FREQUENTLY ASKED QUESTIONS

THE SIXTH AMENDMENT
RIGHT TO COUNSEL

6AC SIXTH AMENDMENT CENTER
ENSURING FAIRNESS & EQUAL ACCESS TO JUSTICE

www.6AC.org

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DEDICATED EXCLUSIVELY TO ENSURING THAT NO PERSON FACES POTENTIAL TIME IN JAIL OR PRISON WITHOUT THE AID OF A LAWYER WITH THE TIME, ABILITY, & RESOURCES TO PRESENT AN EFFECTIVE DEFENSE.

INTRODUCTION LETTER

"Of all the rights that an accused person has," the U.S. Supreme Court explains, "the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Without a lawyer, a person accused of a crime has little ability to challenge the government over an unlawful search or excessive use of force (Fourth Amendment), contest a coerced or false confession (Fifth Amendment), or argue against excessive bail (Eighth Amendment). The Sixth Amendment is not just one component of America's justice system — it is the foundation upon which other constitutional rights are realized and protected, and a core American value that pre-dates the founding of our country.

The Sixth Amendment to the U.S. Constitution requires that every indigent person facing the potential loss of liberty in a criminal prosecution be provided with the effective assistance of counsel. Yet, across America, many people are never given a lawyer at all. Others receive a lawyer in name only — a lawyer overwhelmed with too many cases or burdened by conflicts of interest. These systemic failures contribute to wrongful convictions, over-incarceration, wasted taxpayer dollars, and diminished public trust in the fairness of the justice system.

The **Sixth Amendment Center (6AC)** is a national nonprofit organization dedicated exclusively to ensuring that no person faces potential time in jail or prison without the aid of a lawyer with the time, ability, and resources to present an effective defense — as required under the U.S. Constitution. As a nonpartisan 501(c)(3) organization, 6AC does not litigate or lobby.

Instead, we provide technical assistance to policymakers and equip them with trusted, objective information so they can invest in fixing the structural root causes of their jurisdiction's struggling public defense systems.

The FAQs brings together the questions we most often hear asked in state legislatures across the country — and the answers policymakers need — to effectively implement and ensure the Sixth Amendment right to counsel.

Sincerely,

Aditi Goel, Executive Director
The Sixth Amendment Center

CONSTITUTIONAL REQUIREMENTS

Q1. What does the Sixth Amendment right to counsel require of state government?

The Sixth Amendment to the U.S. Constitution requires that every **indigent person** facing a **potential loss of liberty in a criminal prosecution** be provided with **effective assistance of counsel** at every **critical stage** of the proceeding. Each of these four key terms is explained in this section.

Q2. What does "indigent" mean?

"Indigent" means "of insufficient means." In the context of the right to counsel, it refers to a person who does not have sufficient income or assets to afford the prevailing cost of a private criminal defense attorney in their jurisdiction without substantial burden or undue hardship (for example, depriving themselves or their family of food, housing, clothing, or other necessities).

Importantly, "indigent" is not synonymous with "poor." Even individuals with steady employment may not be able to afford the cost of a private attorney.

Q3. Is there a uniform definition of "indigent" across states?

No. The U.S. Supreme Court left it to states to define indigence. That said, the Court states: "Indigence must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means... the fact that a defendant may be able to muster enough resources, of his own or of a friend or relative, to obtain bail does not in itself establish his non-indigence for the purpose of purchasing a complete trial transcript or retaining a lawyer."

Q4. How do states determine whether a person is indigent?

States use a wide variety of approaches to determine indigence. Most states use objective criteria and presume indigence in certain situations (e.g., receiving public assistance, being in custody, living in a treatment facility, being a "juvenile," or having an income below a set percentage of the Federal Poverty Guidelines), and require individualized financial inquiries only for those not presumed indigent.

Q5. Are there national standards for determining indigence?

Yes. American Bar Association standards recommend that a person in custody or receiving public assistance should be presumed indigent "absent contrary evidence." Further, an attorney should be appointed to anyone who cannot "obtain adequate representation without substantial burden or undue hardship" and any screening process should be confidential and uncomplicated.

The same "substantial hardship" standard is promoted by the National Study Commission on Defense Services (NSC), funded by the U.S. Department of Justice. The NSC standard gives policymakers more guidance, stating that indigency should be determined by ascertaining the person's liquid assets (cash or stocks, but excluding car and house) minus "the amount needed for the support of the person or his dependents and for the payment of current obligations." If the defendant's "liquid assets are not sufficient to cover the anticipated costs of representation as indicated by the prevailing fees charged by competent counsel in the area, the person should be considered eligible for publicly provided representation," noting that the "accused's assessment of his own financial ability to obtain competent representation should be given substantial weight."

