

Report to

**The House of Representatives and Senate Appropriations
Committees on Justice and Public Safety**

North Carolina General Assembly

Report Prepared by

The UNC School of Government

Report Submitted

March 31, 2021

Mandate from the General Assembly

Section 10.2. of S.L. 2020-78, provides in part as follows:

STUDY FEASIBILITY OF OFFICE OF PROSECUTORIAL SERVICES

Section 10.2.(b) Study. – The School of Government at the University of North Carolina at Chapel Hill (School of Government), in consultation with the Conference of District Attorneys, the Administrative Office of the Courts, the Office of Indigent Defense Services, and any other stakeholders the School of Government deems relevant, shall study the feasibility and cost of creating an Office of Prosecutorial Services. The study shall compare North Carolina's judicial branch structure to that of other states in terms of organizational placement of prosecutorial services within the context of the unified court system and shall also determine the necessary resources and costs required to make an Office of Prosecutorial Services viable as an independent agency. The School of Government shall submit the report required under this subsection by April 1, 2021, to the House of Representatives Appropriations Committee on Justice and Public Safety and the Senate Appropriations Committee on Justice and Public Safety.

The School of Government prepared this report in response to that mandate.

Background

Article IV of the North Carolina Constitution describes the “judicial department.” The office of district attorney is established by section 18(1) of that article, so North Carolina’s district attorneys are a part of the judicial department, i.e., the judicial branch. The constitution does not describe the structure of the judicial branch in detail. In practice, for budgeting and administrative purposes, North Carolina’s district attorneys are currently treated as part of the Administrative Office of the Courts (AOC).

This arrangement has been the subject of some criticism. For example, the Commission for the Future of Justice and the Courts in North Carolina saw an “inherent conflict” in having the AOC house “both the judges who hear disputes and the prosecutors and public defenders who represent the state and defendants in criminal cases.” The Commission recommended moving prosecutors to a “free-standing agency” within the executive branch.¹

Historically, the working relationship between the AOC and the Conference of District Attorneys (the Conference), which coordinates, and provides support and assistance to, the state’s prosecutors, has often been strained. Cataloging the reasons for that tension is beyond the scope of this report. However, disagreements have sometimes arisen about issues such as: (1) which items should be included in the AOC’s budget requests, and which items should be prioritized in the budget process; (2) whether, and under what circumstances, individual district attorneys and the Conference should be

¹ *Without Favor, Denial or Delay: A Court System for the 21st Century*, Commission for the Future of Justice and the Courts in North Carolina 22 (1996).

permitted to seek grants and other outside funding; (3) which information technology projects should be prioritized by the AOC's technical personnel; and (4) how funds allocated to the AOC by the General Assembly should be disbursed and managed.

A different system is used for public defenders. In 2000, the General Assembly created the Office of Indigent Defense Services (IDS). At that time, IDS was located "within the Judicial Department" but it was independent of the AOC and had exclusive authority over its own budget.² In practice, this meant that IDS submitted its own budget proposals, made its own personnel decisions, and was responsible for some of its own administrative support. As discussed in more detail below, revisions to the IDS authorization statute were passed in 2015 that now place the agency back under the AOC with somewhat less budgetary autonomy,³ but its relative degree of independence has led to continued calls for similar independence for prosecutors.

In 2009 and 2011, several bills were proposed to create an Office of Prosecution Services (OPS) modeled on IDS⁴. The bills proposed creating an agency that, like IDS, would be an agency in the judicial branch but largely independent of the AOC. The bills did not advance very far in the legislative process; however, the 2011 appropriations bill, S.L. 2011-145, § 15.7.(a), directed the School of Government to study "the feasibility and cost of creating an Office of Prosecutorial Services within the judicial branch." The School was asked to compare North Carolina's judicial structure and organizational placement of prosecutorial and defense services with other states, and determine the necessary resources and costs required to establish OPS as an independent agency under the judicial branch. That report was completed and submitted on March 30, 2012.⁵

