

THE RIGHT TO COUNSEL IN LAKE COUNTY, CALIFORNIA

EVALUATION OF TRIAL-LEVEL INDIGENT
REPRESENTATION SERVICES

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The Right to Counsel in Lake County, California: Evaluation of Trial-Level Indigent Representation Services
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SIXTH AMENDMENT CENTER
PO Box 15556
Boston, MA 02215
www.sixthamendment.org

Prepared by

The Sixth Amendment Center (6AC) is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders. Its services focus on the constitutional requirement to provide effective assistance of counsel at all critical stages of a case to the indigent accused facing a potential loss of liberty in a criminal or delinquency proceeding. See SIXTH AMENDMENT CENTER, <https://sixthamendment.org/>.

The Sixth Amendment Center acknowledges with gratitude those who contributed to the work of conducting the evaluation and writing this report:

Sixth Amendment Center staff: Nancy Bennett, Gabrielle Caron, David Carroll, Lacey Coppage, Aditi Goel, Kourtney Kinchen, Rachael Liebert, Phyllis Mann, Jon Mosher, and Michael Tartaglia

Sixth Amendment Center Law Student Network interns: Claudia Ajluni, Jackson Eskay, Jessica Guzzo, and Palmer Smith

This report solely reflects the opinions of the authors and does not necessarily reflect the views of Lake County.

Prepared for

The County of Lake, California commissioned this evaluation and report.

PREFACE

This report was requested and commissioned by Lake County, California and authored by the Sixth Amendment Center (6AC).

The 6AC is a national nonpartisan nonprofit organization that seeks to ensure that no person faces potential time in jail or prison without first having the aid of a lawyer with the time, ability, and resources to present an effective defense, as required under the United States Constitution. The 6AC conducts independent and objective evaluations of state and local indigent defense systems and offers technical assistance to state and local policymakers, using Sixth Amendment case law and national standards for right to counsel services, along with the requirements of local and federal laws. Our methodology includes four basic components: (1) legal research and analysis, (2) data collection and analysis, (3) court observations, and (4) interviews.

For this evaluation, all interviews and court observations were conducted virtually and in person from September 2021 through January 2022. To control for any potential impact that the COVID-19 pandemic might have had on the county's indigent defense system, the 6AC conducted additional court observations in November 2022. In total, the 6AC observed approximately 170 court proceedings involving indigent representation attorneys in the Lake County Superior Court in all critical stages of an adult trial-level criminal case. We also interviewed stakeholders in the judiciary, indigent defense, prosecution, and law enforcement.

Throughout this evaluation, Lake County administrators and criminal justice stakeholders were cooperative and forthcoming with the 6AC. Although written for Lake County, this report exposes the role of the State of California in Lake County's administration of an indigent defense system that is perilously in need of reform. As this report explains, the state shares responsibility for these local challenges, and strengthening Lake County's indigent defense system requires a coordinated effort by both the county and the state.

We believe this context is important to hold while reading about the right to counsel deficiencies in Lake County that are detailed in this report. We applaud Lake County's commitment to make significant changes in the delivery of right to counsel services, and we hope this report encourages the State of California to provide Lake County with the support necessary to structure a constitutionally effective indigent defense system.

EXECUTIVE SUMMARY

In 1963, the U.S. Supreme Court held in *Gideon v. Wainwright* that providing and protecting the Sixth Amendment right to effective assistance of counsel is a constitutional obligation of the states under the due process clause of the Fourteenth Amendment. California has delegated this responsibility to county boards of supervisors and/or the superior court judges in each county in all trial-level cases.

On its own initiative, Lake County sought this evaluation of its indigent representation services, in order to better understand how the county can effectively and efficiently fulfill the obligation of providing indigent representation services that has been delegated to it by the state. It is difficult for Lake County officials to improve indigent representation services in the trial court, because so many of the problems described throughout this report are inherently tied to decisions made by the state and over which the county has little control. For so long though, as the State of California makes county officials and trial court judges responsible for ensuring the effective right to counsel for indigent defendants, the trial court judges and county officials in Lake County *are* responsible. This report addresses what Lake County policymakers must do to provide effective representation until such time as California meets its Fourteenth Amendment obligations.