Q6. What does a "potential loss of liberty in a criminal prosecution" mean?

The right to counsel applies whenever a criminal prosecution for violation of state or local law carries the possibility of incarceration, even if the sentence is suspended or conditional (e.g., probation, if revoked, subjects a person to incarceration). A criminal prosecution is a government action in a court seeking to hold a person accountable for an alleged violation of criminal law. Crimes are generally categorized as a felony or a misdemeanor: a felony is generally punishable by at least one year of incarceration while a misdemeanor is generally punishable by less than one year of incarceration. In addition to felonies and misdemeanors under state law, many jurisdictions also have county or city level infractions, violations, or petty offenses that carry jail time.

Q7. In which case types must an attorney be appointed under the Sixth Amendment?

The right to counsel applies to:

- Capital cases
- Felonies
- Misdemeanors (whether the sentence is immediate or suspended)
- Direct appeals (either to challenge a lower court conviction or to challenge a sentence imposed on a guilty plea that was not agreed to in advance)
- Local criminal prosecutions that carry the possibility of incarceration

Additionally, youth facing delinquency proceedings are entitled to counsel. As these proceedings are civil and not criminal, the U.S. Supreme Court grounds this right in the protections of the Fourteenth Amendment due process clause instead of the Sixth Amendment. As such, states have different obligations when it comes to taking away the liberty of a youth.

Q8. Can states expand the right to counsel beyond what the Sixth Amendment requires?

Yes. The U.S. Supreme Court determines that states are "free to provide greater protections in their criminal justice system than the U.S. Constitution requires" but they cannot provide less. For example, although the U.S. Constitution does not require it, many states appoint counsel in post-conviction cases, termination of parental rights cases, abuse and neglect (dependency) cases, and civil commitment proceedings.

Q9. At what stages of a criminal prosecution must a defendant be represented by an attorney?

A defendant must be represented at every "**critical stage**" of a case. Because a person accused of a crime "requires the guiding hand of counsel at every step in the proceedings," the U.S. Supreme Court holds that there are certain stages of a case — whether formal or informal, in court or out of court — that are critical because the defendant's rights are at risk and the process is adversarial in nature. The U.S. Supreme Court delineates many events as being critical stages, including arraignments, plea negotiations, the entry of a guilty plea, trials, and sentencing.

Q10. Can a critical stage proceed without an attorney?

No, unless the defendant enters a knowing, voluntary, and intelligent waiver of the right to counsel. A judge must be "rigorous" in ensuring that a person has the requisite knowledge to make an informed decision about waiving the right to counsel, including understanding the nature of the charge and the stage of the proceeding. A person's signature on a court waiver form is not sufficiently rigorous; rather, a judge should question a person individually on the record to determine, for example, their level of education, their understanding of potential penalties, and whether anyone compelled them to waive counsel.

Q11. Can a prosecutor negotiate a plea with an unrepresented defendant?

No. Plea negotiations are a critical stage. A prosecutor may only negotiate a plea with an unrepresented defendant if, first, the court obtains a valid waiver of counsel.

American Bar Association's standards for the prosecution reflect this: "The prosecutor should not obtain a waiver of other important pretrial rights, such as the right to a preliminary hearing, from an unrepresented accused unless that person has been judicially authorized to proceed pro se [without counsel]." Indeed, a "prosecutor should not approach or communicate with an accused unless a voluntary waiver of counsel has been entered or the accused's counsel consents."

Q12. What does "effective assistance of counsel" mean?

The Sixth Amendment requires not just "a person who happens to be a lawyer," but rather, the effective assistance of an attorney. The U.S. Supreme Court holds in *United States v. Cronic* that before a case even begins, the structure of the public defense system must make effective representation by an attorney possible. This requires the system to have **minimum standards**, ensuring **early appointment** of attorneys; **qualified and trained** attorneys; adequate **attorney compensation and resources**; **reasonable workloads**; and **independence of the defense function** from political and judicial interference. The absence of any one of these standards can make a system presumptively ineffective.

Q13. In summary, what does the Sixth Amendment right to counsel require of states?

State government must ensure that every person who cannot afford a private criminal defense attorney at the prevailing rate in their jurisdiction without substantial hardship, and who faces a criminal prosecution that carries potential incarceration, is provided with the **early appointment of a qualified and trained attorney who has sufficient time, resources, and independence to provide effective representation at every critical stage of the case**, unless the person makes a knowing, voluntary and intelligent waiver of counsel in court.

Q14. What happens if a state fails to uphold the Sixth Amendment right to counsel?