Prosecutors have reported positively on their initial experiences communicating with the current AOC leadership on budgetary issues, but also pointed out that this relationship could change at any time.⁶ Based on the historical difficulties outlined above, prosecutors would prefer to have more direct input into budgetary appropriations for District Attorneys and to have control over how those appropriations are spent (e.g., the use of lapsed salaries). In 2019 and 2020, prosecutors sought the passage of legislation that would prevent the AOC from utilizing funding appropriated to prosecutors without the Conference's approval.⁷ The resulting legislation, S.L. 2020-748, § 10.2.(a), directed that "for the 2020-2021 fiscal year, no funds may be transferred from Fund Code 12000-1600 (Office – District Attorney) without the consent of the Conference of District Attorneys as communicated by the Conference's Executive Director to the Administrative Office of the Courts." Section 10.2.(b) of that legislation directed the School to once again consult with the Conference, the AOC, and IDS in order to study the feasibility and costs of establishing an Office of Prosecutorial services as an independent agency, and to

² S.L. 2000-144 § 1, codified at G.S. 7A-498.2(a), eff. Aug 2, 2000.

³ G.S. 7A-498.2

⁴ HB 786 and SB 816 (2009); SB 478 (2011)

⁵ Jeff Welty, "Report to the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety, North Carolina General Assembly," UNC School of Government (March 30, 2012).

⁶ Email from Peg Dorer, Executive Director of the Conference (March 23, 2021).

⁷ Email from Kimberly Spahos, Chief Resource Prosecutor for the Conference (March 18, 2021).

compare North Carolina's judicial structure and organizational placement of prosecutorial and defense services to other states. This report was prepared in compliance with that mandate.

Methodology

The 2012 Report: In keeping with the General Assembly's mandate in S.L. 2011-145, the School studied the organization of prosecution and defense services in North Carolina, in five other southeastern states, and in five other states across the country. The School also studied the federal court system as an additional point of reference. Generally, this involved reviewing each jurisdiction's constitution, statutes, and budget in order to understand how each system functions. The School was able to contact a prosecutor coordinator in almost every jurisdiction to confirm each state's structure. Further, one or more faculty members from the School consulted with:

- Peg Dorer, the Executive Director of the Conference, and several members of her staff, on December 1, 2011;
- Judge John Smith, Director of the AOC, and a member of his staff, on December 20, 2011; and
- Danielle Carman, Assistant Director of and General Counsel to IDS, on December 19, 2011.

The School followed up with the above groups as needed through email and telephone conversations. The School also reviewed relevant materials and publications, such as the report of the Futures Commission. Finally, before submitting this report to the General Assembly, the School circulated a draft to the AOC, IDS, and the Conference for review and comment. That does not imply that any of those entities subscribed to the contents of that report; the views presented therein were those of the School alone. Faculty member Jeff Welty was primarily responsible for the School's work.

The 2021 Report: To comply the General Assembly's mandate in S.L. 2020-78, the School used the 2012 report as a guide to re-examine the organization of prosecution and defense services in North Carolina, five other southeastern states, five other comparable states across the country, and the federal government. In areas where there have been no significant changes since 2012, the findings and conclusions of this report mirror the prior report, except that relevant data such as salaries, budgets, personnel, and statutory references have been updated. In areas where there have been significant developments or statutory changes since 2012, those differences have been incorporated into the appropriate sections of this report. Additionally, the School was able to re-contact a current prosecutor coordinator in most of the states used for comparison to assist in determining whether that jurisdiction's structure or funding had changed since 2012. Finally, the School consulted with the following representatives of relevant state agencies for their input on this report:

- Peg Dorer, Executive Director of the Conference, on March 23, 2021, and Kimberly Spahos, Chief Resource Prosecutor, on March 16-18, 2021;
- Judge Andrew Heath, Director of the AOC, and Trey Allen, General Counsel, on March 26, 2021;
- Mary Pollard, Executive Director of IDS, and Whitney Fairbanks, Assistant Director and General Counsel, on March 22, 2021.