When a state chooses to delegate its constitutional responsibilities to local governments, the state must guarantee not only that those local governments are capable of fulfilling those responsibilities but also that they are in fact doing so. This evaluation shows, as reflected in Finding 1, that the State of California has not established any means to ensure that Lake County provides to every indigent defendant an attorney who has the time, training, and resources to provide effective representation at every critical stage of a criminal or juvenile delinquency case.

As explained in chapter I, the Sixth Amendment Center independently and objectively evaluates indigent defense services through legal research and analysis, data collection and analysis, interviews with criminal justice system stakeholders, and courtroom observations. Indigent defense services are assessed against Sixth Amendment case law that establishes the hallmarks of a structurally sound indigent representation system, which include the early appointment of qualified and trained attorneys, who have sufficient time and resources to provide effective representation under independent supervision. The absence of any of these factors can show that a system is presumptively providing ineffective assistance of counsel.

Chapter II describes the indigent representation system that Lake County has established, placing it in context with the trial court and the prosecution. Today in Lake County, all court-appointed representation of indigent people at the trial court level is provided by private attorneys who are not government employees. This is a two-part system.

- (1) Lake County contracts with an informal partnership of private attorneys, collectively known as Lake Indigent Defense LLP (LID). At the time of this evaluation there are three LID partner attorneys. The LID partner attorneys subcontract with a number of individual private attorneys, including themselves, to represent indigent people in all the types of cases that receive appointed counsel (other than juvenile dependency and family law proceedings), whenever they are appointed by the superior court to do so.

- (2) The Lake County Superior Court appoints on a case-by-case basis private attorneys to represent indigent people in juvenile dependency and family law proceedings, and the court also appoints private attorneys on a case-by-case basis in all other types of trial-level cases where none of the LID subcontractor attorneys are available. Except for juvenile dependency and family court proceedings, no private attorney outside of LID's subcontractor attorneys has been appointed to represent an indigent person in any case since LID was awarded the county contract for indigent representation services on May 7, 2017.

This evaluation is limited in scope to the indigent representation services that Lake County contracts to provide through the private attorneys collectively known as LID. Finding 2 explains that, even though Lake County's contract with LID provides means by which the county can oversee the LID partner attorneys' administration and provision of the right to counsel, the county does not do so. The county does not know, on an on-going basis, whether the right to counsel is being provided effectively, to how many people and in how many cases of what types, by whom, and how much the provision of the effective right to counsel should cost.

Instead, Lake County's contract with the LID partner attorneys devolves onto the LID partner attorneys nearly all of the county's responsibility for providing effective assistance of counsel to indigent people in the trial court. Lake County's contract with the LID partner attorneys requires them to ensure representation is provided to indigent defendants, whenever appointed by the Lake County Superior Court, in an unlimited number of cases of specified types. In exchange for these services, Lake County pays a flat annual fee to the LID partnership (composed of its three attorney contractors), paid in monthly installments, and allows for the possibility of additional compensation for "complex cases requiring extraordinary attorney time" and hourly rate compensation if appointed to a death penalty case.

As a practical matter, there are two different aspects of the contract:

- the administration of the contract, which is performed by the LID partner attorneys who are named as the "contractor," and for which they pay themselves a flat annual fee; and
- the direct representation of indigent people, which is provided pursuant to a series of subcontracts that the LID partner attorneys enter into with themselves and other private attorneys.

As reflected in Finding 3, even though the subcontracts provide means by which the LID partner attorneys can oversee the provision of the right to counsel by all of the subcontractor attorneys, the LID partner attorneys purposefully do not do so. The LID partner attorneys do not know, on an on-going basis, whether the right to counsel is being provided effectively, to how many people and in how many cases of what types, by whom, and how much the provision of the effective right to counsel should cost.

Chapters III through VI explain the details of the indigent representation system that Lake County operates through its contract with the LID partner attorneys, and through which indigent people in the Lake County Superior Court are represented by the subcontractor attorneys in all of the types of cases for which California provides the right to counsel (other than in juvenile dependency and family court proceedings).

