead> <tr> <th style="text-align: left;"><u>Case Type</u></th> <th style="text-align: left;"><u>Max Fee</u></th> </tr> </thead> <tbody> <tr> <td>Misdemeanor</td> <td>\$ 500</td> </tr> <tr> <td>Juvenile</td> <td>500</td> </tr> <tr> <td>Felonies</td> <td>1,500</td> </tr> <tr> <td>Homicides</td> <td>7,500</td> </tr> </tbody> </table>	<u>Case Type</u>	<u>Max Fee</u>	Misdemeanor	\$ 500	Juvenile	500	Felonies	1,500	Homicides	7,500
<u>Case Type</u>	<u>Max Fee</u>											
Misdemeanor	\$ 500											
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SYNOPSIS OF PRIOR REPORTS

<u>NAME OF REPORT</u>	<u>RESULTANT OBSERVATIONS</u>	<u>RECOMMENDATIONS</u>	<u>CURRENT STATUS OF RECOMMENDATIONS</u>
<u>1976</u> <u>Defense Services in New Hampshire</u> <u>(Continued)</u>		<u>FUNDING LEVELS</u> <u>RECOMMENDATION 15:</u> Sufficient funds should be appropriated by the Legislature for the biennium to ensure timely payment of indigent claims. The recurring need for deficiency appropriations for this purpose should be avoided. (p. 22)	The 86/87 biennium was the first biennium since 1966 (when the State initially assumed funding responsibility,) that did not require a supplemental appropriation to meet the cost of providing indigent defense services in the State. This level of funding enabled the public defender and contract counsel systems to handle nearly 90% of the indigent defense caseload statewide, reducing our reliance on assigned counsel, the highest cost alternative of the three types. In some years, the supplemental appropriation exceeded the original appropriation, and in many others it represented a high percentage of the original appropriation. This continuous funding shortfall impedes effective caseload planning and limits staffing levels by the public defender to the amount appropriated rather than the level necessary to meet caseload demand. Cases that cannot be handled by the public defender are assigned to contract or assigned counsel, regardless of appropriations, resulting in greater reliance on the secondary and more costly providers.

STATE OF NEW HAMPSHIRE
SYNOPSIS OF PRIOR REPORTS

<u>NAME OF REPORT</u>	<u>RESULTANT OBSERVATIONS</u>	<u>RECOMMENDATIONS</u>	<u>CURRENT STATUS OF RECOMMENDATIONS</u>
<u>1976</u> <u>Defense Services in New Hampshire</u> <u>(Continued)</u>		<u>ASSIGNMENT OF COUNSEL</u> <u>RECOMMENDATION 9:</u> The decision as to who, if anyone, will be assigned to represent a defendant should remain in the court. (p. 16) <u>RECOMMENDATION 16:</u> All assignments of counsel should be made by the court from a list prepared by the county bar association. Exemption from the list should be only with the approval of the court based upon the showing of a compelling reason. (p. 28) <u>RECOMMENDATION 17:</u> Counsel should be assigned by the court in a uniform and orderly manner. To this end, appointments from the list should, subject to the court's discretion, be made in alphabetical order and on a rotating basis. (p. 28)	<ul style="list-style-type: none">o In accordance with RSA 604-A:2 II, the courts must assign counsel as follows: "first, appointment of the public defender...if that office is available, second, appointment of a contract attorney...and third, in the event that neither the public defender program nor a contract attorney is available the appointment of any qualified attorney."o There does not appear to be any uniform method of appointing assigned counsel other than soliciting acceptance of a case from attorneys known to defend criminal cases in the past that practice within the court's jurisdiction.

STATE OF NEW HAMPSHIRE
SYNOPSIS OF PRIOR REPORTS

<u>NAME OF REPORT</u>	<u>RESULTANT OBSERVATIONS</u>	<u>RECOMMENDATIONS</u>	<u>CURRENT STATUS OF RECOMMENDATIONS</u>
<u>1976</u> <u>Defense Services in New Hampshire</u> <u>(Continued)</u>		<p><u>ELIGIBILITY DETERMINATIONS</u></p> <p><u>RECOMMENDATION 21:</u> Determination of eligibility should not be made by the trial court without reference to guidelines based upon objective standards as promulgated by the Supreme Court. (p. 78)</p> <p><u>RECOMMENDATION 18:</u> The term "indigent" should not be employed in any context in which the limits to the right of counsel are defined. A test of this right should incorporate as its basic element the concept of "substantial hardship." (p. 55)</p> <p><u>RECOMMENDATION 19:</u> The court should be provided with whatever professional and clerical support as may be necessary to investigate and verify affidavits in support of petitions for assignment of counsel. (p. 77)</p> <p><u>RECOMMENDATION 23:</u> Only liquid assets readily convertible to cash should be considered in the eligibility determination.</p>	<p>Chapter Law 225, Laws of 1988, established a pilot program to be administered by the Commissioner of Administrative Services. DAS established the Office of Cost Containment to administer the pilot program. The Office of Cost Containment established guidelines for eligibility determinations for the public defender program, contract counsel, and assigned counsel by administrative rule on October 3, 1988.</p> <p>Under the new guidelines established by the Office of Cost Containment the term "indigent" is not used to describe the defendant. Rather, a person who cannot afford representation is referred to as "a defendant eligible for indigent defense."</p> <p>Chapter Law 225, Laws of 1988, authorized the Department of Administrative Services to employ full-time temporary personnel to administer the pilot program.</p> <p>The Office of Cost Containment established guidelines for the determination of eligibility. Under these guidelines liquid assets and monthly income are considered in the eligibility determination. In addition, the net value of real estate enters into eligibility determinations.</p>

STATE OF NEW HAMPSHIRE
SYNOPSIS OF PRIOR REPORTS

<u>NAME OF REPORT</u>	<u>RESULTANT OBSERVATIONS</u>	<u>RECOMMENDATIONS</u>	<u>CURRENT STATUS OF RECOMMENDATIONS</u>
<u>1976</u> <u>Defense Services in New Hampshire</u> <u>(Continued)</u>		<p><u>REPAYMENT ORDERS</u></p> <p><u>RECOMMENDATION 31:</u> The courts should more vigorously implement statutory provisions for partial payment when defense services are provided at public expense. (p. 113)</p> <p><u>RECOMMENDATION 32:</u> Additional administrative procedures should be developed for investigation of assertions in affidavits where partial eligibility or repayment is considered. (p. 116)</p> <p><u>RECOMMENDATION 35:</u> The determination of whether a defendant will be ordered to make repayment should be based on a more thorough investigation of financial circumstances than is now made. (p. 121)</p>	<p>Until the passage of Chapter 225, Laws of 1988, financial investigations for claims of indigency did not take place because of staffing shortages in the courts. The general court established a pilot program under Chapter 225 Laws of 1988. The Office of Cost Containment was established to administer this pilot program. The provisions of section 3 of Chapter Law 225 L'88 supersedes any conflicting provisions of RSA 604-A until the pilot program terminates. The Office of Cost Containment (OCC) established guidelines with regard to determination of repayment schedules, financial and credit investigations, and other matters related to collection procedures. One of the guidelines requires all partially eligible defendants to pay a portion of their estimated representation costs in advance of trial (or hearing). OCC also established rules concerning financial investigations. At any time after an initial Notification of Financial Liability has been issued, the Administrator of OCC can conduct investigations into the financial status and credit-worthiness of the defendant. Financial investigations can be undertaken for the purpose of verifying any information furnished on a defendant's financial affidavit or establishing a defendant's present or future ability to pay.</p>

STATE OF NEW HAMPSHIRE
SYNOPSIS OF PRIOR REPORTS

<u>NAME OF REPORT</u>	<u>RESULTANT OBSERVATIONS</u>	<u>RECOMMENDATIONS</u>	<u>CURRENT STATUS OF RECOMMENDATIONS</u>
<u>1976</u> <u>Defense Services in New Hampshire</u> <u>(Continued)</u>		<u>REPAYMENT ORDERS (Continued)</u> <u>RECOMMENDATION 34:</u> RSA 604-A:9 should be amended to improve clarity and fairness. The Supreme Court should promulgate guidelines for implementation of the statute. <u>RECOMMENDATION 36:</u> Information should be gathered to determine (i) whether full implementation of the repayment statute is cost effective and (ii) whether the fuller implementation of the repayment statute has caused a significant number of defendants to plead guilty or go to trial without the aid of counsel. (p. 121) <u>RECOMMENDATION 29:</u> The determination of partial eligibility should be understood as incident to, and part of, the examination of the affidavit in support of the petition for assignment of counsel. (p. 112)	Chapter 225:3, Law of 1988, supersedes any conflicting provisions of RSA 604-A. New guidelines (rules) were established by OCC to improve the clarity of RSA 604-A:9. The OCC is charged with the responsibility of implementing RSA 604-A:9 to the fullest extent possible. The Office of Cost Containment has determined that after the first year, the general fund will recover an estimated additional \$200,000 over the present recovery level of \$134,000 and the budgeted program cost of \$200,000. The Department estimates that with 5,000 misdemeanor cases and a recovered cost of \$175 per case, about 60 percent (\$525,000) of the total amount will be recovered. According to OCC, state expenditures for contract and assigned counsel for indigent defense cases will be reduced by approximately five percent, or \$50,000, in the first year. This is due to the change in eligibility standards. The public defender section of the fund would not be affected, as it is contracted. OCC has sought to increase partial eligibility determinations upon the initial filing of the financial affidavit. OCC believes this will be the most successful component of the recoupment effort.

STATE OF NEW HAMPSHIRE
SYNOPSIS OF PRIOR REPORTS

<u>NAME OF REPORT</u>	<u>RESULTANT OBSERVATIONS</u>	<u>RECOMMENDATIONS</u>	<u>CURRENT STATUS OF RECOMMENDATIONS</u>
<u>1976</u> <u>Defense Services in New Hampshire</u> <u>(Continued)</u>		<p><u>MANAGEMENT INFORMATION SYSTEMS AND PLANNING</u></p> <p><u>RECOMMENDATION 39</u>: A uniform docketing system and expanded recordkeeping requirements in the district, municipal and superior courts should be mandated. The uniform system must be understood by clerical personnel to ensure that entries are accurate, consistent and sufficient to provide information for a wide range of analysis, planning, and management decisions. (p. 131)</p> <p><u>RECOMMENDATION 40</u>: A procedure for accurately predicting defense system requirements should be established. Predictions should be based on changes in the total number of cases received each year. A uniform method of counting cases, based on the number of defendants rather than the number of charges, should be adopted. (p. 146)</p> <p><u>QUALITY CONTROL MEASURES</u></p> <p><u>RECOMMENDATION 38</u>: A select committee should be named by the Supreme Court to suggest criteria to measure the effectiveness of publicly provided defense services. The suggested criteria should be subject to periodic reexamination and modification as necessary. (p. 131)</p>	<p>A uniform docketing system in the district, municipal and superior courts has not been designed. The uniform system should be designed to provide information for a wide range of analysis, planning and management decisions. There is no method of measuring the potential to go to trial or to appeal. The types of findings and dispositions also elude quantification. The system should also record information to predict future caseload. The necessary information would include the number of defendants, total number of cases, and total hours worked on the cases. This information would allow the prediction of defense requirements to be based on the number of defendants rather than the number of charges.</p> <p>No action has been taken to form such a committee, nor has there been any attempt to quantify or measure the effectiveness of publicly provided defense services in New Hampshire.</p>

**STATE OF NEW HAMPSHIRE
SYNOPSIS OF PRIOR REPORTS**

<u>NAME OF REPORT</u>	<u>RESULTANT OBSERVATIONS</u>	<u>RECOMMENDATIONS</u>	<u>CURRENT STATUS OF RECOMMENDATIONS</u>
<p><u>1973</u> <u>Report on the Examination of</u> <u>the State of New Hampshire</u> <u>Indigent Defendant Fund for</u> <u>the Fiscal Year Ending</u> <u>June 30, 1972.</u></p> <p>7 pages Submitted by the Office of Legislative Budget Assistant</p>	<ul style="list-style-type: none"> o Budget appropriations have not met expenditure requirements, resulting in the deferral of payments to the next fiscal year. o Reimbursement of attorneys fees by defendants, ordered by the courts, constitute General Fund Accounts Receivable. There is no effective control over these receivables by the State. Recovery checks come directly to the Comptroller from varied sources and when received are credited to the expenditure account. o Recordkeeping problems concerning accounting for expenditures, recoveries and statistical data were noted. 	<ul style="list-style-type: none"> o Although the 1973 Legislature appropriated additional funds, a more permanent solution is necessary. o The Comptroller's office should be notified of all repayments ordered by the courts to establish control over the receivables. Payments should be credited to a receipt account instead of the expenditure account. o Recordkeeping problems could be resolved with the establishment of an account clerk II position. 	<ul style="list-style-type: none"> o Supplemental appropriations have been required nearly every year since 1966 except for the 86/87 Biennium. o Accounting for outstanding repayment orders was not successfully accomplished until early in FY 1989. The level of confidence in the current accounting system is seriously questioned by all parties involved. o RSA 604 A:10 requires the Commissioner of Administrative Services to maintain certain records pertaining to payments and case type.