The Sixth Amendment right to counsel is so "basic to our adversary system of criminal justice," explains the U.S. Supreme Court, because it "constitutionalizes the right in an adversary criminal trial to make a defense as we know it." A deficient public defense system that systemically denies the right to counsel leads to severe consequences: wrongful convictions, over-incarceration, wasted taxpayer dollars, and diminished public trust in the fairness of the justice system. States risk lawsuits alleging systemic violations of the right to counsel. These lawsuits, frequently brought by advocacy groups like the American Civil Liberties Union, argue that a public defense system is not structurally capable of delivering effective representation. The U.S. Department of Justice also sometimes investigates or sues jurisdictions for systemically violating defendants' constitutional rights.

Q15. Is there a Sixth Amendment right to counsel in U.S. territories?

The Sixth Amendment right to counsel applies in some territories, but not all. The U.S. Congress has the authority to determine whether and which constitutional rights apply in the territories. Currently, the Sixth Amendment right to counsel applies in Guam, Northern Mariana Islands and U.S. Virgin Islands, but it does not apply in American Samoa and Puerto Rico.

IMPLEMENTING THE RIGHT TO COUNSEL IN ADULT STATE CRIMINAL TRIAL CHARGES

Q1. Is ensuring the right to counsel a state or local obligation?

The U.S. Supreme Court holds that ensuring the Sixth Amendment right to counsel is a state government obligation through the Fourteenth Amendment.

Q2. Can the state delegate this obligation to local governments?

The U.S. Supreme Court has never been asked whether it is constitutional for the state to delegate its obligation to local governments. However, if a state does, it must still ensure that those local governments are both capable of and actually do provide constitutionally required services.

Q3. Do states use a uniform system for implementing the right to counsel?

No. While the U.S. Constitution guarantees the right to counsel, it does not dictate how states must structure their public defense systems. As a result, each state has developed its own approach. To make sense of this variation, 6AC organizes the implementation of the right to counsel into three core components:

FUNDING PUBLIC DEFENSE

Q1. What does "funding public defense services" mean?

"Funding public defense services" is defined as the way state government pays for the public defense services required under the Sixth and Fourteenth Amendments.

Q2. How do states fund public defense services?

There are four models for funding services:

1. State funding
2. Hybrid state-local funding
3. Local funding
4. Alternative funding (e.g., local fines and fees)

Q3. What does "state funding" mean?

"State funding" means the state government is required to fund the entirety of public defense services.

Many states allow local governments to supplement state public defense funding. Because these local contributions are optional, we still classify such states as state funding. In these states, the state government remains solely responsible for guaranteeing a funding floor to ensure constitutionally required services, regardless of whether localities choose to contribute.

Similarly, some states require local governments to cover limited overhead expenses. Overhead refers to the resources an attorney requires before representing an appointed client, such as office rent, furniture, equipment, software, utilities, state licensing and bar dues, and malpractice insurance. When a state requires local governments to fund only overhead expenses, we categorize these states as state funding rather than hybrid state-local funding, as the battle for securing adequate funding for representational services entirely lies with the state's budgeting process.

Q4. What does "hybrid state-local funding" mean?

"Hybrid state-local funding" means that both state and local governments are required to share responsibility for funding the entirety of public defense services. This can occur in three main ways:

1. **State-funded, with mandatory local contributions:** the state is required to provide primary funding, and local funds must either contribute to state funding or reimburse a portion of the state's total costs.
2. **Split responsibilities:** state and local governments are required to divide funding obligations, with each responsible for funding distinct parts of the public defense system. This can occur in various ways, such as:
    - **Geographic locale:** the state funds services in certain regions, while local governments fund the rest. For example, Oklahoma counties with a population of over 300,000 (only two counties) must fund services, while the state must fund services in the remaining 75 counties.
    - **Case type:** the state funds specific case types, while local governments fund the others. For example, Kansas requires local governments to fund services in misdemeanor cases, while the state funds services in felony cases.
    - **Court level:** the state funds services in certain courts, while local governments fund services in the remaining courts. For example, local governments in Oregon must fund services in justice and municipal courts (where state misdemeanors are heard), while the state must fund services in circuit courts.

- **Non-state entity:** local governments fund services that the state public defense entity cannot provide. For example, in Wisconsin, county governments must fund services in cases where the state public defender is conflicted out, faces excessive workloads, or when a defendant does not meet the income eligibility requirements for state-appointed counsel.
- **State services in local jurisdiction:** the state partially or fully funds services that it provides at the local level when the local government requests assistance or enters into an agreement with the state. For example, in Ohio, a local trial court can appoint, or a public defender may request, the state public defender to provide direct representation services, which is funded by the state. However, in most counties, local governments fund services and receive state reimbursements — untied to compliance with state standards — that fluctuates year to year. Similarly, in Mississippi and Nebraska, the state funds a state public defense entity to provide representation in serious cases when requested by a county.