A copy of the final 2012 report and a draft copy of the 2021 report were provided to the representatives of the agencies above in the course of consulting with them on this report. Consultation with representatives of these agencies does not imply that they either endorse or oppose the findings of the current report; the views presented herein are those of the School alone. As noted above, in areas where there have been no significant changes in the intervening nine years, this report replicates the findings of the 2012 report and that work remains primarily attributable to former faculty member Jeff Welty. In areas where this report differs from the prior report, that work is primarily attributable to Jonathan Holbrook, prosecutor educator at the School of Government.

Survey of Jurisdictions

The General Assembly instructed the School to “compare North Carolina’s judicial branch structure to that of other states in terms of organizational placement of prosecutorial and defense services within the context of the unified court system.” To satisfy this mandate, the School examined the following jurisdictions:

- North Carolina
- The federal government
- Five southeastern states: Georgia, Maryland, South Carolina, Tennessee, and Virginia
- Five states outside the southeast that are roughly similar to North Carolina in size and population density: Kentucky, Michigan, Minnesota, Missouri, and Washington

Because some jurisdictions place prosecution and/or defense services outside the judicial branch, it was necessary to expand the scope of the study beyond “judicial branch structure.” The structure of each studied jurisdiction is set forth in detail in Appendix A. This report summarizes the most salient results.

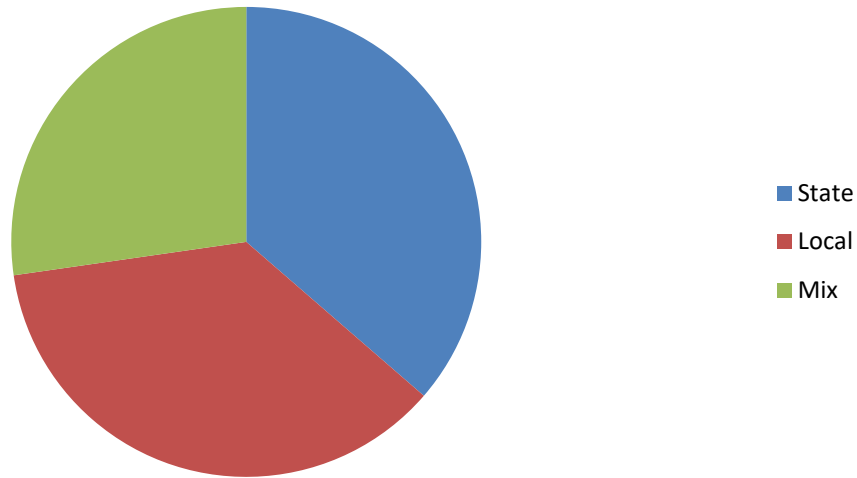
Prosecutors

The surveyed jurisdictions vary widely in the organizational placement of prosecutors. There is no predominant or preferred practice. For present purposes, there are two principal ways in which jurisdictions differ.

- **State vs. Local.** In some jurisdictions, prosecutors are fundamentally local rather than state officials. They may be paid out of local revenues; may be given office space and administrative support by local government; and, in some cases, may be required to advise local government officials on a variety of non-criminal matters. In other jurisdictions, like North Carolina, prosecutors are state officials, though elected locally. In still other jurisdictions, prosecutors defy easy categorization, being funded by a mix of state and local revenues and discharging a mix of duties.

One way of classifying prosecutors is based simply on the source of their salaries. The chart below shows whether prosecutors’ salaries in the surveyed jurisdictions are paid by the state, by local governments, or by a combination of the two. It illustrates the lack of a dominant practice.