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NEW HAMPSHIRE PUBLIC DEFENDER
DISPOSITIONAL CHARGES
SUMMARY OF SENTENCES RECEIVED FOR FELONY CASES CLOSED BETWEEN
APRIL 1, 1987-JULY 31, 1988

DESCRIPTION OF CHARGE	DISPOSITION OF CASE :												NUMBER OF SENTENCES :						
	STATE PRISON	COUNTY HOC	PROBATION	FINED	RESTITU-TION	STATE HOSPITAL	CON'T SENTENCE	DIS-CHARGED	OTHER	NOT GUILTY	CASE DISMISSED	CASE TERMINATED	TOTAL CASES	# LOST LIBERTY	% LOST LIBERTY	SUSPENDED	DEFERRED	COMMITTED	SUSPENDED EXCEPT FOR TIME SERVED
FELONIES																			
ASSAULTS BY PRISONERS																			
RSA 642:9	1	3								1		4	9	4	44.44%	2		1	1
ATTEMPTS TO SABOTAGE-																			
RSA 649:4	1											1	2	1	50.00%			1	
AIDING CRIMINAL ACTIVITY																			
RSA 626:3	1	1										2	4	2	50.00%	2			
AGGREGATED FELONIOUS SEXUAL ASSAULT-RSA 632-A:2	50	6						1	9	28	36	130	56	43.00%	11	11	34		
ATTEMPTED MURDER																			
RSA 629:1 IV,651:2II-C	5									1	1	7	5	71.43%		1	4		
ARSON-RSA 634:1	8	7								3	2	20	15	75.00%	6	3	5	1	
BIGAMY - 639:1			1							1	1	3	0	0.00%					
BAIL JUMPING-RSA 642:8	2	5										7	7	100.00%	2	1	3	1	
BURGLARY - 635:1	51	122	3	2	2				5	35	111	331	173	52.27%	68	23	77	5	
CONCEALING DEATH OF NEWBORN-RSA 639:5	1											1	1	100.00%			1		
CARRYING FIREARM W/OUT LICENSE-RSA 159:4												1	1	100.00%	1				
CRIMINAL MISCHIEF -																			
RSA 634:2		19							1	3	7	30	19	63.33%	7	2	7	3	
CRIMINAL RESTRAINT-633:2										2		2	0	0.00%					
CRIMINAL THREATENING -																			
RSA 631:4		9							1	1	2	13	9	69.23%	5		3	1	
CONSPIRACY-RSA 629:3	2	1								2	2	7	3	42.86%			3		
DRUG CONSPIRACY -																			
RSA 318-B:26 III	1											1	1	100.00%	1				
ESCAPE-RSA 642:6	17	21						2		8	13	61	30	62.30%	9	5	20	4	
ENDANGER WELFARE OF A CHILD-RSA 639:3	1	2										4	3	75.00%		1	2		
FELONIOUS USE OF FIREARM-650-A:1												1	1	0.00%					
FIRST DEGREE ASSAULT-																			
RSA 631:1	12	5		1						10	7	35	17	48.57%	4	4	9		
FORGERY-RSA 638:1	35	76	3	2	9		2		1	13	28	169	111	65.68%	54	16	38	3	
FALSIFYING PHYSICAL EVIDENCE																			
RSA-641:6										1		1	0	0.00%					
FELONIOUS SEXUAL ASSAULT -																			
RSA 632-A:3	12	14							2	8	13	49	26	53.06%	4	5	17		
FAILURE TO APPEAR-																			
RSA 597:14(A)		1									1	2	1	50.00%	1				
FRAUDULENT USE OF CREDIT CARD-RSA 638:5		3										3	3	100.00%	1		2		
FELONIOUS USE OF FIREARMS-RSA 650-A:1												2	2	0.00%					

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DESCRIPTION OF CHARGE	DISPOSITION OF CASE:											NUMBER OF SENTENCES:							
	STATE PRISON	COUNTY DOC	PROBATION	FINED	RESTITUTION	STATE HOSPITAL	CON'T SENTENCE	DIS-CHARGED	OTHER	NOT GUILTY	CASE DISMISSED	CASE TERMINATED	TOTAL CASES	# LOST LIBERTY	% LOST LIBERTY	SUSPENDED	DEFERRED	COMMITTED	SUSPENDED EXCEPT FOR TIME SERVED
FELONIES																			
HINDERING APPREHENSION OR PROSECUTION-RSA 542:3											1	1	2	0	0.00%				
ISSUING BAD CHECKS-RSA 538:4	6	33		1	4		1				9	5	65	45	69.23%	28	6	9	2
INTERFERENCE W/ CUSTODY - RSA 633:4			1								2		3	1	33.33%			1	
IMPLEMENTS FOR ESCAPE AND OTHER CONTRABAND-642:7			1								1	1	3	1	33.33%			1	
KIDNAPPING RSA 633:1	1			1							1	2	5	1	20.00%			1	
AGGRAVATED DRIVING WHILE INTOXICAT RSA 265:82-A		2		2									4	2	50.00%			2	
ALTER, FORGE OR COUNTERFEIT CERT OF TITLE RSA 262:1			1										1	1	100.00%			1	
MANSLAUGHTER RSA 630:2	2												2	2	100.00%			2	
CONDUCT AFTER ACCIDENT RSA 264:25	1	18		1							3	3	26	19	73.08%	8	1	9	1
MFG CONTROLLED DRUG RSA 318-B:26 I(a)	1	5									1	2	9	6	66.67%	4	1	1	
CONCEALING IDENTITY OF VEHICLE RSA 262:8									1				1	0	0.00%				
MISC DRUG OFFENSE		1									1	1	3	1	33.33%	1			
DISOBEY POLICE OFFICER RSA 265:4	2	8										1	11	10	90.91%	2		7	1
OPER MOTOR VEH AFTER DEC HABTL OFNDR RSA 262:22	24	35									7	25	91	59	64.84%	6	1	52	
TRANS CONTROLLED/NARC DRUG RSA 265:88		2		1									3	2	66.67%		1		1
NEGLNT HOMICIDE RSA 630:3	6	2									3	5	16	8	50.00%	2	1	5	
PERJURY RSA 641:1											1		1	0	0.00%				
POSSESSION OF BOMB OR EXPLOSIVE RSA 158:32												1	1	0	0.00%				
POSSESS OF CONTROLLED DRUG RSA 318-B:26 I(b) (2)	6	24		2					1	1	18	6	58	38	68.00%	19	2	6	3
POSS OF CONTRL DRUG SUBSE RSA 318-B:26 I(b) (2)	1	13									6	3	23	14	60.87%	6	1	7	
POSS OF CANNIBUS DRUG SUBSEQUENT OFFENSE		6									1		7	6	85.71%	4		1	1
POSS CONTRLED DRUG W/INT SELL RSA318-B:26I(a) (2)	2	2		1							2	7	14	4	28.57%	1	1	2	
POSS DANGEROUS WEAPON BY FELON RSA 159:3	1	3									5	1	18	4	40.00%	4			
POSS FIREARM BY FELON RSA 159:3	15	4		1							4	5	29	19	65.52%	12	3	3	1
POSS FORGED PRESCRIPTION		2									2	1	5	2	40.00%	1		1	

NEW HAMPSHIRE PUBLIC DEFENDER
DISPOSITIONAL CHARGES
SUMMARY OF SENTENCES RECEIVED FOR FELONY CASES CLOSED BETWEEN
APRIL 1, 1987-JULY 31, 1988

DESCRIPTION OF CHARGE	DISPOSITION OF CASE:											NUMBER OF SENTENCES:							
	STATE PRISON	COUNTY HOC	PROBATION	FINED	RESTITUTION	STATE HOSPITAL	CON'T SENTENCE	DIS-CHARGED	OTHER	NOT GUILTY	CASE DISMISSED	CASE TERMINATED	TOTAL CASES	# LOST LIBERTY	% LOST LIBERTY	SUSPENDED	DEFERRED	COMMITTED	SUSPENDED EXCEPT FOR TIME SERVED
FELONIES																			
POSSESSION OF INFERNAL MACHINE RSA 153:35											1	1	0	0.00%					
POSS OF LESS THAN ONE POUND CANNIBUS DRUG				1								1	0	0.00%					
POSS OF NARCOTIC DRUG RSA 318-B:26 I (b)(1)	5	33		3							30	33	104	38	36.54%	19	4	11	4
POSS NARCOTIC DRUG SUBSEQ RSA 318-B:26I (b)(1)												1	1	0	0.00%				
POSS NARCOTIC DRUG INTENT TO SELL 318-B:26I(a)(1)	4	1									3	10	18	5	27.73%	3	1	1	
PROHIBITED SALES	3		1									1	5	3	60.00%	2		1	
RIOT RSA 644:1											1	1	0	0.00%					
ROBBERY RSA 636:1	32	10									1	8	22	73	42	57.53%	8	2	32
RECEIVING STOLEN PROPERTY RSA 637:7	13	44	1	5				1		1	24	23	112	57	50.89%	27	7	22	1
SALE OF CONTROLLED DRUG RSA 318-B:26 I (a)(2)	12	18									4	23	57	30	52.63%	6	5	18	1
SALE OF COUNTERFIET DRUGS RSA 318-B:2 (I-a)		1									2	1	4	1	25.00%	1			
SECOND DEGREE ASSAULT RSA 631:2	9	32						1		4	24	8	78	41	52.56%	12	9	19	1
SALE OF NARCOTIC DRUG RSA 318-B:26 I(a)(1)	18	13									2	24	57	31	54.39%	2	5	23	1
THEFT BY DECEPTION 637:4	7	17	1								4	6	35	24	68.57%	11	5	8	
THEFT BY EXTORTION 637:5											1	1	0	0.00%					
THEFT BY UNTHOR TAKING OR TRANSFER RSA 637:3	32	76	1	3	2		1			3	25	43	186	100	50.06%	61	9	35	3
THEFT OF LOST OR MISLAID PROPERTY RSA 637:6		2										2	2	100.00%	2				
THEFT BY MISAPPLICATION OF PROPERTY RSA 637:10		2										2	2	100.00%	2				
THEFT OF SERVICES 637:8	3				1						2	1	7	3	42.86%	1		2	
TAMPERING W/ WITNESSES & INFORMANTS RSA 641:5	1										4	2	7	1	14.29%			1	
UTTERING FALSE PRESCRIPTIONS RSA 318-B:2	3	6		1							2	1	13	9	69.23%	2	4	3	
WILLFUL CONCEALMENT AND SHOPLIFTING RSA 644:17	1	10									1	1	13	11	84.62%	8		3	
WELFARE FRAUD RSA 167	2	63	1	1	3			1		2	3	9	85	65	76.47%	50	9	6	
GRAND TOTALS	413	793	12	29	21	0	4	5	3	31	321	511	2143	1206	56.28%	493	150	523	40

NEW HAMPSHIRE PUBLIC DEFENDER
DISPOSITIONAL CHARGES
SUMMARY OF SENTENCES RECEIVED FOR MISDEMEANOR CASES CLOSED BETWEEN
APRIL 1, 1987-JULY 31, 1988

DESCRIPTION OF CHARGE	DISPOSITION OF CASE :										NUMBER OF SENTENCES :						
	COUNTY HOC	PROBATION	FINED	RESTITUTION CNT	COND/UNCOND DISCHARGE	LOSS OF FWF	OTHER LICENSE	CASES DISMISSED	CASES TERMINATE	NOT GUILTY	TOTAL CASES	#LOST LIBERTY	% LOST LIBERTY	SUSPENDED	DEFERRED	COMMITTED	SUSPENDED EXCEPT FOR TIME SERVED
MISDEMEANORS																	
BAIL JUMPING -RSA 642:8	13					2		3	3	1	22	13	59.09%	4	1	3	5
BUILDING W/OUT PERMIT	2										2	2	100.00%			2	
CRIMINAL TRESPASS																	
RSA 635:2	60		22	1	2		17	37	16	1	156	60	38.46%	34	6	16	4
CRUELTY TO ANIMALS																	
RSA 644:8	3		1						2		6	3	50.00%	1		2	
CONTRIBUTING TO DELINQUENCY																	
RSA 169-B:41								4	1		5	0	0.00%				
CRIMINAL MISCHIEF																	
RSA 634:2	45	3	21	5	1		10	35	19	3	142	45	31.65%	35	2	6	2
CARRYING OR SELLING																	
DANGEROUS WEAPON-159:16	2		2					1			5	2	40.00%	1		1	
CRIMINAL THREATENING -																	
RSA 631:4	32		16			2	5	27	8	4	94	32	34.04%	19	2	10	1
CONSPIRACY -RSA 629:3								2	1		3	0	0.00%				
DISORDERLY CONDUCT-644:2	21		50				10	18	16	3	118	21	17.80%	19		2	
ENDANGER WELFARE OF																	
A CHILD-RSA 639:3	5						1				6	5	83.33%	3		1	1
FALSE FIRE ALARMS-																	
RSA 644:3-A	1						3				4	1	25.00%	1			
FALSE IMPRISONMENT-633:3	2										2	2	100.00%	1	1		
FORGERY -RSA 638:1	2		1						1		4	2	50.00%	2			
OBTAINING FRAUDULENT UNEMPLOY-																	
MENT BENEFITS-282-A:161			1								1	0	0.00%				
FALSE PERSONATION -																	
RSA 104:28-A	1		1								2	1	50.00%	1			
FALSE PUBLIC ALARMS-																	
RSA 644:3	2							1	1		4	2	50.00%	2			
FALSE REPORTS TO LAW																	
ENFORCEMENT-RSA 641:4	16		1				3	5	8	3	36	16	44.44%	11		3	2
FALSE SWEARING-RSA 641:2								1			1	0	0.00%				
FAILURE TO APPEAR -																	
RSA 597:14-A	2						2				4	2	50.00%	1		1	
FRAUDULENT USE OF CREDIT																	
CARD-RSA 630:5	4		1					1	1		7	4	57.14%	3			1
HARASSMENT-RSA 644:4	11				1		6	3	2	1	24	11	45.83%	8	2	1	
HINDERING APPREHENSION OR																	
PROSECUTION-RSA 642:3	2		5				2	2	3	1	15	2	13.33%			1	1
ISSUING BAD CHECKS-																	
RSA 638:4	21	1	10	5			10	19	5	3	74	21	28.38%	17	1	2	1
INTERFERENCE W/ CUSTODY-																	
RSA 633:4									1		1	0	0.00%				
INDECENT EXPOSURE/LEWDNESS																	
RSA 645:1	18		3				2	1	2		26	18	69.23%	9	1	7	1