Before the Lake County Superior Court can appoint any individual attorney to represent any indigent defendant, the indigent defense representation system established by Lake County through its contract with the LID partner attorneys must first select the attorneys whom it makes available to be appointed. As of October 2021, there are 15 subcontractor attorneys (including the three LID partner attorneys) who are eligible to be appointed pursuant to the LID contract to represent indigent people in Lake County. As shown in Chapter III, the LID partner attorneys have not established any required qualifications that an attorney must meet to receive a subcontract to represent indigent people, nor is there any formal process for selecting the subcontractor attorneys. Once selected, there is no requirement from the state, county, or LID partner attorneys for the subcontractor attorneys to receive on-going training in the non-death penalty adult criminal cases to which they are appointed. As one stakeholder explains, “no one teaches anyone what to do” – there is no “professional development, nobody getting taught how to be a public defender.”

Further, there is almost no oversight of either the LID partner attorneys’ performance of their contractual obligations to administer and provide direct representation of indigent people or of the subcontractor attorneys’ actual representation of indigent people. The county’s contract with the LID partner attorneys contains numerous mechanisms by which the county can, if it chooses to do so, provide oversight. Yet the LID partner attorneys state that, from the outset of the contract and continuing through at least January 2022, the county has not made any requests of the LID partner attorneys to fulfill their contractual reporting obligations and the LID partner attorneys have not submitted any reports to the county.

Lake County delegates to the LID partner attorneys almost all responsibility for supervising the LID subcontractor attorneys (which includes the LID partner attorneys themselves, leaving them responsible for their own supervision), holding them “legally responsible” for all work performed pursuant to the contract by the subcontractor attorneys. Nonetheless, the LID partner attorneys avoid supervising the LID subcontractor attorneys, because they do not believe they “can simultaneously have truly conflict free counsel and also engage in any significant effort to compel any performance which requires or hints at supervision.” The LID partner attorneys say they do not conduct any type of performance evaluation of the LID subcontractor attorneys because “there is no way to do a performance evaluation without supervising the attorneys, which we are not allowed to do.”

The U.S. Constitution holds the State of California responsible for ensuring adequate funding for the right to counsel under the Sixth and Fourteenth Amendments. California has delegated to its counties all responsibility at the outset for funding trial-level indigent representation services, and up through March 2022, Lake County has never received funding from the state government for trial-level right to counsel indigent representation services. Chapter IV provides a detailed discussion of the funding that Lake County allocates to providing the right to counsel, and how that money is spent for necessary case-related expenses, overhead, and compensation of appointed attorneys.

As this report concludes in Finding 4, Lake County’s contract with the LID partner attorneys pays them a flat annual fee to administer the trial-level indigent defense system and to provide all right to counsel services for which the State of California is responsible under the U.S.

Constitution, without regard to how much or how little time is necessary to provide effective assistance of counsel in all appointed cases. The LID partner attorneys' subcontracts with individual private attorneys (including themselves) pay each of the subcontractor attorneys a flat monthly fee to represent all people to whom they are appointed by the superior court, without regard to how much or how little time is necessary to provide effective assistance of counsel in all appointed cases. These flat-fee compensation methods result in a system-wide conflict of interest between each and every indigent person's interest in their constitutionally guaranteed right to effective representation and the personal financial interest of the attorney appointed to represent them, leading to the constructive denial of the right to counsel to some indigent people in Lake County.

Chapter V focuses on when and how an attorney is appointed to represent an individual defendant in an adult criminal case in the Lake County Superior Court. All misdemeanors and felonies in California carry the possibility of incarceration as a punishment, so every person charged with any of these crimes who cannot afford to hire their own attorney is entitled under the Sixth and Fourteenth Amendments to have an attorney provided at public expense to represent them. Once the right to counsel has attached, any indigent defendant facing possible loss of liberty in a criminal case and who does not waive their right to counsel must be represented by counsel at every critical stage of the proceedings. In Lake County, the judges presume that defendants who appear without counsel are indigent. If the defendant says they would like to have a lawyer but cannot afford to hire one, the judge finds that the defendant qualifies for court-appointed counsel. It is estimated that approximately 90-95% of defendants charged with a criminal offense in Lake County receive appointed counsel.

Despite counsel being appointed, the greatest difficulty experienced by indigent defendants is in communicating with their appointed attorneys, as expressed by criminal justice system stakeholders throughout the evaluation. It is most often the situation that appointed subcontractor attorneys meet with their clients only on the dates of scheduled court proceedings, and often the only attorney-client conversations occur during the court proceedings. This causes confusion and frustration for indigent defendants, impeding their ability to make informed decisions about the exercise of their legal rights, and it creates a backlog of cases for the courts, the prosecution, and the subcontractor attorneys.