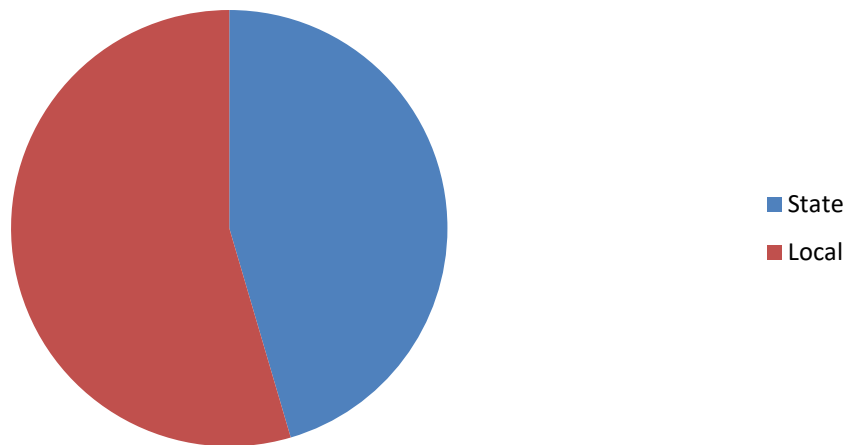
Source of Prosecutors' Salaries



Key: State (KY, NC, TN, VA); Local (MD, MI, MN, MO); Mix (GA, SC, WA).

Considering factors other than salary, such as which level of government provides administrative support to prosecutors, and prosecutors' organizational placement in the state constitution and statutes, makes the picture more complicated and makes some jurisdictions extremely difficult to characterize. However, the figure below represents one possible classification of jurisdictions. Under that classification, in five of the eleven surveyed jurisdictions (excluding the federal government because it simply is not analogous) prosecutors are principally state officials. It is worth noting, however, that among southeastern states it is more common for prosecutors to be state officials.

Are Prosecutors State or Local Officials?



Key: State (GA, KY, NC, SC, TN); Local (MD, MI, MN, MO, VA, WA).

- Branch Placement.** Where prosecutors are state officials, their placement within state government also varies. Among the five surveyed states in which prosecutors are state officials, three house prosecutors in the judicial branch (GA, NC, TN), while two place them in the executive branch (KY, SC). The federal government also places prosecutors in the executive branch. Among the surveyed jurisdictions, only North Carolina treats prosecutors as a part of the administrative office of the courts.

Indigent Defense

The surveyed jurisdictions also vary in the placement of indigent defense services, though as the graphic below illustrates, the most common practice is to locate indigent defense services in the judicial branch. Notably, of the seven surveyed jurisdictions that locate indigent defense services in the judicial branch, all of them provide those services through an independent agency similar to IDS.



Key: Judicial (KY, MI, MN, MO, NC, TN, VA); Executive (GA, MD, SC); Local (WA).

Feasibility and Costs

The General Assembly’s mandate requested information about “the feasibility and cost of creating an Office of Prosecutorial Services” as a viable, independent agency in the judicial branch.

It is plainly feasible: legislation has been introduced that would accomplish it; several other jurisdictions place prosecutors within the judicial branch but not within the AOC; and the creation of IDS serves as a precedent for the creation of an independent judicial branch agency in North Carolina. However, any such restructuring would involve both costs and benefits not present in the current system. This report identifies some of the major considerations, in three areas: legal, administrative, and financial.

Legal Issues

One could contend that creating an Office of Prosecution Services would violate the state constitution, i.e., would require a constitutional amendment. Two possible arguments could be made in support of that position.

The first argument is based in article IV, section 15 of the state constitution, which states that “[t]he General Assembly shall provide for an administrative office of the courts to carry out the provisions of this article.” One could read the use of the singular article “an” to preclude the existence of any agencies other than the AOC within the judicial branch. Alternatively, however, one could read section 15 as establishing the AOC, but not prohibiting the establishment of other agencies within the judicial branch. In fact, the General Assembly has established other agencies within the judicial branch, most notably IDS, but also including the Innocence Inquiry Commission, which was created as an “independent commission under the Judicial Department for administrative purposes.”⁸ Given these precedents and the strong presumption of constitutionality that attaches to any act of the General Assembly,⁹ section 15 does not appear to prohibit the establishment of an independent Office of Prosecution Services.