3. **Standards-based, with mandatory state contributions:** local governments are required to provide funding, and the state is required to offset a portion of local costs based on local compliance with state standards. This can occur in two main ways:

   - **Mandatory state standards program:** the state must fund or reimburse local governments, contingent on local compliance with state standards that apply uniformly across all jurisdictions.
   - **Optional state standards program:** the state must fund or reimburse local governments that choose to comply with state standards. Local participation may be structured as an opt-in system or as a default system where participation is presumed unless a local government opts out.

Q5. What does "local funding" mean?

"Local funding" means the state requires local governments to fund the entirety of public defense services.

In some states, the only source of state funding comes from a pre-fixed formula untied to standards, pilot programs, or grants. In these states, local governments remain solely responsible for guaranteeing a funding floor to ensure constitutionally required services, regardless of whether the state contributes more. We categorize these states as local funding as the battle for securing adequate funding for services entirely lies with the local government budgeting process.

Q6. What does "alternative funding" mean?

Alternative funding is funding that does not come from general tax dollars but is instead generated locally through fees — such as civil filing, conviction, or indigency screening fees — and distributed only within the local jurisdiction where it was collected. Alternative funding does not work as a primary source of funding because there is no correlation between the costs of providing effective public defense services and the revenue generated from these fees. Although some jurisdictions use alternative revenue streams to supplement government funding, it should not account for more than 1% of total public defense funds.

For example, roughly 30% of public defense funding in Louisiana comes from fees imposed on people convicted in criminal court — many convictions are for traffic tickets. If for any reason traffic tickets decline, so does public defense funding. So, if a local sheriff decides it is best for public safety to shift officers away from traffic enforcement and toward combating illegal drug distribution, that move may improve public safety but simultaneous reduce the revenue stream that funds public defense in that local judicial district — at the very moment when more public defense services are needed for the increasing drug cases.

Q7. What is the preferred funding model?

State funding. States are ultimately responsible for ensuring public defense services are adequately funded. National standards prioritize state funding over other models because local jurisdictions most in need of services are often the least able to afford it. Factors that limit local revenue — such as low property values, high unemployment, high poverty, limited household incomes, and lower educational attainment — tend to coincide with higher crime rates. In these areas, a higher proportion of defendants are indigent and require public defense services, while local budgets are already strained to cover social services like public health, housing, and unemployment support, leaving fewer resources available for protecting people's right to counsel under the Sixth Amendment.

Q8. Are some hybrid state-local funding models better than others?

Yes. Hybrid funding models that require state funding with mandatory local contributions or mandatory state standards are preferred, because they reduce geographical disparities by ensuring necessary funding for effective services statewide.

Funding Public Defense

Which states use which funding models?

Which states use which type of hybrid funding model?

CLICK TO UNLOCK 50-STATE CATEGORIES ON FUNDING PUBLIC DEFENSE

ADMINISTERING PUBLIC DEFENSE

Q1. What does "administering public defense services" mean?

"Administering public defense services" is defined as the government employee(s) authorized to make decisions regarding (1) how public defense services are delivered and (2) which attorneys are eligible to deliver those services.

Q2. How do states administer public defense services?

There are three models for administering public defense services:

1. State administration
2. Hybrid state-local administration
3. Local administration

Q3. What does "state administration" mean?

"State administration" means that state government employees have the sole authority to decide how public defense services are delivered, and which attorneys are eligible to deliver those services across the entire state.

The most direct example of state administration is when a state commission, department, or office is authorized to make these decisions statewide. A less direct example is when judges appoint individual attorneys to cases — this is still considered state administration provided those judges are state employees. The defining factor is that state government employees retain authority over both the service delivery model and attorney eligibility for appointments.

Q4. What does "hybrid state-local administration" mean?

"Hybrid state-local administration" means that both state and local government employees share the authority to decide how public defense services are delivered and which attorneys are eligible to deliver those services.

This can occur in various ways, such as:

- **Geographic locale:** the state administers certain regions (e.g., rural counties), while local governments administer the rest (e.g., urban counties).
- **Case type:** the state administers specific case types (e.g., felonies), while local governments administer the others (e.g., misdemeanors).
- **Court level:** the state administers services in certain courts (e.g., state courts), while local governments administer services in the remaining courts (e.g., municipal courts).
- **State services in local jurisdiction:** local governments administer services, but they can request the state to administer services in their jurisdiction or specific cases.
- **Conflict representation:** state and local governments divide administration responsibilities by primary, conflict, and tertiary representation.
- **Split administration:** one level (state or local) determines how services are delivered, while the other level determines the eligibility of attorneys.
- **Mandatory state standards program:** local governments administer services, but they must comply with state standards that apply uniformly across all jurisdictions. Under this model, state government employees set mandatory standards on the service delivery model and attorney eligibility — within these defined parameters, local governments select the specific service delivery model and individual attorneys.