NEW HAMPSHIRE PUBLIC DEFENDER
DISPOSITIONAL CHARGES
SUMMARY OF SENTENCES RECEIVED FOR MISDEMEANOR CASES CLOSED BETWEEN
APRIL 1, 1987-JULY 31, 1988

DESCRIPTION OF CHARGE	DISPOSITION OF CASE :										NUMBER OF SENTENCES :						
	COUNTY HOC	PROBATION	FINED	RESTITU- TION CNT	COND/UNCOND DISCHARGE	LOSS OF FWOF LICENSE	OTHER CASES	CASES DISMISSED	CASES TERMINATE	NOT GUILTY	TOTAL CASES	%LOST LIBERTY	%LOST LIBERTY	SUSPENDED	DEFERRED	COMMITTED FOR TIME SERVED	SUSPENDED EXCEPT
MISDEMEANORS																	
LITTERING (NON MOTOR VEH) RSA 163-B:1-6											1	1	0	0.00%			
AGGRAVATED DRIVING WHILE INTOXICATED RSA 265:82-a	22		82			1	6	10	1	122	22	18.03%	13		8	1	
CONDUCT AFTER AN ACCIDENT RSA 264:25	23		25	2	1	4	8	10	1	74	23	31.00%	16	1	3	3	
CONCEALING IDENTITY OF VEHICLE RSA 262:8	1									1	1	100.00%			1		
COUNTERFEIT, UNAUTHOR FORGE STICKERS RSA 262:16	2		2				1			5	2	40.00%	2				
DRIVING AFTR REVOCATION OR SUSPENSION RSA 263:64	279	1	184		4	60	2	3	78	79	31	721	279	38.70%	141	12	187
DRIVERS LIC PROHIBITIONS RSA 263:12	1		1						1		3	1	33.33%				1
DISOBEYING POLICE OFFICER RSA 265:4	44		27	1	1	3	1	7	8	1	93	44	47.31%	28		12	4
DRIVING UNINSPECTED MOTOR VEHICLE RSA 266:6	1		2								3	1	33.33%	1			
DRVNG UNDER INFLUENCE OF DRUGS/LIQUOR RSA 265:82	238	3	125			1	5	8	48	13	441	238	53.97%	7	2	217	12
FALSE REPORT OF ACCIDENT RSA 264:28								1			1	0	0.00%				
FALSE REPORT OF AUTO THEFT RSA 262:3						1					1	0	0.00%				
MISC MISDEMEANOR MOTOR VEH PROHIBITIONS			2						1		3	0	0.00%				
RSA 263:12	1		7					2	1	1	12	1	8.33%	1			
OPER OFF-HWY REC VEH INTOXICATED RSA 215-A:11						1			1		2	0	0.00%				
OPERATING W/O LICENSE RSA 263:1	12		21							1	34	12	35.29%	8	2	2	
ROAD RACING (ON HWY) RSA 265:75	1		6								7	1	14.29%	1			
SUSPENSION OF REGISTRATION OF VEHICLE RSA 261:30	1		1								2	1	50.00%	1			
TAKING W/O OWNER CONSENT RSA 262:12	12		4		1	5		5	3		38	12	40.00%	11		1	
UNLAWFL POSSESION ALCOHOL OPERATING W/O PROOF OF	1		1								2	1	50.00%			1	
FINAN RESP RSA 263:63	1		2			1		3			7	1	14.29%	1			
NON-SUPPORT	1										1	1	100.00%	1			
OBSTRUCTING GOVERNMENT ADMINISTRATIN RSA 642:1	3										3	3	100.00%	3			
POSSESSION BURGLARY TOOLS																	

NEW HAMPSHIRE PUBLIC DEFENDER
DISPOSITIONAL CHARGES
SUMMARY OF SENTENCES RECEIVED FOR MISDEMEANOR CASES CLOSED BETWEEN
APRIL 1, 1987-JULY 31, 1988

DESCRIPTION OF CHARGE	DISPOSITION OF CASE:											NUMBER OF SENTENCES:					
	COUNTY HOC	PROBATION	FINED	RESTITUTION CNT	COND/UNCOND DISCHARGE	LOSS OF FWO	OTHER LICENSE	CASES DISMISSED	CASES TERMINATE	NOT GUILTY	TOTAL CASES	#LOST LIBERTY	% LOST LIBERTY	SUSPENDED	DEFERRED	COMMITTED FOR TIME SERVED	SUSPENDED EXCEPT
MISDEMEANORS																	
RSA 635:1								1			1	0	0.00%				
POSS PISTOL W/O LICENSE																	
RSA 159:4	1										1	1	100.00%			1	
POSS DRUG PARAPHERNALIA	1		1								2	1	50.00%	1			
POSS HYPODERMIC NEEDLE																	
RSA 318:25-e	3									2	5	3	60.00%			2	1
POSSESSION PROPERTY W/O SERIAL NO. RSA 637:7-a	1		1							2	4	1	25.00%	1			
PROHIBITED SALES	8	1	7			3		5		2	26	8	30.77%	5	1	2	
RESISTING ARREST OR DETENTION RSA 642:2	81		27		2	7		12	19		148	81	54.73%	57	2	19	3
RECKLES CONDUCT RSA 631:3	10		2					9	2		23	10	43.40%	5	1	4	
RECEIVING STOLEN PROPERTY RSA 637:7	16		4	1		4		12	11	1	49	16	32.65%	11	1	4	
SIMPLE ASSAULT RSA631:2-a	171	4	40	1	3	2	34	1	1	106	52	13	420	171	4	38	11
SALE-DRUG PARAPHERNALIA RSA 318-B:26 II (c) (d)			1								1	0	0.00%				
SEXUAL ASSAULT RSA632-A:4	6							2	1	1	10	6	60.00%	2	1	3	
THEFT BY DECEPTION 637:4	10					1		6	3		20	10	50.00%	7		2	1
THEFT BY UNAUTHOR TAKING OR TRANSFER RSA 637:3	51	3	20	4		10		1	24	11	7	131	51	4	13	5	
THEFT/LOST/MISLAID PROPERTY RSA 637:6	1					1					2	1	50.00%	1			
THEFT OF SERVICE RSA637:8	12		11	1		4		11	7	2	40	12	25.00%	9		2	1
UNLAWFUL ENTRY ON PROPERTY								1			1	0	0.00%				
UNSWORN FALSIFICATION RSA 641:3	1										1	1	100.00%	1			
UNAUTHOR USE OF PROPELLED VEH OR ANIMAL RSA344:13	7							4	3		14	7	50.00%	4		2	1
UNAUTHOR USE OF PROPELLED OR RENTL PROP RSA637:9	6		2			1		1			10	6	60.00%	4		1	1
WILLFUL CONCEALMENT & SHOPLIFTING RSA 644:17	66	2	39			15		13	12	1	148	66	44.59%	49	1	10	6
WELFARE FRAUD RSA 167	3										3	3	100.00%	2		1	
WEAPONS, POSSESSION AT ARREST RSA 159:15	1										1	1	100.00%			1	
GRAND TOTALS	1365	18	782	21	16	4	229	10	6	486	376	97	3410	1365	48	515	89



United States Attorney
District of New Hampshire

Federal Building
P.O. Box 480
Concord, New Hampshire
603/225-1552

March 11, 1988

Jo Ellen Orcutt
Executive Director
Judicial Council of the
State of New Hampshire
Room 6, State House
Concord, NH 03301

Dear Ms. Orcutt:

I am pleased to respond to your inquiry of February 2, 1988 concerning the rights of indigent defendants to counsel under federal law.

In your letter, you noted that "under the federal Constitution a convicted person may not be imprisoned unless he has been afforded the right to counsel...." As the United States Supreme Court stated in Scott v. Illinois, 440 U.S. 367, 373-74 (1979), "the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel in his defense." The foundation of the rule is that "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment." Id. at 373. Accordingly, the federal Constitution requires representation by counsel (or a valid waiver thereof) as a precondition to the punitive deprivation of personal liberty.

The issue remains whether the federal rules in a federal court proceeding set a higher standard. On the face of the matter, it appears they do. Federal Rule of Criminal Procedure ("F. R. Crim. P.") 44 provides in pertinent part:

(a) RIGHT TO ASSIGNED COUNSEL. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the federal magistrate or the court through appeal, unless he waives such appointment.

(b) The procedures for implementing the right set out in subdivision (a) shall be those provided by law and by local rules of court established pursuant thereto.

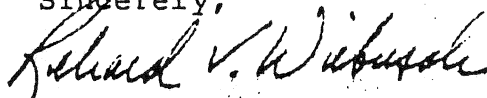
Subsection (a) makes the sweeping statement that "[e]very defendant" who is unable to afford counsel is entitled to court-appointed counsel. Subsection (b) reflects the incorporation of the Criminal Justice Act ("CJA") of 1964 (18 U.S.C. § 3006A) into the Federal Rules of Criminal Procedure.

The CJA more specifically defines the instances where federal courts must afford a defendant appointed counsel. Thus, the judicial officer must provide representation upon request to an indigent defendant whenever the defendant is charged with "a felony or a misdemeanor." The section, however, further states that the court may provide representation to a defendant charged with a "petty offense" for which a sentence of imprisonment is authorized. Inasmuch as a defendant cannot be imprisoned for any crime without having had the benefit of counsel (or the opportunity to waive counsel), it appears that a defendant charged with a "petty offense" (for which a short period of imprisonment may be authorized) nonetheless does not have a right to counsel if the judicial officer does not impose a sentence of imprisonment. See United States v. Doe, 743 F.2d 1033, 1038 (4th Cir. 1984) (when defendant to a petty violation charge is not imprisoned, no error in failing to advise of right to appointed counsel); but see United States v. Ramirez, 555 F. Supp. 736, 740 (E.D. Calif. 1983) (if imprisonment for petty offense is possible, defendant must be afforded counsel unless magistrate indicates on record in advance that he will not impose sentence of incarceration).

Accordingly, in federal courts the general rule appears to be: 1) that an indigent defendant charged with a "felony" or "misdemeanor" has a right to appointed counsel irrespective of the potential penalties with which he is faced; and 2) a defendant charged with a "petty offense" is not entitled to appointed counsel (although the magistrate may in his discretion appoint one) but cannot be sentenced to a term of imprisonment unless counsel has been provided or validly waived.

I hope our analysis has been of help to you. Please do not hesitate to contact our office if we can be of further assistance.