A second legal argument could be made based on the concept of separation of powers. Article IV, section 1 of the state constitution provides in part that “[t]he General Assembly shall have no power to deprive the judicial department of any power . . . that rightfully pertains to it.” The idea of separation of powers has also been generally endorsed by cases such as *State ex rel. Wallace v. Bone*, 304 N.C. 591 (1982) (improper for legislators to serve on executive commissions), *Advisory Opinion In re Separation of Powers*, 305 N.C. 767 (1982) (Governor’s duties as director of the budget may not be encroached upon), and *State v. Elam*, 302 N.C. 157 (1981) (the General Assembly cannot make procedural rules for the appellate division, because that authority is reserved in the state constitution for the supreme court). One could argue that if the General Assembly were to establish an independent Office of Prosecution Services, it would be meddling in the affairs of the judicial branch in a way that violates the separation of powers.

However, the separation of powers in our constitution is not absolute. The constitution gives the legislature significant control over the court system, including the power to structure the court of appeals and the trial courts, the power to dictate certain procedural rules, the power to determine judges’ salaries and to remove judges, and the like.¹⁰ Similarly, article III, section 5(10) of the constitution provides that “[t]he General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time.” The General Assembly has exercised its authority by enacting an array of statutes that affect the structure, operations, and funding of the courts. Indeed, virtually all of Chapter 7A of the General Statutes fits that description. Most significantly, the General Assembly has already created agencies other than the AOC within the judicial branch. If establishing an Office of Prosecution Services would be unconstitutional, then those acts, too, were unconstitutional. Yet a separation of powers challenge to IDS, though

⁸ G.S. 15A-1462.

⁹ See, e.g., *Pender County v. Bartlett*, 361 N.C. 491 (2007).

¹⁰ See generally N.C. Const. art. IV.

admittedly one slightly different than the argument described above, was rejected by the court of appeals in *Ivarsson v. Office of Indigent Defense Services*, 156 N.C. App. 628 (2003) (holding that the appointment of counsel is not the exclusive province of the judiciary). Given the language of the state constitution, the legislature’s history of taking action that impacts the judicial branch, and the presumption of constitutionality that attaches to legislative enactments, it is unlikely that the separation of powers would preclude the establishment of an Office of Prosecution Services under the current state constitution.

Although the two arguments discussed above are unlikely to prevail, it is still possible that the creation of an independent Office of Prosecution Services would be challenged in court. The expense and uncertainty of any such litigation must be viewed as a possible cost associated with restructuring.

Administrative Issues

Any separation of the district attorneys from the AOC would create a number of practical concerns. Among these concerns are the following:

- **Support Services.** It would be necessary to determine whether OPS would provide its own support services, whether it would rely on the AOC for such services, or some combination of the two. Each solution presents its own difficulties. The relationship between IDS and the AOC illustrates the potential difficulty of having the AOC provide continued support to OPS. Under the system originally established by G.S. 7A-498.2, the AOC was required to continue supporting IDS administratively, but no longer had the same authority over IDS’s actions. For example, the AOC was required to support IDS’s purchasing decisions without having any ability to limit or manage that purchasing. As discussed in more detail in the Appendix below, G.S. 7A-498.2 was amended in 2015. Under the current statute, the AOC still provide IDS with “general administrative support,” but some authority over IDS’s budget was restored to the AOC. In return, IDS would like to have more input into certain aspects of the support that the AOC provides, such as the selection of vendors, products, and support processes. For example, IDS is satisfied with the support it receives in areas such as human resources and basic tech support, but would like to see improvements in other areas such as developing a better system for automating payments; however, the AOC’s technology improvement efforts are currently focused on implementing e-Courts, a new electronic case management system.¹¹

Disagreements about budget or support issues have the potential to cause friction between the two agencies, and a similar potential for disagreements would exist if the AOC were ordered to continue providing administrative support to a semi-independent OPS. On the other hand, such friction may occur between prosecutors and the AOC under the current system as well, as evidenced by prosecutors’ repeated efforts to establish OPS as an independent agency.