Q5. What is meant by "local administration"?

"Local administration" means that local government employees have the sole authority to decide how public defense services are delivered and which attorneys are eligible to deliver those services locally.

The most direct example of local administration is when county governments are authorized to make these decisions for their county. A less direct example is when local governments can opt into state standards that set service delivery model and attorney eligibility requirements – this is still considered local administration because the decision to opt into state standards rests entirely with local government employees.

Q6. What is the preferred administration model?

State administration and hybrid state-local administration through a mandatory state standards program.

Local government officials often do not have access to the legal expertise required to administer a public defense system that meets all the state's complex and evolving constitutional obligations. Centralizing administrative authority at the state level ensures that decisions are made by policymakers with greater access to legal experts, and the system benefits from greater oversight, transparency, and accountability. Additionally, it allows for a more efficient allocation of resources based on statewide needs.

In states that prioritize local control, however, a hybrid model can be used to preserve local involvement while achieving the advantages of state administration through the enforcement of mandatory statewide standards.

SERVICE DELIVERY MODELS

Q1. What is a "service delivery model"?

A "service delivery model" refers to the type of attorneys a public defense system uses to provide services. There are two models for delivering services:

1. Public defenders
2. Private attorneys

Q2. What is the difference between a public defender and a private attorney?

A **public defender** is an attorney who is employed by government, either full-time or part-time, to provide services. A **full-time public defender** is usually not allowed to take private clients and, in return, receives government-employee benefits like health insurance, retirement plans, malpractice coverage, and office space. A part-time public defender works a set number of hours per week, month or year; they may or may not receive government benefits or office space and are typically allowed to take private cases outside of their public hours.

A **private attorney**, on the other hand, is not a government employee. They are paid by the government to provide services but do not receive government benefits or office space. Private attorneys often run their own law practices, though in some cases they may work full-time for non-profit organizations that provide public defense services or they are under contract to handle all public defense cases in a specific area.

Q3. Do public defenders provide better representation than private attorneys?

Not necessarily. In fact, many systems use a mixed model that includes both public defenders and private attorneys — a practice supported by national standards. What matters most is not the type of attorney, but whether the system ensures that every person receives the **early appointment of a qualified and trained attorney who has sufficient time, resources, and independence to provide effective representation at every critical stage of the case.**

6AC has seen strong and weak versions of both models. Some public defender offices provide excellent representation, while others are overwhelmed with too many cases. Similarly, some private attorney systems are effective, but many lack proper oversight and training. Deciding whether — and to what extent — a government relies on public defenders, private attorneys, or both is a policy decision best left to policymakers. However, problems can arise when a system over-relies on one service delivery model. For example, over-relying on public defenders can overburden public defenders with excessive workloads, while over-relying on private attorneys can lead to an attorney shortage crisis.

Q4. What are the different service delivery models for private attorneys?

There are three service delivery models for private attorneys:

1. **Assigned counsel:** private attorneys are appointed on a case-by-case basis to provide services. These systems are often administered by a judge or court staff, and as a result, frequently lack minimum standards for attorney qualifications, training, supervision, compensation, workloads, and performance.
2. **Managed assigned counsel (MAC):** a coordinated assigned counsel system where a government administrator creates, maintains, and manages a list of private attorneys who are eligible to provide services. The administrator's job is to ensure that every attorney on the list is qualified, trained, supervised, and has the time and resources needed to effectively represent every case to which they are appointed.
3. **Contract:** a model where government enters into an agreement with private attorneys, law firms, groups of attorneys, or non-profit organizations to provide services. Instead of appointing attorneys case-by-case, the contract attorney agrees to represent multiple cases under one binding contract. These contracts often include requirements for performance, reporting, and workload limits. They may also include separate funding for complex cases or resources like experts and investigators. While a contract model looks appealing to governments due to the higher predictability of costs, 6AC has found that governments often award contracts based mainly on the lowest cost, use flat-fee payments, and do not provide enough oversight to ensure constitutionally required services.

Q5. What is the preferred service delivery model for private attorneys?

A managed assigned counsel (MAC) model is preferred because it allows government to properly oversee private attorneys who provide services, ensuring they are qualified, trained, supervised, and have sufficient time and resources for their cases.

Q6. How are private attorneys paid for providing services?

Governments pay private attorneys in two ways:

1. Hourly rates
2. Flat fees

Q7. What is an hourly rate?