Sincerely,

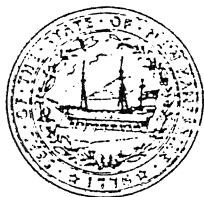


RICHARD V. WIEBUSCH
United States Attorney

3-74-2 128

State of New Hampshire

APPENDIX F



JOHN H. SUNUNU
GOVERNOR

DEPARTMENT OF CORRECTIONS

DIVISION OF FIELD SERVICES
P.O. BOX 769
CONCORD, N.H. 03301

STATE OF NEW HAMPSHIRE
INDIGENT DEFENSE
Received

RONALD L. POWELL, Ph. D.
COMMISSIONER

THOMAS K. TARR
DIRECTOR

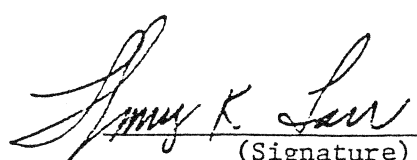
MEMORANDUM OF UNDERSTANDING

BETWEEN THE DEPARTMENT OF CORRECTIONS
AND THE DEPARTMENT OF ADMINISTRATIVE SERVICES

SUBJECT: INDIGENT DEFENSE FEE COLLECTION

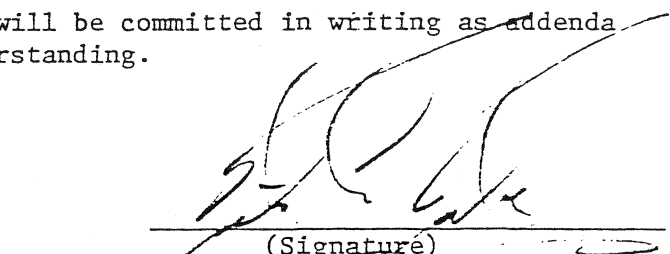
1. The Department of Administrative Services (DAS) will be limited to indigent fee collection from adult cases not involving a probation or parole supervision component.
2. The Department of Corrections (DOC) will continue to be responsible for all other collection cases including indigent defense fee collection when there is a probation or parole supervision component.
3. For informational systems purposes, DAS shall have access to the DOC data base maintained by the Division of Informational Services (DIS) to include information relative to unsupervised offenders assessed an indigent defense repayment, total number of orders by court and aggregate amount, payments made to date and balances outstanding and other pertinent information as agreed upon by DOC and DAS.
4. DAS initial caseload will consist of unsupervised indigent fee cases not presently on the DOC data base in which DAS will assist DOC staff in entering the cases on the data base. The initial DAS caseload will also include unsupervised indigent fee cases where no payment has been received.
5. DAS will be provided with information concerning offender residence, employment, etc. in facilitating the collection of assigned indigent defense fees.
6. Enforcement activity that results from non payment and that includes the filing of motions and/or petitions before the court, courtroom appearances and testimony will be the responsibility of DAS with DOC providing a consultative role.

- 7. When functioning in a DOC District Office, DAS staff will attempt to provide advance notice and will be supervised by the Chief Probation/Parole Officer of the DOC. DOC agrees to provide secretarial services limited only to previously agreed upon DAS cases.
- 8. Costs associated with required travel by DAS staff between district offices, courts, and offender follow up will be borne by the DAS. DOC will provide telephone access and use of district office facilities without charge.
- 9. Additional issues requiring resolution will be resolved by agreement between the Director of Field Services and the Administrator of Cost Containment as the needs arise. Such agreements will be committed in writing as addenda and considered a part of this understanding.

 1/11/88

 (Signature)

Thomas K. Tarr, Director
 Division of Field Services
 NH Department of Corrections



 (Signature)

Kenneth L. Robie, Administrator
 Office of Cost Containment
 Department of Administrative Services

New Hampshire Public Defender

117 NORTH STATE STREET, CONCORD, N.H. 03301

TELEPHONE: (603) 224-1236

October 28, 1988

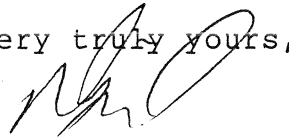
Ms. Michelle Clausen
LBA Audit Division
10 Ferry Street, Room 429
Concord, New Hampshire 03301

Dear Michelle:

Enclosed please find my comments to the ABA Standards Relating to the Administration of Criminal Justice. I hope that they are helpful to you in preparing your final report.

As always, if you have any questions, please give me a call.

Very truly yours,



David A. Garfunkel
Executive Director

DAG/jh

enclosure

THE AMERICAN BAR ASSOCIATION
STANDARDS RELATING TO THE AD-
MINISTRATION OF CRIMINAL JUSTICE

PROVIDING DEFENSE SERVICES

PART I. GENERAL PRINCIPLES

Standard 5-1.1. Objective

The objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel pursuant to this chapter. The bar should educate the public to the importance of this objective.

Standard 5.1-2. Plan for legal representation

The legal representation plan for each jurisdiction should provide for the services of a full-time defender organization and coordinated assigned-counsel system involving substantial participation of the private bar. Neither defender nor assigned-counsel programs should be precluded from representing any particular type or category of case.

Standard 5-1.1.

New Hampshire practice is consistent with this standard.

Standard 5.1-2.

The provisions of RSA 604-A and 604-B create a three level indigent defense system which includes a statewide public defender, a contract counsel system which handles conflicts and overflow from the public defender, and an assigned counsel system which handles cases which neither public defender nor contract counsel can serve. Both contract counsel and assigned counsel are private bar programs. Contract counsel do not provide representation in first degree murder, second degree murder, and manslaughter, but both public defender and assigned counsel represent clients in these case types.

Standard 5-1.3. Professional independence

The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not normally be made by the judiciary or elected officials, but should be arranged for the administrators of the defender and assigned-counsel programs. An effective means of securing professional independence for defenders is to place responsibility for the governance of the organization in a board of trustees. Assigned-counsel components of the legal representation system should be governed by such a board. Boards of trustees should have the power to establish general policy for the operation of the defender and assigned-counsel programs consistent with these standards and in keeping with the standards of professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction.

Standard 5-1.3.

The goal of this standard, Professional Independence, is met in New Hampshire by the role that the Judicial Council plays in the delivery of indigent defense services. The Judicial Council is the contracting and oversight authority for both contract counsel and public defender. Additionally, the Judicial Council actually selects lawyers for the contract counsel program while public defender lawyers are hired by the public defender which an independent, non-profit New Hampshire corporation.

All but one of the members of the Judicial Council are members of the Bar, and the members of the Board of Directors of New Hampshire Public Defender are all members of the Bar.

There currently is no board governing the Assigned Council component of New Hampshire's indigent defense system, but that segment of the delivery system is the smallest of the three alternative systems and is the least preferred in the priority of appointment established in RSA 604-A:2.II.

Standard 5-1.4. Supporting services and training

The plan should provide for investigatory, expert, and other services necessary to an adequate defense. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process. The plan should also provide for the effective training of defenders and assigned counsel.

Standard 5-1.5. Funding

Government has the responsibility to provide adequate funding for legal representation of all eligible persons, as defined in standard 5-6.1. The determination of which level of government will fund defender organizations and assigned-counsel programs depends upon whichever is the most efficient and practical method to best achieve adequate funding and independent representation. Under no circumstances should the funding power interfere with or retaliate against professional judgments made in the proper discharge of defense services.

Standard 5-1.4.

The Public Defender employs investigatory staff and such staff is available to contract counsel and assigned counsel by petitioning the court pursuant to RSA 604-A:6. Expert and other services are available to all indigent defense providers by petitioning the court pursuant to RSA 604-A:6.

Finally, training is an integral part of public defender operations and one continuing legal education program per year is a requirement for contract counsel pursuant to the terms and conditions of the contract.

Standard 5-1.5.

Indigent defense funding in New Hampshire is provided by the Legislature on a statewide basis. I am not aware of any circumstances where the funding power interfered with or retaliated against professional judgments made in the proper discharge of defense services.

PROVIDING DEFENSE SERVICES

PART II. ASSIGNED COUNSEL

Standard 5-2.1. Systematic assignment

The assigned-counsel component of the legal representation plan should provide for a systematic and publicized method of distributing assignments. Except where there is a need for an immediate assignment for temporary representation, assignments should not be made to lawyers merely because they happen to be present in court at the time the assignment is made. A lawyer should never be assigned for reasons personal to the person making assignments. Administration of the assigned-counsel program should be by a competent staff able to advise and assist the private attorneys who provide defense services.

Standard 5-2.2. Eligibility to serve

Assignments should be distributed as widely as possible among the qualified members of the bar. Every lawyer licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts should be included in the roster of attorneys from which assignments are made.

Standard 5-2.1.

While there is no administrator of the Assigned Counsel Program, assignments are made by the court based upon the court's personal knowledge of the qualifications of the attorneys appointed. New Hampshire is a relatively small state, and most criminal practitioners are well-known to the court.

Standard 5-2.2.

Assigned counsel appointments in criminal cases are generally made to attorneys who have experience and expertise in the practice of criminal law. All attorneys who are interested in receiving assigned counsel appointments will receive such appointments. The real problem is finding a sufficient number of qualified attorneys to serve on this panel.

Standard 5-2.3. Rotation of assignments

As nearly as possible, assignments should be made in an orderly way to avoid patronage and its appearance, and to ensure fair distribution of assignments among all whose names appear on the roster of eligible lawyers. Ordinarily, assignments should be made in the sequence that the names appear on the roster of eligible lawyers. Where the nature of the charges or other circumstances require, a lawyer may be selected because of his or her special qualifications to serve in the case, without regard to the established sequence.

Standard 5-2.4. Compensation

Assigned counsel should be compensated for time and service performed. The objective should be to provide reasonable compensation in accordance with prevailing standards. Compensation for assigned counsel should be approved by administrators of assigned-counsel programs.

Standard 5-2.3

See comments to Standard 5-2.2. A lawyer may be selected for a particular case by the court because of his or her special qualifications. This is particularly true in homicide cases.

Standard 5-2.4.

The current rate of compensation is \$20 out-of-court and \$30 in-court with payment of \$25 out-of-court and \$35 in-court available upon a showing of good cause and exceptional circumstances. This rate has been in effect since 1978. See, Smith v. State, 118 N.H. 764 (1978).

PROVIDING DEFENSE SERVICES

PART III. DEFENDER SYSTEMS

Standard 5-3.1. chief defender and staff

Selection of the chief defender and staff should be made on the basis of merit and should be free from political, racial, religious, sexual, ethnic, and other considerations extraneous to professional competence. Recruitment should include special efforts to employ attorney candidates from minority groups which are substantially represented in the defender program's client populations. The chief defender and staff should be compensated at the rate commensurate with their experience and skill sufficient to attract career personnel and comparable to that provided for their counterparts in prosecutorial offices. The chief defender nor staff should be removed except upon a showing of good cause. Selection of the chief defender and staff by judges should be prohibited.

Standard 5-3.2. Restrictions on private practice

Defense organizations should be staffed with full-time attorneys. All such attorney should be prohibited from engaging in the private practice of law.

Standard 5-3.1.

The chief defender in New Hampshire is selected by the Board of Directors of New Hampshire Public Defender, which is a private, non-profit corporation organized for the purpose of delivering public defender services.

Rates of compensation in the Public Defender Program are generally based upon statewide comparability data although at present starting Public Defender lawyers are paid substantially less than their counterparts in the Office of the Attorney General.

All Public Defender staff are hired through a competitive employment process without any judicial involvement.

Standard 5-3.2.

Public Defender attorneys must devote full-time to their public defense practice. Outside law practice is prohibited by personnel policies except upon a showing of special circumstances.

Standard 5-3.3. Facilities;
library

Every defender office should be located in a place convenient to the courts and be furnished in a manner appropriate to the dignity of the legal profession. A library of sufficient size, considering the needs of the office and the accessibility of other libraries, and other necessary facilities and equipment should be provided.

Standard 5-3.3.

New Hampshire Public Defender has located all of its offices in places convenient to the courts. Each office has a basic law library as well as other necessary office equipment.

PROVIDING DEFENSE SERVICES

PART IV. TYPES OF PROCEEDINGS
AND QUALITY OF REPRESENTATION

Standard 5-4.1. Criminal cases

Counsel should be provided in all criminal proceedings for offenses punishable by imprisonment, regardless of their denomination as felonies, misdemeanors, or otherwise. An offense is deemed to be punishable by imprisonment if the fact of conviction may be established in a subsequent proceeding, thereby subjecting the defendant to imprisonment.

Standard 5-4.2. Collateral proceedings

Counsel should be provided in all proceedings arising from or connected with the initiation of a criminal action against the accused, including but not limited to extradition, mental competency, postconviction relief, and probation and parole revocation, regardless of the designation of the tribunal in which they occur or classification of the proceedings as civil in nature.

Standard 5-4.1.

Counsel is provided in New Hampshire in accordance with Part I, Article 15 of the New Hampshire Constitution which is consistent with the language of the standard.

Standard 5-4.2.

New Hampshire practice is consistent with this standard.

Standard 5-4.3. Workload

Neither defender organizations nor assigned counsel should accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Whenever defender organizations or assigned counsel determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing or representation lacking in quality or to the breach of professional obligations, the defender organizations or assigned counsel must take such steps as may be appropriate to reduce their pending or projected workloads.

Standard 5-4.3.

Public defender workload is managed in accordance with a caseload plan which is provided for by statute (RSA 604-B:4). This plan is appended to the contract between New Hampshire Public Defender and the State and it provides for caseload controls consistent with the recommendations of Standard 5-4.3.

The workload of contract counsel is controlled by the terms and conditions of the contract. In addition, if an attorney finds that h/she has been appointed to too many cases in a relatively short period of time, that attorney will normally notify the court that h/she is unavailable for appointments for a designated period of time.

PROVIDING DEFENSE SERVICES

PART V. STAGE OF PROCEEDINGS

Standard 5-5.1. Initial provision of counsel

Counsel should be provided to the accused as soon as feasible after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest. The authorities should have the responsibility to notify the defender or the official responsible for assigning counsel whenever a person in custody requests counsel or is without counsel. Upon request, counsel should be provided to persons who have not been taken into custody but who are in need of legal representation arising from criminal proceedings.

Standard 5-5.2 Duration of representation

Counsel should be provided at every stage of the proceedings, including sentencing, appeal, and postconviction review. Counsel initially provided should continue to represent the defendant throughout the trial court proceedings.