¹¹ See generally Brad Fowler, “e-Courts Initiative” PowerPoint presentation (Sep. 18, 2020), available at https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/eCourts%20Initiatives%20-%20Clerk%20of%20Superior%20Court%20Conference.pdf.

Having OPS provide its own support services might avoid these issues in the long run; however, it would create different problems in the short run. For example, if OPS were to provide its own support services, OPS and the AOC would need to determine, and might disagree about, how many AOC support positions should be transferred to OPS. There could also be a loss of economies of scale in support services, an issue discussed below. Additionally, the entities would have to determine whether other services and benefits currently provided by the AOC (such as assisting prosecutors with bar complaints or providing facility space) would continue, and if so, how they would be funded.

- **Information Technology.** It would be necessary to resolve several information technology issues. In addition to the new electronic case management system mentioned above, the AOC currently provides and maintains other computer programs that are important to prosecutors, such as a case management program known as CCIS-DA¹² and a software product called DAS¹³ that is used for collecting police reports and other information about criminal cases and providing the information to the defense during the discovery process. Some of these programs, such as DAS, are freestanding and could be transferred to OPS, perhaps with some associated information technology positions. Others, like CCIS-DA and the upcoming e-Courts system, are used by multiple actors in the court system, and are integrated with other services and likely could not be transferred. (CCIS-DA is integrated with the clerks' case management and record-keeping programs.) These issues are not necessarily intractable. For example, the district attorneys could pay the AOC for continued access to CCIS-DA or other systems. However, the details of the solutions could be complicated.
- **Allocated Funds.** It would be necessary to determine how some previously allocated funds would be divided. Funds allocated to the AOC for supplies, technology, and the like are not currently earmarked for any particular group within the AOC. If OPS were to be created, there could be a disagreement about what fraction of the funds in question should be transferred to OPS. In the long run, each agency would submit its own budget requests and would receive and manage its own allocation, so this issue should not persist.

Financial Issues

Addressing the legal and administrative issues noted above could be time-consuming and might be costly in the near term. In the long run, the principal financial concern is the possible loss of economies of scale in administrative support services. For example, if OPS were to provide its own support services, it would need to have a human resources department. The AOC, of course, would continue to need its own human resources department. The AOC's human resources department would be smaller than it is

¹² Criminal Court Information System – District Attorney (CCIS-DA), *summary available at* https://www.nccourts.gov/assets/documents/publications/Technology_CCIS_DA_Facts.pdf?_ixmf2Bx8Jf5Vbg1VRxPXAGrqXur6Qj3.

¹³ Discovery Automation System (DAS), *summary available at* https://www.nccourts.gov/assets/documents/publications/DAS_FactSheet_2018.pdf?OuLGXFDJnETQv4Z1iFZyRHH8kDxO2BJ5.

now because it would not have to handle the human resources issues that arise in connection with district attorneys and their staffs. However, human resources staffing levels in other jurisdictions suggest that the combined size of the two human resources departments would need to be larger than the AOC's current human resources department due to a loss of economies of scale.¹⁴ Similar points could be made about other support services, such as purchasing and information technology training and support.

Prior experience in transferring support positions from the AOC to IDS illustrates this potential loss of economies of scale. Effective July 1, 2006, IDS assumed responsibility for processing and paying fee applications submitted by private attorneys who handled indigent defense cases, a function previously performed by the AOC. The AOC transferred three accounts payable positions to IDS, but IDS added an additional position, meaning that the total number of support positions increased slightly across the two agencies.¹⁵ It should be noted that IDS found the added expense to be warranted by the increased level of service that it was able to provide in processing fee applications, in terms of accuracy and timeliness.