It is reportedly common in Lake County for indigent defendants to ask the court to remove the subcontractor attorney who is representing them and appoint a different attorney on their case. This situation is referred to as a "*Marsden* motion," arising most often because the defendant says their appointed subcontractor attorney "never talk[s] to them at the jail, never visit[s], or never talk[s] to witnesses." Stakeholders explain that "*Marsden* motions happen all the time" and "almost everyone gets a *Marsden* filed against them once every several months." One LID subcontractor attorney reports that in Lake County they "have been *Marsden*-ed more times than [they] can count" and more than in any other California county during their years of criminal defense practice.

As Chapter VI explains, there are certain fundamental tasks each attorney must do on behalf of every client in every criminal case. The time an appointed attorney can devote to accomplishing each of these tasks in each defendant's case depends on the total amount of time the attorney

has available for all professional endeavors and the total amount of work the attorney must accomplish in that available time. For this reason, the U.S. Department of Justice has advised, and national standards agree, that a careful analysis of each appointed attorney's workload is necessary. Workload includes caseload – the raw number of cases of each type that an attorney is responsible for within the indigent defense system in a given time period – *plus* any cases an attorney takes on privately, appointed cases for which the attorney is responsible in other jurisdictions, and the attorney's other professional obligations such as obtaining and providing training and supervision. Workload additionally considers "all of the factors affecting a public defender's ability to adequately represent clients, such as the complexity of cases on a defender's docket, the defender's skill and experience, the support services available to the defender, and the defender's other duties."

California does not charge any state agency to collect caseload or workload information nor even to ensure that cases are counted uniformly throughout the state. Lake County's contract with the LID partner attorneys requires that the subcontractor attorneys should not carry excessive caseloads that interfere with their lawyer's obligation to provide effective assistance to each client in each case. Despite this, the county and the LID partner attorneys have not implemented effective tools for monitoring or reporting subcontractor attorney caseloads.

The LID partner attorneys have not established any caseload limits for the subcontractor attorneys. Instead, the LID partner attorneys pass their contractual duty to maintain reasonable caseloads onto the individual subcontractor attorneys. The onus is on each subcontractor attorney to understand, evaluate, and raise the issue of an excessive caseload to the LID partner attorneys. During this evaluation however, none of the subcontractor attorneys were able to provide their actual caseload numbers and few could accurately give a ballpark estimate of their number of open cases. In sum, no one at the state, county, or local levels tracks accurate data on the number of cases appointed to the subcontractor attorneys who provide indigent representation services.

The case management technology developed by the LID partner attorneys cannot be relied on to accurately show the actual caseloads of the subcontractor attorneys, and the subcontractor attorneys do not report the information necessary to know their caseloads or workloads. LID subcontractor attorneys are allowed to take private cases and appointed cases in other jurisdictions, and some do, but there is no mechanism for either the county or the LID partners to monitor this. Most LID subcontractor attorneys work without any secretary or social worker, and there are only two part-time investigators available for investigation in all of the cases appointed to all of the LID subcontractor attorneys. When indigent representation system attorneys must perform tasks that do not require legal credentials or experience (such as tasks that can be performed by a paralegal or legal secretary), this reduces the amount of the attorney's time that is available for representing clients. And when indigent representation system attorneys must fulfill responsibilities in their appointed cases that require specialized skills that the attorneys lack (such as the skills of a trained investigator or social worker), this *increases* the amount of time the attorney must devote to each appointed case.

The anecdotal evidence, on top of the limited available caseload data, suggests that LID subcontractor attorneys have excessive workloads that affect their ability to provide effective assistance of counsel to each individual defendant. Throughout this evaluation, various

stakeholders expressed frustration about ways in which the representation provided by the subcontractor attorneys is often impeded by the subcontractor attorneys' attempts to represent too many people at the same time.

Prosecutors and judges commented at length that the subcontractor attorneys often seem unprepared for their court appearances and have not communicated with their clients in advance of scheduled court proceedings. The subcontractor attorneys frequently confer with their clients for the first time *during* court proceedings, causing confusion and frustration for indigent defendants that impedes their ability to make informed decisions about the exercise of their legal rights.