Standard 5-5.3. Removal

Representation of an accused establishes an inviolable attorney-client relationship. Removal of counsel from representation of an accused therefore should not occur over the objection of the attorney and the client.

Standard 5-5.1.

New Hampshire practice is consistent with this standard.

Standard 5-5.2.

New Hampshire practice is consistent with this standard.

Standard 5-5.3.

New Hampshire practice is consistent with this standard.

PROVIDING DEFENSE SERVICES

PART VI. ELIGIBILITY FOR ASSISTANCE

Standard 5-6.1. Eligibility

Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship to themselves or their families. Counsel should not be denied merely because friends or relatives have resources adequate to retain counsel or because bond has been or can be posted. Supporting services necessary to an adequate defense should be available to all persons eligible for representation and to the clients or retained counsel who are financially unable to afford necessary supporting services.

Standard 5-6.2. Ability to pay partial costs; reimbursement

The ability to pay part of the cost of adequate representation should not preclude eligibility. Reimbursement of counsel or the organization or governmental unit providing counsel should not be required, except on the ground of fraud in obtaining the determination of eligibility.

Standard 5-6.1.

New Hampshire practice is consistent with this standard.

Standard 5-6.2.

Eligibility, partial eligibility and repayment are currently controlled by legislation enacted in 1988. A pilot program to perform these functions was created by Laws of 1988, Chapter 225. (copy attached)

Standard 5-6.3. Determination of eligibility

Determination of eligibility should be made by defenders or assigned counsel, subject to review by a court at the request of a person found to be ineligible. A questionnaire should be used to determine the nature and extent of the financial resources available for obtaining representation. If at any subsequent stage of the proceedings new information concerning eligibility becomes available, eligibility should be redetermined.

Standard 5-6.3.

Eligibility, partial eligibility and repayment are currently controlled by legislation enacted in 1988. A pilot program to perform these functions was created by Laws of 1988, Chapter 225. (copy attached)

PROVIDING DEFENSE SERVICES

PART VII. OFFER AND WAIVER

Standard 5-7.1. Explaining the availability of a lawyer

A person taken into custody or otherwise deprived of liberty should immediately be warned of the right to assistance from a lawyer. This warning should be followed at the earliest opportunity by the formal offer of counsel, preferably by a lawyer, but if that is not feasible, by a judge or magistrate. The offer should be made in words easily understood, and it should be stated expressly that one who is unable to pay for adequate representation is entitled to have it provided without cost. At the earliest opportunity a person in custody, should be effectively placed in communication with a lawyer. There should be provided for this purpose access to a telephone, the telephone number of the defender or assigned-counsel program, and any other means necessary to establish communication with a lawyer.

Standard 5-7.1.

New Hampshire practice is consistent with this standard.

Standard 5-7.2. Waiver

The accused's failure to request counsel or an announced intention to plead guilty should not of itself be construed to constitute a waiver. An accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into the accused's comprehension of the offer and capacity to make the choice intelligently and understandingly has been made. No waiver should be found to have been made where it appears that the accused is unable to make an intelligent and understanding choice because of mental condition, age, education, experience, the nature or complexity of the case, or other factors.

Standard 5-7.3.

No waiver of counsel should be accepted unless it is in writing and of record. If an accused has not seen a lawyer and indicates an intention to waive the assistance of counsel, a lawyer should be provided for consultation purposes. No waiver should be accepted unless the accused has at least once conferred with a lawyer. If a waiver is accepted, the offer should be renewed at each subsequent stage of the proceedings at which the accused appears without counsel.

Standard 5-7.2.

New Hampshire practice is consistent with this standard.

Standard 5-7.3.

New Hampshire practice is consistent with this standard.

CHAPTER 225

Littleton, and purchase and enhancement of federal post office, N. Main St., Rochester, is hereby extended to January 1, 1990.

224:33 Effective Date. This act shall take effect upon its passage.

(Approved April 30, 1988.)
(Effective Date April 30, 1988.)

CHAPTER 225 (HB 847)

AN ACT RELATIVE TO INDIGENT DEFENSE.

Be it Enacted by the Senate and House of Representatives in General Court convened:

225:1 New Section; Alternate Public Defender Program. Amend RSA 604-B by inserting after section 7 the following new section:

604-B:8 Alternate Public Defender Program. The state of New Hampshire by the judicial council and with the approval of the governor and council may, in addition to the contract for the public defender program referred to in RSA 604-B:4, contract for an alternate public defender program to represent indigent defendants in circumstances where, because of conflict of interest or otherwise, the public defender program is unable to provide representation to a defendant. The alternate public defender program and the contract between it and the state shall be governed by the provisions of this chapter.

225:2 Arraignment. Amend RSA 625:9, VI to read as follows:

VI. Prior to or at the time of arraignment, the state may, in its discretion, charge any offense designated a misdemeanor, as defined by paragraph IV, as a violation. At such time, the prosecutor shall make an affirmative statement to the court as to whether he intends to proceed under this paragraph. In such cases the penalties to be imposed by the court shall be those provided for a violation under RSA 651:2. This paragraph shall not apply to any offense for which a statute prescribes an enhanced penalty for a subsequent conviction of the same offense.

225:3 Pilot Program; Indigent Defense. It is the intent of the general court that RSA 604-A:9 be implemented to the fullest extent possible and that all fees and costs provided by the state on behalf of an indigent defendant which are recoverable shall be recovered. Therefore, the general court establishes a pilot program to be administered by the commissioner of administrative services. This pilot program shall terminate on June 30, 1989, unless authorized to continue by the legislature. In order to implement this pilot program the commissioner of administrative services shall:

CHAPTER 225

I. Subject to the provision of paragraph III, be responsible for determining eligibility of defendants for the public defender program, contract counsel, and assigned counsel.

II. With the approval of the attorney general, adopt rules, pursuant to RSA 541-A, governing eligibility determinations, the method for pre-qualification, forms to be executed under oath subject to the penalties of perjury, the actual process to be followed relative to eligibility determinations, and any other matters regarding eligibility he deems necessary to fully implement section 3 of this act. These rules shall apply to defendants who claim eligibility for the public defender program, contract counsel, and assigned counsel.

III. (a) Unless the court finds extenuating circumstances requiring an immediate determination relative to a defendant's eligibility, the commissioner shall make a decision relative to a defendant's eligibility and a recommendation to the court in regard to the defendant's ability to pay all or a portion of the costs incurred for counsel. In the event that the defendant disagrees with the commissioner's decision on eligibility or his recommendation relative to the defendant's ability to repay the state, the defendant shall have the right to appeal to the court having jurisdiction over the alleged offense within 7 days of notification of the commissioner's findings. The court shall give the defendant an opportunity to be heard and shall render its decision within 7 days of the filing of the appeal. In the event that the court rejects, overrules or modifies the commissioner's decision or recommendation, the court shall include in its order written findings specifically outlining why the commissioner's decision or recommendation was not sustained. In the event that there is no appeal, the court shall issue an order relative to the defendant's responsibility to reimburse the state after consideration of the commissioner's recommendation.

(b) In the event that the court finds extenuating circumstances requiring an immediate determination relative to a defendant's eligibility, the court shall make its eligibility determination in an order which shall include specific findings of extenuating circumstances and shall forward a copy of said order and the approved application to the commissioner. The commissioner shall conduct a financial investigation and make a recommendation relative to the defendant's ability to pay all or a portion of the costs incurred for counsel. Upon receipt of the commissioner's recommendation, and after consideration thereof, the court shall enter an order relative to the defendant's responsibility to reimburse the state. In the event that the court rejects, overrules or modifies the commissioner's recommendation, the court shall include in its order written findings specifically outlining why the commissioner's recommendation was not sustained.

IV. Be responsible for collections of court ordered reimbursements.

CHAPTER 226

V. Enter into a cooperative agreement with the commissioner of corrections for collection of court ordered reimbursements.

VI. With the approval of the attorney general, adopt rules pursuant to RSA 541-A, with regard to determination of repayment schedules, financial and credit investigations, and other matters related to collections procedures which the commissioner deems necessary to fully implement section 3 of this act.

225:4 Temporary Positions Authorized for Pilot Program. The department of administrative services is authorized to employ full-time temporary personnel to administer the pilot program established in section 3.

225:5 Report. The commissioner of administrative services shall make an interim report on or before December 1, 1988, and a final report on or before June 30, 1989, to the speaker of the house, the senate president, and the governor, on his activities, findings and recommendations under sections 3 and 4 of this act.

225:6 Applicability. The provisions of section 3 of this act shall supersede any conflicting provisions of RSA 604-A until the pilot program terminates.

225:7 Effective Date.

I. Section 2 of this act shall take effect January 1, 1989.

II. The remainder of this act shall take effect upon its passage.

(Approved April 30, 1988.)

(Effective Date I. Section 2 of this act shall take effect January 1, 1989. II. The remainder of this act shall take effect April 30, 1988.)

New Hampshire Public Defender

117 NORTH STATE STREET, CONCORD, N.H. 03301

TELEPHONE: (603) 224-1236

February 1, 1989

The Honorable William F. Kidder, Chairman
Legislative Fiscal Committee
State House
Concord, New Hampshire 03301

Dear Chairman Kidder:

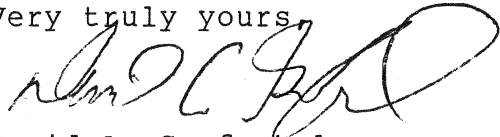
I have reviewed the report entitled State of New Hampshire Indigent Defense Program and offer the following brief response.

New Hampshire Public Defender and its predecessor corporation have provided public defense services to the citizens of New Hampshire since 1971. During that time, the Public Defender has grown from a single lawyer office in Merrimack County to a statewide program serving all ten New Hampshire counties. This expansion was first recommended in a 1976 study of defense services in New Hampshire conducted by the National Center for State Courts, and that recommendation has been supported in subsequent indigent defense studies. See, Appendix C of this report.

Under the supervision and leadership of the Judicial Council, the indigent defense system in New Hampshire has continually developed to meet the ever changing needs of the state. As the caseload has grown, New Hampshire Public Defender has responded by increasing staff, and the Judicial Council has implemented the Contract Attorney Program to accept those cases which the Public Defender cannot. Unfortunately, the initial funding for indigent defense in the current biennium was not sufficient to meet the projected caseload increase. As a result, caseload distribution was altered with assigned counsel accepting a larger percentage of total cases thus adversely affecting the overall efficiency of the system. This is to be contrasted to the previous biennium where adequate initial funding enabled the system to maximize its efficiency and substantially reduce the assigned counsel component. The impact of such changes in caseload mix is reflected in the attached report.

We are gratified by the favorable comments about New Hampshire Public Defender that are contained in the report. We hope that New Hampshire Public Defender will continue to be the "backbone of the system," and we look forward to maintaining our ongoing relationship with the Judicial Council and other appropriate State agencies in a coordinated effort to deliver efficient, high quality indigent defense services to the State.

Very truly yours,

A handwritten signature in black ink, appearing to read 'David A. Garfunkel', written in a cursive style.

David A. Garfunkel
Executive Director

DAG/jh

THE STATE OF NEW HAMPSHIRE



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Nina C. Gardner, Executive Director
410D State House Annex
25 Capitol Street
Concord, NH 03301
(603) 271-3592
Telefax (603)271-2361

January 31, 1989

The Honorable William F. Kidder, Chairman
Legislative Fiscal Committee
State House
Concord, New Hampshire 03301

Dear Chairman Kidder:

I am writing in response to the report to the Fiscal Committee entitled STATE OF NEW HAMPSHIRE, INDIGENT DEFENSE PROGRAM which was delivered to our office on Monday, January 23, 1989.

I would like to echo the opinion attributed on page 55 to the judges who responded to the survey prepared by the Legislative Budget Assistant. These judges "find strength in the resilience of the [indigent defense] system, which, despite an increasingly demanding caseload, competing interests and a limited legal work force, still meets its constitutional obligation to defend the indigent against criminal charges." The judges point to the lack of funds and of lawyers as "the most evident weakness in New Hampshire's indigent defense program."

As the judges point out, the public defender is the backbone of the system. This program provides in all ten counties of the State full-time attorneys trained in criminal law. Their work is supervised and directed through a central administrative office in Concord and through local offices in Concord, Manchester, Stratham, Dover, Keene and Orford. Except for the New Hampshire Attorney General's office, the New Hampshire Public Defender is, in effect, the only large law firm in the State that actively recruits new lawyers interested in developing a specialty in criminal law.

One danger of not funding the public defender to meet anticipated caseloads is, as the judges point out, that the legal work force available to accept these cases is very limited. There are very few private attorneys who concentrate a significant portion of their time in criminal law. It is a field that requires continuous attention to case law developments in both state and federal courts. New decisions are issued monthly, and only someone who devotes a significant amount of time can remain current. It is for this reason, as well as the low rate of compensation, that the courts have difficulty finding attorneys to undertake indigent defense. Indeed, the bulk

Page Two
The Honorable William F. Kidder
January 31, 1989

of attorneys in the contract attorney program administered by the Judicial Council are former public defender or former prosecutors.