Under an hourly rate system, private attorneys are paid a set amount for each hour worked. The rate may vary depending on factors such as case type, court level, or whether the attorney's work is performed in court or out of court.

Sometimes, there are limits on total pay, such as a cap on the maximum amount an attorney can earn for a case (e.g., the hourly rate for representing a misdemeanor case is $100 per hour, and the total compensation cannot exceed $500 per case). These caps can sometimes be waived after review by a judge or administrator.

Q8. What is a flat fee?

A flat fee is a fixed amount of money paid to a private attorney for providing services. There are various types of flat-fee models:

- **Per case event:** the attorney earns a separate flat fee for each hearing or event in a case (e.g., $100 for an initial hearing, $200 for a plea hearing).
- **Per defendant:** the attorney earns one flat fee to represent a single defendant against all charges, no matter how long it takes for the case(s) to resolve (e.g., one defendant with two complaints originating from the same incident = one flat fee).
- **Per case:** the attorney earns one flat fee per prosecution instrument (e.g., one defendant with two complaints = two flat fees).
- **Time-based:** the attorney earns a flat fee for a half-day, day, week, month or year, regardless of how many cases or hearings they handle during that time.

Q9. Should governments avoid certain compensation models?

Yes. Certain compensation models create conflicts of interests between the attorney's financial interests and the defendant's right to effective assistance of counsel and should be avoided. These include:

- Any type of flat fee, since it can encourage attorneys to do the minimum work possible to earn the fee.
- Hourly rates with a cap, effectively turning the hourly rate into a flat fee.
- Hourly rates too low to cover actual overhead and attorney pay.
- Any model that requires attorneys to pay for case-related expenses out of their compensation package.

National standards recommend private attorneys should not be paid any type of flat fee because it "reward[s] counsel for doing as little work as possible" or only "what is minimally necessary to qualify for the flat payment." For this reason, some states like Idaho and Nevada have banned flat fees. Other states, like Michigan, ban any compensation model that discourages private attorneys from spending adequate time on their public cases.

Q10. How much should private attorneys get paid?

A **reasonable hourly rate, without a cap**. National standards affirm that attorneys must be paid "reasonable compensation" for "all hours necessary to provide quality legal representation." The hourly rate should account for overhead costs (e.g., office rent, utilities) and attorney pay. Attorney should also be reimbursed for case-related expenses, such as investigators, social workers, immigration consults, experts, postage, jail calls, and copying discovery documents. This "encourage[s] vigorous defense representation" and eliminates conflicts of interest that may arise under flat-fee and other compensation models.

Q11. What is a reasonable hourly rate to pay private attorneys?

This is a policy decision best left to policymakers. A state's compensation rate is impacted by various factors, such as the number of law schools in a jurisdiction, the number of available lawyers in a jurisdiction, cost of living, and geographic diversity that impacts drive times needed to reach courts and jails. For example, in some more rural states with fewer law schools and a limited number of attorneys, the state may need to provide higher private attorney pay rates to attract and retain lawyers to do public defense work despite having a lower cost of living. On the other hand, less rural states can be at risk of losing lawyers to neighboring states that can pay higher rates.

Q12. Should state or local governments set private attorney compensation rates?

State government. Private attorney compensation rates should be set at the state level. When local jurisdictions set attorney compensation rates, it can lead local governments to compete with one another for a finite pool of qualified attorneys. Based on 6AC's experience, this can worsen existing attorney shortages, contribute to legal deserts, and result in geographic disparities in ensuring constitutionally effective services. The problem is especially acute in local jurisdictions most in need of services because they often have the least financial resources and are therefore unable to offer competitive compensation. Additionally, by setting the compensation rates at the state level, rates can be better aligned with statewide needs by, for example, temporarily increasing rates in regions facing attorney shortages.

Currently, in some states, **private attorney compensation rates** are established by state law, while other states are silent on the issue, leaving the decision to local discretion.

Administering Public Defense

+ Which states use which administration models?

+ Which states use which type of hybrid administration model?