Because the subcontractor attorneys are paid a flat monthly fee for their LID-appointed work but are not required to devote all of their working hours to their LID-appointed work, they often take on other paying work to increase their income. This leaves fewer working hours for the subcontractor attorneys to devote to their appointed Lake County clients, as discussed by subcontractor attorneys, prosecutors, and judges alike. Frequently, subcontractor attorneys are in a different county representing other clients when they are scheduled to be in court for their LID-appointed clients. This results in many continuances of Lake County cases, creating a backlog of cases for the courts, the prosecution, and the subcontractor attorneys, and forcing indigent defendants to return again and again to court before their cases can be resolved.

With 52 weeks in a year, and if there were no holidays and subcontractor attorneys were never absent for illness or vacation, there would be 260 business days in the year, and at eight hours per day that provides 2,080 working hours in a year. Under the NAC misdemeanor caseload standard of no more than 400 cases spread throughout a year, an attorney should have at least 5.2 hours to devote to each misdemeanor defendant's case. But the LID-appointed caseloads of misdemeanor subcontractor attorneys are sometimes at least as high as 450 misdemeanor cases all open at the same time, allowing only 4.6 hours per case, and leaving no time at all for that subcontractor attorney to be appointed to any additional cases during the year (not to mention for any non-LID work). The subcontractor attorneys must do all of the necessary preparation in every case, consulting with and advising each client so that the client can make informed decisions about exercising their legal rights, but the subcontractor attorneys cannot control when and how many of their cases are set for trial. For example, at the time of this evaluation, one subcontractor attorney had six misdemeanor cases set for trial during every week for the next ten weeks – 60 cases all needing trial preparation at the same time – without accounting for any time to devote to the subcontractor attorney's other 300 open case (not to mention for any non-LID work).

As summed up by a Lake County stakeholder: the subcontractor attorneys “have too many cases, and they're too busy, and should not be appointed new cases,” wishing that “the attorneys would decline to take cases” because of their excessive caseloads – “clients do not have their day in court.”

All of this leads to the conclusion that Lake County has established an indigent representation system that is devoid of basic oversight. Neither the State of California, Lake County, nor the LID partner attorneys know whether each indigent defendant in the Lake County Superior Court who is entitled to public counsel is in fact represented by a qualified and trained attorney,

who has sufficient time and resources to provide effective representation under independent supervision. The absence of systemic accountability has allowed deficiencies in the provision of direct services to indigent clients to become institutionalized, which the U.S. Supreme Court describes as the constructive denial of the right to counsel. And without oversight, Lake County lacks any mechanism to identify and rectify these systemic deficiencies.

Lake County should not be responsible for solving these problems alone. The State of California's dereliction of its constitutional obligations to provide effective representation to indigent people was recently the subject of a class action lawsuit that culminated by settlement in 2020. In an April 2016 ruling in that case, the trial court found that the state "cannot disclaim its constitutional responsibilities merely because it has delegated such responsibilities to its [counties]. . . . If the State created an indigent defense system that is systematically flawed and underfunded, . . . the State remains responsible, even if it delegated this responsibility to political subdivisions."

The Sixth Amendment Center makes three recommendations, one calling on the State of California to uphold its constitutional responsibilities, and the other two as stopgap measures until such time as the state does so:

Recommendation 1. Lake County policymakers should advocate for the State of California to form a legislative and/or gubernatorial committee to study and make recommendations about how best to fulfill the state's Sixth and Fourteenth Amendment responsibilities to ensure that each indigent defendant who faces the possible loss of liberty in a criminal or juvenile delinquency case receives effective assistance of counsel.

Recommendation 2. The Lake County Board of Supervisors should establish a non-partisan independent commission to oversee all aspects of indigent representation services and should fund the operations of the commission and the implementation of the methods and standards it adopts.

Recommendation 3. The Lake County Board of Supervisors should immediately establish an office of indigent representation services to carry out the day-to-day duties of the commission, headed by an executive director attorney selected by the commission. As quickly as possible, Lake County should provide adequate permanent staff to fulfill the commission's duties to ensure effective assistance of counsel to each indigent defendant.