It is apparent that some of the respondents asked to evaluate the effectiveness of the Judicial Council were not familiar with the role of the Judicial Council. For example, they have attributed to the Council shortcomings in an area where the Council has no responsibility at all -- that is, delays in the processing of payments for Assigned Counsel, a function which is handled by the Department of Administrative Services. And these delays are not the fault of that department either. The delays are due to shortfalls in funding.

In addition, both the report and the evaluations from the various respondents suggest a lack of understanding of the purpose of the Contract Attorney program. This program was never intended to be a parallel to the public defender program. The public defender has significant administrative and technical resources and is a coordinated statewide organization capable of responding on the spot to the concerns and needs of the courts. The contract attorney program was set up primarily to handle cases that the public defender must refuse because of a conflict of interest -- and to do this with the least administrative overhead.

The Contract Attorney program consists of 26 individual, independent contractors -- not employees under our day-to-day supervision. The Judicial Council provides supervision only in the initial selection of attorneys and in the monitoring of their performance in a general way so as to verify their workloads. More experienced contract attorneys perform the task of reviewing the individual case reports provided by the program attorneys and make recommendations to assist the Council in determining whether to renew the contracts. Nothing in the statutes contemplates a more extensive administrative role.

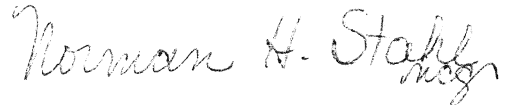
The alternate public defender recommended by the report would not solve the conflict-of-interest problem that the contract attorney program was set up to solve. If an alternate public defender also had a conflict of interest in a case referred to them by the public defender, the case would then have to be referred to another attorney. By providing a number of individual, independent contractors, the Contract Attorney program is best suited to handle conflicts.

The members of the Judicial Council contribute hundreds of volunteer hours in the performance of the Council's duties. The dollar value of the time devoted just to interviewing prospective contract attorneys represents a significant savings for the State. Additionally, the Judicial Council, which operates with a paid staff of an Executive Director and one assistant, has other duties with respect to the legislative process as it affects the justice system in New Hampshire.

Page Three
The Honorable William F. Kidder
January 31, 1989

I appreciate the opportunity to respond to this report and look forward to discussing it with you further at the meeting of the Legislative Fiscal Committee on February 6, 1989.

Sincerely,

A handwritten signature in cursive script that reads "Norman H. Stahl" with a small flourish at the end.

Norman H. Stahl, Chairman
New Hampshire Judicial Council

NHS/jeo

State of New Hampshire
Department of Administrative Services



STATE HOUSE ANNEX - ROOM 120
CONCORD, NEW HAMPSHIRE 03301

OFFICE OF THE COMMISSIONER

TELEPHONE
603-271-3201

February 1, 1989

Michael Buckley
Director of Audits
Office of Legislative Budget Assistant

Dear Mr. Buckley

We appreciate the opportunity to respond to the extensive audit of the indigent defense program.

The enclosed memorandum by Kenneth L. Robie, Administrator of the Office of Cost Containment within this department is offered as our response comments and it would be appreciated if these comments were made part of the report.

I further appreciate the time spent with my staff in gaining insight to the many aspects of the program and for the concerned and cooperative manner in which they were treated.

Sincerely

Michael E Barlow,
Acting Commissioner

February 1, 1989

From: Kenneth L Robie, Administrator
Office of Cost Containment



To: Michael E Barlow, Acting Commissioner
Department of Administrative Services

Subj: Indigent Defense Program

The following are our response comments on the audit report of the entire indigent defense program. As extensive changes were made to the draft report as a result of meetings with this office as well as others, we do not feel that we have had sufficient opportunity or time to make an in depth point by point response.

We solicited comments from the Division of Information Services who report that they know of no problems nor have they received any complaints from their customer, DOC with regard to the reports generated. It has not had opportunity to review the most recent changes in this audit.

This report, although set up in a study report format, in reality only contains 50 of 67 pages (74.6 %) which are for the greater part objective, thorough, and represent a general overview of the program. The balance, or 17 pages (25.4 %) is a summary of opinions by members of the judicial branch which do not have the same objectivity as that of the rest of the report. The addition of a caveat before the recommendation sections does not seem to point out that many of the so called recommendations from the courts had already been implemented at the time of the report.

Recommendations made regarding those portions of the program under the control of this office do not consider the administrative rules adopted to comply with the requirements of 1988,225.3. Interim rules had been adopted in full compliance with the Administrative Procedures act with the approval of the Joint Legislative Committee on Administrative Rules. Those rules have been streamlined over the past several months and permanent rules, again with the approval of JLCAR have been adopted. We can find little mention of this in the report and although this office has furnished a copy of the rules it was not included in the appendix of the report.

Specific Concerns:

Rather than point out each instance where it might be appropriate to make comments we would point out certain pertinent facts which should be considered in reading the opinion portion of the report.

o On October 3, 1988 new rules for determining eligibility including a revised Financial Affidavit were in place. The opinions of clerks based on a survey were after they had the new rules in place for just a few weeks. It should be noted that AOC had guidelines and rules in place for months yet they were not being followed by many court personnel. Rules and procedures that had built in performance checks could be met with some resistance and doubt.

o The courts had no objective way of measuring or backing up their opinions regarding potential performance as they had no data base on which to draw. Their opinions must be considered as being drawn without basis. While substantial numbers of judges and clerks told how the procedures would not work, the facts are already proving the positive impact of the program.

Facts which should be considered:

1. There has been a significant shift to greater numbers of findings of partial eligibility (where payment is made in advance of trial and not subject to the findings on the merits of the case). See Table... this improvement continues.
2. Findings of ineligibility have already saved the state several thousand dollars which might have been spent in the past.
3. Several courts have reported that the program has a non measurable result in that some who might have requested state appointed counsel, upon reading the financial affidavit have determined for themselves that they did not qualify and retained private counsel.
4. With the creation of the Office of Cost Containment recoupment improved significantly up to October and then DOUBLED in the period from October to the present.
5. This increased collection rate is a direct result of more intensive collection activity and a greater rate of ordering repayment. However repayment orders are still not consistent from court to court. The AOC and OCC are presently working on solutions to the problem by using the concept of education and cooperation rather than confrontation. The projected result of this effort will be to increase orders for payment of all costs of representation up to the 60% level by the end of the fiscal year.

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CHAPTER Adm 1000 PAYMENT OF CERTAIN INDIGENT DEFENSE EXPENSES

Statutory Authority: RSA 604-A:8, RSA 604-A:9, RSA 604-A:10

PART Adm 1001 ORGANIZATIONAL RULES

Adm 1001.01 Definitions. The following definitions shall apply to this part:

(a) "Administrator" means the person appointed by the Commissioner of Administrative Services to manage the Office of Cost Containment.

(b) "Commissioner" means the Commissioner of Administrative Services.

(c) "Contribution threshold" means that amount of available funds which shall obligate a defendant to make a partial payment towards the cost of his or her representation pursuant to Adm 1004.01.

(d) "Court Code" means the three digit number used by the New Hampshire Administrative Office of the courts to identify each of the courts in the state.

(e) "Chapter 225" means section 3, Laws of 1988, Chapter 225 (HB847), which took effect April 30, 1988.

(f) "Defendant" means any person charged with a criminal offense, or otherwise constitutionally entitled to counsel, including juveniles charged with delinquency, and also including neglected or abused juveniles as described in RSA 604-A:1-a, provided, however, that if a justice determines that a witness in any type of proceeding is exposed to such a realistic threat of criminal liability that the witness requires legal counsel concerning his or her constitutional right against self incrimination, then that witness shall also be deemed a "defendant" for purposes of these rules.

(g) "Indigent Defense Funds" means monies appropriated by the legislature to pay representation costs of defendants who are eligible for representation under RSA 604-A and Laws of 1988, Chapter 225.

(h) "Minimum cost of representation" means the estimated minimum cost of obtaining qualified private counsel for the type of case being tried. This amount is \$10,000 for homicides; \$4,000 for felonies (non-homicide), misdemeanor appeals and supreme court appeals; \$1,500 for misdemeanors, \$2,000 for juvenile cases and "other" cases.

(i) "Notification of Eligibility" means the form currently used by New Hampshire courts to enter their orders pertaining to a defendant's eligibility for indigent defense funds and duty to make partial payment, or any similar court order containing essentially the same information.

(j) "Notification of Financial Liability" means the form currently used by New Hampshire courts to enter their orders pertaining to a person's duty to repay indigent defense funds, or any similar court order containing essentially the same information.

(k) "Representation" means the services and expenses commonly associated with an adequate defense to criminal or delinquency charges (or adequate presentation of the interests of an abused or neglected child). Representation includes, but is not limited to, legal services, investigative services, expert witness services, and the cost of compulsory process.

Adm 1001.02 Office of Cost Containment.

(a) All functions pertaining to the payment, recoupment and monitoring of indigent defense funds authorized by RSA 604-A, including the pilot program on indigent defense repayment and eligibility standards established by Chapter 225, shall be administered by the Office of Cost Containment.

(b) The Office of Cost Containment shall be a unit within the Office of the Commissioner and shall report directly to the Commissioner.

(c) The Office of Cost Containment is located at One Eagle Square, Concord, NH 03301.

Adm 1001.03 Purpose And Scope. These rules apply to the disbursement of indigent defense funds for the benefit of eligible defendants and to the recovery of the cost of representation from defendants, persons who may be responsible for the defendant's support under RSA 546-A:2, or both. More particularly, these rules establish forms, procedures and standards governing:

(a) The eligibility of defendants for indigent defense funds;

(b) The collection of all or part of the representation costs expended on behalf of each eligible defendant wherever such costs are reasonably collectible; and

(c) The disbursement of certain indigent defense funds to persons who provide representation to eligible defendants.

PART Adm 1002 ELIGIBILITY FOR INDIGENT DEFENSE FUNDS

Adm 1002.01 Status as a Defendant. Only persons who meet the definition of "defendant" contained in Adm 1001.01(d) shall be eligible for indigent defense funds.

Adm 1002.02 Ability to Pay. Except in the case of neglected or abused juveniles entitled to representation under RSA 604-A:1-a, eligibility for indigent defense funds shall be based upon the defendant's present ability to pay all or part of the estimated costs of representation.

Adm 1002.03 Financial Affidavit. Except in the case of neglected or abused juveniles entitled to representation under RSA 604-A:1-a, no person shall be eligible for indigent defense funds unless he or she completes a financial affidavit in the form prescribed by these rules. The financial affidavit required from defendants shall be included as part of the Eligibility Determination Form (OCC Form #1) reproduced as Appendix I hereto.

Adm 1002.04 Categories of Eligibility. There shall be three categories of eligibility for indigent defense funds: eligible, partially eligible and ineligible. These categories are defined as follows:

(a) "Eligible" means that the defendant shall receive representation at public expense without liability for payment of any representation costs before trial (or hearing). Eligible defendants are responsible for repaying indigent defense funds expended on their behalf if they are convicted. Liability for repayment are judicially determined at the conclusion of the court proceeding.

(b) "Partially eligible" means that the defendant shall receive representation at public expense, but shall be responsible for paying a portion of his or her representation costs before the trial (or hearing). Partially eligible defendants who are convicted are also responsible for repaying any additional indigent defense funds expended on their behalf. Liability for repayment is judicially determined at the conclusion of the court proceeding.

(c) "Ineligible" means that the defendant shall not receive representation at public expense.

PART Adm 1003 DETERMINATION OF ELIGIBILITY

Adm 1003.01 Eligibility Determination Form (OCC Form #1). Except for interim judicial determinations pursuant to Adm 1003.03(b) and determinations involving neglected or abused juveniles under Adm 1003.02(a), eligibility determinations shall be based upon the information provided on the defendant's completed eligibility determination form. This form shall be known as "OCC Form #1" and shall contain the following information:

(a) A financial condition section to be completed by the defendant. The following information pertaining to the defendant's income, assets, expenses, liabilities, employment and credit history shall be provided in this section:

(1) Name, address, social security number, date of birth and age.

(2) Marital status, person(s) with whom defendant lives, name of spouse, address of spouse (if different from defendant's), the names of any dependents personally supported by defendant and living in the same household, and the names of the defendant's parents and any of the defendant's children who are 18 years old or older.

(3) All cash, financial accounts and other liquid assets of both defendant and spouse.

(4) Accounts receivable (defendant only).

(5) Past, present and planned employment information for both defendant and spouse.

(6) Monthly income information of both defendant and spouse.

(7) Net monthly housing costs.

(8) Monthly loan payments.

(9) Other monthly payments, including but not limited to medical, alimony, child care and support.

(10) Real and personal property of the defendant, including property worth \$200 or more sold or transferred by the defendant within the last six months, and any mortgages or liens held on this property.

(11) Any remarks the defendant wishes to make about his or her financial condition that will help in determining ability to pay for representation.

(b) A judicial verification section to be completed by court personnel or personnel of the Office of Cost Containment, and not by the defendant. The following information shall be provided in this section:

(1) The county, court, court code, docket number, name of case, case type and the charge for which the defendant is being tried.