CLICK TO UNLOCK 50-STATE CATEGORIES ON ADMINISTERING PUBLIC DEFENSE

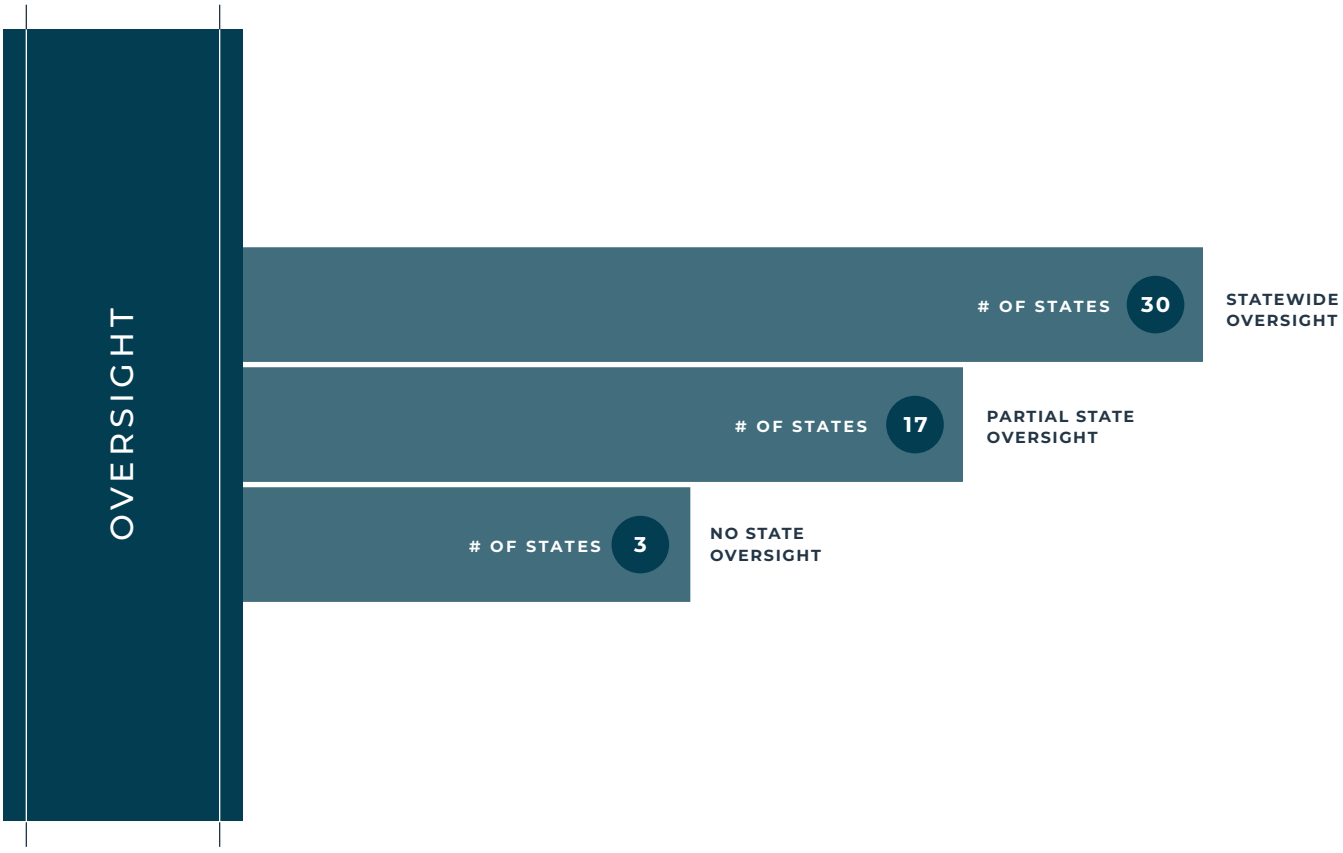
OVERSEEING PUBLIC DEFENSE

Q1. What does "overseeing public defense services" mean?

"Overseeing public defense services" is defined as the state's ability to ensure that every person within its jurisdiction is provided their constitutional right to counsel.

Oversight consists of two components:

1. The **state's authority** to oversee services
2. The **state's structure** for overseeing services



OVERSIGHT AUTHORITY

Q1. How do states oversee public defense services?

States oversee services either by directly delivering services or by setting and enforcing standards.

Q2. What does "directly delivering services" mean?

"Directly delivering services" means a state entity employs public defenders, manages a system of private attorneys to provide services, or does both.

Q3. What does "setting and enforcing standards" mean?

A state **sets standards** by establishing formally written rules, regulations, or policies for constitutionally required representation, such as:

- Early appointment of counsel
- Providing representation at every critical stage
- Attorney qualifications, training, and supervision
- Reasonable compensation and resources
- Workload limits
- Defender independence

A state **enforces standards** by monitoring compliance with set standards and taking corrective action when necessary. Enforcement can take several forms, including authorizing the state to:

- Disqualify attorneys who do not meet standards from accepting public cases.
- Terminate a contract with a local government or provider when it fails to meet required standards.
- Assume control of a local government's public defense system when it fails to meet required standards.
- Impose financial penalties on non-compliant local governments, such as withholding state funds.

Q4. Do all states have the same authority to oversee services?

No, states vary in the scope of their authority to oversee services. There are three models for oversight authority:

1. Statewide oversight
2. Partial state oversight
3. No state oversight

Importantly, having the authority to oversee services does not mean that a state is exercising that authority in practice.