(2) The factors which determine eligibility under Adm 1003.02 (net value of real property," "total funds available for representation," type of case, "minimum cost of representation" and "contribution threshold".

(3) The correct eligibility category as determined by applying the standards of Adm 1003.02(e) or Adm 1003.02(g).

(4) The name of the person completing the judicial verification section and the date of completion.

(c) A statement by the defendant that he or she:

(1) Has read, or been read, the instructions for completing the affidavit.

(2) Understands that the Administrator may investigate his or her financial condition (including employment and credit status), and that a report of this investigation will be available to the Court.

(3) Acknowledges a duty to repay indigent defense funds expended on his or her behalf. (This statement shall be on the form prescribed by RSA 604-A:9,II.)

(4) Acknowledges a duty to report changes in the information provided in the financial affidavit if his or her financial condition improves before the final disposition of the case for which representation is being sought.

(d) A declaration that the information provided by the defendant is true and given under penalty of perjury.

(e) A notice that the defendant has the right to appeal if he or she is denied eligibility.

(f) The defendant's signature.

(g) The jurat of a Justice of the Peace or Notary Public who shall have taken the defendant's oath and witnessed his or her signature.

Adm 1003.02 Determination Standards.

(a) Except in the case of neglected or abused juveniles entitled to representation under RSA 604-A:1-a, ability to pay for representation shall be determined by comparing "net value of real estate" and "total funds available for representation" with the "minimum cost of representation" and "contribution threshold" figures for the type of case being tried.

(b) Seven types of cases shall be recognized for the purpose of calculating the "minimum cost of representation." These case types are: homicide, felony (non-homicide), misdemeanor, misdemeanor appeal, juvenile, supreme court appeal and "other." The minimum cost of representation and contribution threshold for each case type is included in the Financial Eligibility Table contained in Adm 1003.02(f).

(c) "Total funds available for representation" shall be computed in the following manner using information in the financial affidavit portion of the defendant's OCC Form #1:

(1) Add together the totals shown as items 1A, 1B, 2, 4A and 4B (liquid assets and monthly income).

(2) Add together the totals shown as items 5, 6 and 7 (monthly expenses). Increase this sum by \$250, a figure which represents a personal living allowance automatically credited to the defendant. If the defendant has listed personal dependents on the financial affidavit, a further living allowance of \$100 per dependent shall also be added to the total.

(3) Subtract the total expense figure calculated in subparagraph (c)(2), above, from the total income and assets figure calculated in subparagraph (c)(1), above. The remainder shall represent the defendant's "total funds available for representation."

(d) "Net value of real estate" shall be computed by subtracting the figure shown as item 8b.2 on the financial affidavit portion of the defendant's OCC Form #1 (real estate mortgages and liens) from the figure shown as item 8b.1 on the defendant's OCC Form #1 (market value of real estate).

(e) Except in the case of neglected or abused juveniles entitled to representation under RSA 604-A:1-a, the financial standards for determining a defendant's ability to pay for representation shall be as follows:

(1) The defendant shall be ineligible for indigent defense funds if the net value of real property is equal to or greater than:

- a. \$40,000 if the case type is a homicide.
- b. \$20,000 if the case type is a felony (non-homicide), misdemeanor appeal or supreme court appeal.
- c. \$10,000 if the case type is a misdemeanor, juvenile or "other".

(2) The defendant shall be ineligible for indigent defense funds if the total funds available for representation equals or exceeds the minimum cost of representation for the type of case being tried, i.e. the higher limit of partial eligibility as set forth in subparagraph (4), below.

(3) A defendant shall be eligible for indigent defense funds if total funds available for representation is equal to or less than the contribution threshold for the type of case being tried. The applicable contribution threshold shall be as follows:

- a. Homicide (\$500)
- b. Felony (non-homicide) (\$400)
- c. Misdemeanor appeal (\$275)
- d. Misdemeanor (\$175)
- e. Juvenile (\$180)
- f. "Other" (\$140)
- g. Supreme court appeal (\$500)

(4) A defendant shall be partially eligible for indigent defense funds if:

a. The type of case is a homicide and the total funds available for representation exceeds the contribution threshold (\$500), but is less than the minimum cost of representation (\$10,000).

b. The type of case is a felony (non-homicide) and the total funds available for representation exceeds the contribution threshold (\$400), but is less than the minimum cost of representation (\$4,000).

c. The type of case is a misdemeanor appeal and the total funds available for representation exceeds the contribution threshold (\$275), but is less than the minimum cost of representation (\$4,000).

d. The type of case is a misdemeanor and the total funds available for representation exceeds the contribution threshold (\$175), but is less than the minimum cost of representation (\$1,500).

e. The type of case is juvenile and the total funds available for representation exceeds the contribution threshold (\$180), but is less than the minimum cost of representation (\$2,000).

f. The type of case is "other" and the total funds available for representation exceeds the contribution threshold (\$140), but is less than the minimum cost of representation (\$2,000).

g. The type of case is a supreme court appeal and the total funds available for representation exceeds the contribution threshold (\$500), but is less than the minimum cost of representation (\$4,000).

(f) The financial eligibility standards established by this section are summarized in the following Financial Eligibility Table. If the net value of a defendant's real estate is less than the amounts shown in Adm 1003.02(e)(1) for the type of case being tried, an immediate further determination of eligibility shall be made by matching the type of case and the total funds available for representation with the minimum cost of representation.

FINANCIAL ELIGIBILITY TABLE

Case Type	Ineligible (Based on net value of real property)	Ineligible			Partially Eligible	Partial Payment Rate
		(Based on available funds)				
Homicide	\$ 40,000	\$ 10,000 or more	\$ 500 or less	500.01-9999.99	\$ *	
Felony	\$ 20,000	\$ 4,000 or more	\$ 400 or less	400.01-3999.99	\$ 400	
Mis. Appeal	\$ 20,000	\$ 4,000 or more	\$ 275 or less	275.01-3999.99	\$ 275	
Misdemeanor	\$ 10,000	\$ 1,500 or more	\$ 175 or less	175.01-1499.99	\$ 175	
Juvenile	\$ 10,000	\$ 2,000 or more	\$ 180 or less	180.01-1999.99	\$ 180	
Other	\$ 10,000	\$ 2,000 or more	\$ 140 or less	140.01-1999.99	\$ 140	
Sup Ct Ap	\$ 20,000	\$ 5,000 or more	\$ 500 or less	500.01-4999.99	\$ *	

*75% of the Total Funds Available For Representation.

(g) Neglected or abused juveniles entitled to representation under RSA 604-A:1-a shall be conclusively presumed to be financially eligible for indigent defense funds.

Adm 1003.03 Determination Procedures.

(a) Neglected or abused juveniles entitled to representation under RSA 604-A:1-a shall be automatically eligible for indigent defense funds. No financial affidavit shall be completed by such defendants, but those portions of an OCC Form #1 which must be completed by court personnel under Adm 1003.01(b) shall be completed and a copy forwarded to the Administrator in each instance.

(b) Any justice wishing to proceed under the first phrase of section III(a) of Chapter 225 may make an interim appointment of counsel for defendants other than neglected or abused juveniles without first ascertaining eligibility under paragraph (c), below. Such interim appointment may be made whenever the court is presented with circumstances in which immediate representation appears necessary and there is insufficient time to obtain a properly completed OCC Form #1. Indigent defense funds shall be provided during the period between the interim appointment of counsel and completion of the eligibility determination procedures set forth in paragraph (c) below; provided, however, that a completed OCC Form #1, a Notification of Eligibility form, and the court's initial order authorizing immediate representation are subsequently filed with the Administrator pursuant to section 1003.04(b).

(c) Eligibility determinations not made under paragraphs (a) and (b), above, shall be made using the following procedure:

(1) Once the defendant has fully completed the financial affidavit portion of OCC Form #1, the back copy of the form shall be separated from the front copy and shall be sworn to and executed by the defendant.

(2) The eligibility determination prescribed by Adm 1003.02(e) shall be entered on the back copy of OCC Form #1 by performing the following steps, in sequence:

a. Ascertain the type of case being tried and the minimum cost or representation for that type of case (as shown on the Financial Eligibility Table in Adm 1003.02(f)).

b. Compute total funds available for representation and enter that amount on the designated line.

c. Compute net value of real estate and enter the total on the designated line. If the net value of real estate is equal to or greater than the amounts shown on the Financial Eligibility Table, the defendant is ineligible for indigent defense funds.

d. Compare total funds available for representation with the contribution threshold and minimum cost of representation amounts shown on the Financial Eligibility Table in Adm 1003.02(f).

e. Identify the appropriate category of eligibility revealed by the application of subsections (c)(2)d. or (c)(2)e., above, and enter partial payment amount, if required.

(3) The person completing the back copy of OCC Form #1 shall sign and date that copy.

(d) The completed back copy of OCC Form #1 shall constitute the eligibility determination of the Commissioner, and shall be relied upon by the Courts and other interested persons. No personal review by or written confirmation from the Administrator shall be necessary to establish an eligibility determination based upon Adm 1003.03(a) or Adm 1003.03(c). If time permits, and special circumstances so warrant, the Administrator shall provide written confirmation of an Adm 1003.03(c) determination to the court upon request. This confirmation may be obtained by mailing the defendant's fully completed OCC Form #1 to the Office of Cost Containment with a written request for completion of the eligibility determination portion of that form.

Adm 1003.04 Eligibility Orders.

(a) After the eligibility determination prescribed by Adm 1003.03 has been recorded, the court shall enter an order relating to the defendant's eligibility for indigent defense funds and duty to make partial payment (if partially eligible), and shall record this order on a Notification of Eligibility form or in some similar format deemed appropriate by the court.

(b) A copy of the Notification of Eligibility, any other court order relating to appointment of counsel, and the front copy of the OCC Form #1 shall be forwarded to the Administrator.

(c) The back copy of OCC Form #1 shall be retained in the defendant's case file as a permanent record for use as evidence under Adm 1003.05(b)(2).

Adm 1003.05 Appeal of Eligibility Determination.

(a) If the defendant is found ineligible for representation, he or she may appeal the determination of the Commissioner by requesting a hearing within seven days from the date of the Notification of Eligibility Form.

(b) An appeal hearing shall be held before the court in which the defendant will be tried, and the burden of persuasion shall be upon the defendant to demonstrate why the determination procedure specified by Adm 1003.03(c) should not be controlling in his or her case. In any such hearing, the court shall receive such evidence and argument as justice may require and shall thereafter enter an order setting forth its decision.

(c) In the event the court alters the Commissioner's eligibility determination on appeal, its order shall contain the specific findings required by paragraph III(a) of Chapter 225.

(d) Indigent defense funds shall be authorized whenever ordered by the court following an appeal hearing; provided, however, that the Administrator has been furnished with a copy of the documents required by Adm 1003.04(a), including the court's order on appeal.

PART Adm 1004 PARTIAL PAYMENTS

Adm 1004.01 When Required.

(a) All partially eligible defendants shall be required to pay a portion of their estimated representation costs in advance of trial (or hearing). In the case of homicides and supreme court appeals, this partial payment shall be seventy-five percent (75%) of the "total funds available for representation" as computed pursuant to Adm 1003.02(c). In all other types of cases, the partial payment amount shall equal the applicable contribution threshold set forth in Adm 1003.02(e)(3).

(b) Partial payments shall not be refunded on the grounds that the defendant was not convicted. The defendant shall, however, be entitled to a refund of that portion of any partial payment which exceeds the actual cost of his or her representation.

Adm 1004.02 Payments Made.

(a) Partial payments shall be made to the clerk of court and shall be retained in the custody of the clerk of court until the conclusion of the proceeding.

(b) At the conclusion of the proceeding, all partial payment funds received by the court shall be forwarded to the Administrator with the Notification of Financial Liability required by Adm 1005.02.

Adm 1004.03 Payments not Made. If partial payments ordered under Adm 1003.04(a) are not made before the beginning of the trial (or hearing), the defendant's liability for these payments shall be specifically addressed at the conclusion of the proceeding pursuant to Adm 1005.02(a) and (b), and the court's further order shall be forwarded to the Administrator.

Adm 1004.04 Refunds of Excess Partial Payments.

(a) A defendant may seek a refund of any partial payment amount which exceeds the actual costs of his or her representation by requesting such a refund in writing from the Administrator. Such a request shall not be accepted, however, unless the court has issued a Notification of Financial Liability and the request is accompanied by an itemized list of representation costs verified by the defendant's court-appointed counsel.

(b) The cost of legal services provided by a member of the public defender service or by an attorney under contract pursuant to RSA 604-A:2-b shall be assessed at the flat rate currently allowed by the judicial council for the type of case in question and need not be further itemized.

(c) The Administrator shall issue the defendant a refund or a notice that no refund is owing within 30 days from the date a properly completed refund request is received by the Administrator.

PART Adm 1005 REPAYMENT

Adm 1005.01 Liability for Repayment.

(a) If an eligible defendant is a witness entitled to representation under the proviso clause of Adm 1001.01(e), that defendant shall be obligated to repay all indigent defense funds expended on his or her behalf without regard to the disposition of the case in which the witness was called to testify.

(b) If an eligible defendant (other than a witness) is not convicted, the defendant shall have no obligation to repay any indigent funds expended on his or her behalf.

(c) If a partially eligible defendant (other than a witness) is not convicted, the defendant shall have no obligation to repay any indigent funds expended on his or her behalf other than the partial payment amount previously ordered by the court. Partial payments shall be refunded only to the extent and in the manner provided by Adm 1004.01 and Adm 1004.04.

(d) If an eligible or partially eligible defendant (other than a witness) is convicted, the defendant shall be liable for all indigent funds expended on his or her behalf (with credit given for partial payments made before trial).

(e) A juvenile entitled to representation under RSA 604-A:1-a shall not be personally liable for repayment of indigent defense funds expended on his or her behalf, but the parents of such a juvenile shall be so liable.

(f) Any parent, spouse, or child of a defendant who may be responsible for the support of the defendant under RSA 546-A:2 may be ordered to repay indigent defense funds expended on the defendant's behalf. The liability of such persons shall be joint and several among themselves and the defendant. The Administrator may petition the court for an order imposing liability upon such a person at any time after the court issues an initial Notification of Financial Liability and before the six year limitation period provided by RSA 604-A:9,V and RSA 604-A:9,VI. No such order shall issue without notice to the person (or persons) alleged to have a duty of support and an opportunity for such person to be heard.

Adm 1005.02 Court Orders Upon Sentencing.

(a) At the conclusion of the proceeding, the court shall enter an order pursuant to RSA 604-A:9 I, relating to the defendant's liability to repay indigent defense funds expended on his or her behalf and shall record this order on a Notification of Financial Liability form or in some similar format deemed appropriate by the court.

(b) If partial payment was ordered, but not made by the date specified in the Notification of Eligibility, and the defendant has not been convicted, the court shall issue a new order for payment by a certain date and time. Such order shall be considered a continuation of the original partial eligibility order and shall be served upon the Administrator as well as the defendant. The Administrator shall have standing to enforce this order by petitioning the issuing court, or such other court as the issuing court may find to have proper venue, for the imposition of sanctions.

(c) If partial payment was ordered, but not made by the date specified in the Notification of Eligibility, and the defendant has been convicted, the court shall address his or her liability for partial payment as a condition of probation (should probation be ordered). If probation is not ordered, the previous partial payment order shall be vacated and the defendant's liability for all indigent defense funds expended on his or her behalf shall be addressed pursuant to subsection (d) or (e), below.

(d) If a non-juvenile defendant is convicted, and if, as part of the sentence, the defendant is placed on probation, the defendant shall make full repayment in accordance with RSA 604-A:9, IV. In such cases, the Notification of Financial Liability and other relevant court orders shall be forwarded to both the Department of Corrections and the Administrator, and the defendant shall be ordered to make prompt contact with the Field Service Division of the Department of Corrections.

(e) If a non-juvenile defendant is convicted and is not placed on probation, the Notification of Financial Liability shall be forwarded to the Administrator as required documentation for payment in such cases, the following collection procedures shall be employed:

(1) If the court orders full payment, the defendant shall be directed to make payment by money order or certified check to the Administrator or to make other payment arrangements with the Administrator within five working days from the date of the court's order.

(2) If the court does not order full payment for representation under RSA 604-A:1, the Administrator shall perform an investigation to determine the defendant's current financial condition and ability to make repayment, and under RSA 604-A:9 VI, may petition the court for a new repayment order at any time within six years from the date of the Notification of Financial Liability.

(f) If a juvenile defendant is adjudicated a delinquent, the Notification of Financial Liability and other relevant court orders shall be forwarded to both the defendant's juvenile service officer and the Administrator in such cases, the following procedures shall be employed:

(1) If the court orders full payment, the defendant, his or her parents, or both, shall be directed to make payment by money order or certified check to the Administrator or to make other payment arrangements with the Administrator within five working days from the date of the court's order.

(2) If the court does not order full payment for representation under RSA 604-A:1, the Administrator shall perform an investigation to determine the current financial condition of the defendant and his or her parents and the ability to make repayment, and under RSA 604-A:9 VI, may petition the court for a new repayment order at any time within six years from the date of the Notification of Financial Liability.

(g) If a defendant (or a parent of a juvenile defendant) fails to comply with a court order concerning repayment, or with any arrangements made with the Administrator for payment in accordance with a court order, the Administrator shall petition the issuing court, or such other court as the issuing court may find to have proper venue, for the imposition of sanctions.

PART Adm 1006 FINANCIAL INVESTIGATIONS.

Adm 1006.01 Investigation of Defendants.

(a) At any time after an initial Notification of Financial Liability has been issued, the Administrator shall conduct such investigations into the financial status and credit-worthiness of defendants as the Administrator deems appropriate.

(b) Financial investigations shall be undertaken for the purpose of verifying any information furnished on a defendant's OCC Form #1 or establishing a defendant's present ability to pay or repay representation costs.

(c) Financial investigations may be made with whatever frequency the Administrator deems appropriate. The results of each investigation shall be reduced to writing.

(d) The results of a financial investigation shall be an appropriate subject for a petition seeking modification of a judicial repayment order made pursuant to Adm 1005.02(e)(2) and Adm 1005.02(f)(2).

Adm 1006.02 Judicial Requests.

(a) At any time after an eligibility determination has been made under Adm 1003.03(c) or Adm 1003.05(b), the court may request the Administrator to conduct a financial investigation and present the results of this investigation to the court in writing. The Administrator shall respond to such requests, provided that the Administrator receives 20 days written notice from the court.

(b) The court may request the Administrator, or a representative thereof, to appear at any hearing concerning the defendant's liability to repay indigent defense funds. The Administrator shall respond to such request, provided that the Administrator receives ten days advance written notice of the date and place of said hearing.

PART Adm 1007 DISBURSEMENT OF INDIGENT DEFENSE FUNDS.

Adm 1007.01 Approval of Administrator. The Business Office of the Department of Administrative Services shall not authorize the disbursement of indigent defense funds to any provider of representation services unless the Administrator has verified that the services were performed for a defendant eligible for such services under these rules.

Adm 1007.02 Necessary Documentation. The commissioner shall not authorize the payment of indigent defense funds unless a completed OCC Form #1, an accounting of any required partial payment, and all court orders pertaining to eligibility and liability have been filed with the Administrator in accordance with Adm 1003.04(a), Adm 1004.01(b), and Adm 1005.02. Costs of representation which are not identified in a court order as provided by Adm 1005.02(a) shall not be paid unless the provider of services petitions the court for modification of its order for the purpose of identifying the costs in question and ruling on the defendant's ability to pay these costs.

Adm 1007.03 Exception for Certain Types of Indigent Defense Expenditures. The following expenditures of indigent defense funds are not subject to the requirements of Adm 1007:

(a) Monies approved by governor and council for public defender service and alternate public defender contracts pursuant to RSA 604-B:4 and RSA 604-B:8; or

(b) Monies approved by governor and council for legal services contracts arranged by the judicial council under RSA 604-A:2-b.

Disbursements for such expenditures shall be authorized in accordance with the terms of the approved contract in question.

STATE OF NEW HAMPSHIRE

INTER-DEPARTMENT COMMUNICATION

DATE January 27, 1989

FROM Thomas K. Tarr, Director
Division of Field Services

AT (OFFICE)
271-5650

SUBJECT LBA Review on Attorney Fees

TO Ronald L. Powell
Commissioner

Attached please find a draft copy of a recently completed L.B.A. review of the indigent defense program in the State of New Hampshire. I was presented with this report on Monday, January 23, 1989 by Michelle Clauson, C.P.A. who is assigned to the L.B.A. She requested that if the Department had comments that they should be received by Wednesday, January 25, 1989.

I reviewed the report with Internal Auditor John Koch on January 23rd and 25th. It was his opinion that the report was just that, and not an audit. It appears that L.B.A. was charged with reviewing the entire spectrum of the indigent defense system "to determine whether the program is operating as efficiently as can reasonably be expected and whether indigent defendants are receiving effective representation in the administration of justice throughout our court system."

I want to point out that the sum total of my contact with Ms. Clauson consisted of an office visit in the Fall of 1988 in which she requested to meet with me to help explain the substantial increase in the level of attorney fees collected by DOC from the previous years totals. Additionally, a staff person from her office, Michael Sullivan, during the Fall of 1988, visited the Concord and Nashua District Offices to observe the operational components at that level. He also spent a brief period meeting with the DOC, BIS Bureau to familiarize himself with dispersement and reporting procedures.

I am sure that several of the observations noted in the report were as a result of those on site visits.

In the attached response, I have extracted portions of the report verbatim and have commented accordingly.

L. B. A. ON

INDIGENT DEFENSE PROGRAM

1. Page 43, "Recoveries prior to 1982 are not available. DOC is unable to provide information relative to total amounts ordered or provide an aging report of outstanding balances."

COMMENT: Recoveries are available back to 1980. Total amounts ordered are available on the existing Financial Status Report. While an aging report is not yet available, DOC and DIS recognize the importance of such a report and have been jointly working toward the development of same.

2. Page 45, "In several reports, the computer counts a single case twice if more than one payee is collecting. In others, the computer distinction between supervised and "collection only" cases fails to account for a number of cases that are neither supervised nor solely collections; this is true of cases in which the offender flees or is missing."

COMMENT: If an offender has more than a single financial sanction such as restitution and attorney fee reimbursement, the case will appear on separate reports for restitution and attorney fees. On the consolidated "Financial Status Report," the offenders name would appear once followed by a complete listing of each financial sanction and corresponding order amounts. DOC and DIS staff have been working toward an appropriate system identifier that accurately flags missing or wanted offenders on the current "active" offender roster. In addition, staff have been working toward report titles and headings that adequately and accurately describe report contents.

3. Page 46, "but a larger problem comes from the lack of communication among the agencies involved. Frustration especially characterizes the relationship between DOC and DIS, and DOC and OOC. Similarly, despite the shared mission of DOC and OCC in collecting outstanding fees from indigent defendants, little communication occurs between the two bodies. The mistake and accompanying confusion has furthered the breakdown in communication and cooperation between the agencies."

COMMENT: There is no question that at times, frustration with system progress has been experienced by both DOC and DIS. In an effort to minimize frustration and convey system needs in a clear, concise manner, DOC several months ago appointed a systems

supervisor to function as chief liaison with DIS in facilitating the refinement of meaningful relevant management reports. Additionally, a Regional Administrator with the Division of Field Services has been appointed to participate in regular, weekly sessions with the system supervisor and DIS staff in conveying field office system concerns.

I do not concur with the observation that frustration and little communication exists between DOC and OCC. Neither I nor Ken Robie, Administrator of OCC, are aware of any problems between the agencies. Certainly, individual cases, can from time to time be a source of frustration, however in each case thus far, a prompt resolution has been jointly achieved.

4. Page 46, "RECOMMENDATIONS

1. Revise computer programs in order to make DIS reports representative of actual caseload and DOC financial records and to control the variation in data in summary and companion reports.
2. Clarify the meaning of DIS report terms, titles, headings and categories for consistency and precision.
3. Explain the purpose and meaning of individual DIS reports in appropriate cover letters explaining the methods used in generating the reported information.
4. DIS reports should follow consultation with, and request by, DOC, in order to better satisfy the interests and needs of the department. DIS bills DOC monthly for its reports. DOC should withhold payment for DIS consultations and reports that prove unsatisfactory."

COMMENT: Each of these recommendations has merit and have been a priority of the DOC systems supervisor and Regional Administrator. Regular, weekly meetings between the two agencies have already resulted in improved DIS reports and system credibility. Significant strides have been accomplished including the achievement of statewide, on-line system capability.

5. Page 47, "Within statutory limits, open OCC access to information collected and maintained by DIS and DOC. Create a computer program that will accurately isolate data relevant to OCC operations."

COMMENT: The Interagency Agreement signed by DOC and OCC specifies "For informational systems purposes, DAS shall have access to the DOC data base maintained by the Division of Informational Services (DIS) to include information relative to unsupervised offenders assessed an indigent defense repayment, total number of orders by court and aggregate amount, payments made to date and balances outstanding and other pertinent information as agreed upon by DOC and DAS."

6. Page 47, "Consider broadening the repayment base by approximately twenty-five percent."

COMMENT: This would appear to require legislative concurrence.

7. Page 47, "Consider placing temporary liens on property owned by defendants to ensure repayment."

COMMENT: Generally, criminal defendants who are assigned an attorney do not have much in the way of assets that would justify additional hearings and filing fees.

8. Page 47, "Create a policy that makes repayments of attorneys fees and services other than counsel a condition of probation or parole."

COMMENT: Every order of the sentencing court or parole board for a financial sanction has always been incorporated into existing probation/parole terms as a special condition. Wilful or deliberate failure to comply with pre-agreed payment terms result in a hearing before the court or parole board for suitable disposition.

9. Page 47, "As required include expenses for services other than counsel in all repayment orders. These expenses often amount to more than the amount paid to counsel."

COMMENT: DOC will collect any financial sanctions imposed by the court for offenders placed on probation or parole supervision. This recommendation should be directed more toward the judiciary at the sentencing stage.