Q5. What does "statewide oversight" mean?

"Statewide oversight" means the state has the authority to oversee all services in the entire state. No local government, region, court, case type, service delivery model, or attorney can opt out from state oversight.

All state-administered systems, and hybrid state-local administered systems that have a mandatory state standards program, are considered to have statewide oversight because the state sets and enforces standards statewide, directly delivers services statewide, or does both.

Q6. What does "partial state oversight" mean?

"Partial state oversight" means the state's authority to oversee services is limited in scope.

Partial state oversight includes states that set and enforce standards or directly deliver services in specific regions, courts, case types, service delivery models, or conflict cases, or when local governments opt into state standards or request state delivery of services — but outside of these areas, the state provides no oversight.

Q7. What does "no state oversight" mean?

"No state oversight" means the state has no authority to oversee services in any part of the state.

Locally funded states, where the only source of state funding comes from a pre-fixed formula untied to standards, pilot programs, or grants, are categorized as "no state oversight." While the state may withhold these funds if certain conditions or reporting requirements are not met, generally, this **financial penalty alone is ineffective as an enforcement tool.** For local governments that have historically funded their own systems, the loss of supplemental state funds is rarely significant enough to incentivize compliance with state standards. Sometimes local officials choose not to apply for state funds at all because the application and compliance process are not worth the effort. As a result, these states are categorized as "no state oversight."

Q8. What is the preferred model for oversight authority?

Statewide oversight. The U.S. Supreme Court holds that ensuring the Sixth Amendment right to counsel is a state obligation through the Fourteenth Amendment. As such, each state is responsible for overseeing public defense services statewide. When a state has no authority to oversee services or its authority is limited, it cannot guarantee it is fulfilling its constitutional obligations.

Overseeing Public Defense

Which states have which oversight authority model?

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OVERSIGHT STRUCTURE

Q1. How do states structure an oversight entity?

There are two models for structuring an oversight entity:

1. State oversight commission
2. State oversight office

Q2. What is a "state oversight commission"?

A "state oversight commission" is a state-level body whose members are appointed by government officials.

The commission typically oversees a central state office, which is led by a director and supported by staff, to carry out the commission's responsibilities – ideally, statewide oversight of services. In some states, a state commission exists but it has no oversight authority because it functions simply in an advisory capacity or as a pass-through entity for distributing state funds. These states do not have a state oversight commission.

Q3. Who should serve on the state oversight commission?

National standards recommend the state oversight commission be composed of 9-13 members appointed equally by all three branches of government. National standards recommend this structure because it protects the **independence of the defense function** from government interference by preventing any single branch from exerting undue influence or control. To further avoid conflicts of interest, commission members should not include current judges, prosecutors, law enforcement officials, or public defense providers.

The state oversight commission's primary function is to protect the independence of the public defense system by appointing a director to carry out the commission's responsibilities. The director should serve a 4-to-6-year term that is renewable, and the commission should be authorized to remove the director for good cause only, ensuring stability and insulation from political and judicial interference.

Q4. Is independence of the defense function required?

Yes. The Sixth Amendment requires that public defense be independent from government interference. When the state infringes on the "constitutionally protected" independence of the defense function – by allowing political or judicial interference — it risks a system-wide denial of the right to counsel. National standards echo this principle, stating that "public defense providers and their lawyers should be independent of political influence and subject to judicial authority and review only in the same manner and to the same extent" as private attorneys and prosecutors.

The most direct example of judicial interference is when judges determine which attorneys are eligible to accept case appointments and set their compensation. The most direct example of political interference is when the director of a public defense system serves at the pleasure of the governor or local governing body.

Q5. What is a "state oversight office"?

A "state oversight office" is a central state-level entity led by a director — usually appointed by the governor — with no commission.

In some states, a state office exists but it has no oversight authority because it functions simply as a pass-through entity for distributing state funds or making payments to private attorneys. These states do not have a state oversight office.

Q6. Do states that have a "state oversight office" lack independence?

Generally, yes. A state oversight office is typically accountable only to the executive branch, which can create a risk of political interference.

For example, a director who serves at the pleasure of the governor may feel pressured to comply with their political directives, such as a mandate for all executive agencies to implement a 10% budget cut. In a public defense system, where most expenditures go toward personnel, such a cut would likely reduce the number of attorneys and essential staff, such as investigators and paralegals.If the 10% budget cut is not matched by a corresponding 10% cut in workloads, the state risks failing to meet its constitutional obligation to provide effective representation. Nevertheless, a director who lacks independence and job security may carry out the budget cut without advocating for reduced workloads to avoid jeopardizing their position.

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