It is impossible to precisely predict the cost of creating an independent OPS, in part because the answer depends on the degree of independence that OPS is given. A completely separate agency might cost more than an agency that, like IDS, is separate in some ways but still relies on the AOC for administrative support services. Additionally, the costs may vary based on how the new OPS would be constituted in relation to the existing Conference of District Attorneys; e.g., whether they would operate entirely separately from each other, or act as components of a single agency. In either case, the new duties to be performed by OPS would likely require, at a minimum, a director and additional office staff, along with other related expenses such as office space and equipment.

Regardless of the specific structure chosen for an independent OPS, it is likely that there would be some cost, both in the short run as the split is effectuated and one-time problems associated with the split are addressed, and in the long run due to lost economies of scale. A rough estimate of the long-run cost, based partly on IDS's experience assuming the accounts payable function, partly on other states' experiences, and partly on estimates from informed sources, is that at least 3 to 6 additional positions

¹⁴ In 2012, there were 1,154 district attorney positions allocated in the budget (not including roughly 100 grant-funded employees, who also require administrative support). See Office of State Budget and Management, FY 2012-2013, Position Counts Summary by Fund [1600 – Office of District Attorney], page 36 of PDF, available at https://files.nc.gov/ncosbm/2012_BD307_Vol4.pdf. At that time, the AOC indicated that it would be able to transfer two human resources positions to OPS, if such an agency were created. Based on the total number of prosecutors, two human resources staff would have put the ratio of prosecutorial personnel to human resources staff at 627:1. Compared to the ratio in other jurisdictions at that time where prosecutors provided their own human resources function (261:1 in Tennessee; 300:1 in Georgia; 575:1 in Kentucky), the School determined that a third human resources position would likely be necessary for OPS, bringing the ratio down to 418:1. For 2019-2021, the number of full-time prosecutor positions in the AOC's biennium budget increased slightly (1175 and 1181), suggesting that at least 3 human resources positions would still be necessary. See Office of State Budget and Management, Current Operations Appropriation, Fund Code 12000 [Judicial-AOC-General Fund], Jan. 31, 2020, page 2, available at https://files.nc.gov/ncosbm/documents/files/2019-21_Certified_020_AOC.pdf.

¹⁵ Email from Gregg Stahl, Senior Deputy Director, Administrative Office of the Courts (Mar. 9, 2012); email from Elisa Wolper, Chief Financial Officer, Office of Indigent Defense Services (Mar. 8, 2012).

(director, administrative assistant, and supplemental financial or human resources staff) would need to be created, funded, and equipped to establish OPS.

Comparing that cost to the overall size of the judicial branch funding and employee count provides some perspective on those numbers: For FY 2021, the AOC encompasses a total of 5,999 positions, and has a combined appropriations budget of \$599.1 million.¹⁶ The additional costs associated with creating OPS might be justified by improvements in the quality of services provided, or by reduced friction between prosecutors and the AOC.

Conclusion

Having the district attorneys fall under the AOC umbrella for administrative purposes is a practice of long standing, but it appears to be unique to North Carolina. Creating an Office of Prosecution Services has the potential to solve some of the problems inherent to that structure, but it would create some difficulties in the short run and likely would result in modest financial costs in the long run.

¹⁶Office of State Budget and Management, Current Operations Appropriation, Fund Code 12000 [Judicial-AOC-General Fund], Jan. 31, 2020, page 2, available at https://files.nc.gov/ncosbm/documents/files/2019-21_Certified_020_AOC.pdf.

Appendix A: Survey of Jurisdictions

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North Carolina Prosecution

North Carolina prosecutors are part of the judicial branch, and function for budgeting and administrative purposes as part of the Administrative Office of the Courts.

North Carolina prosecutors are part of the judicial branch. Article IV of the North Carolina Constitution, titled “Judicial,” creates the “judicial department,” i.e., the judicial branch of state government. Section 18 of that article provides for the office of District Attorney. Additional details about district attorneys, such as the number and boundaries of the prosecutorial districts, the duties of district attorneys, and the like, are set forth in Article 9 of Chapter 7A of the General Statutes, which is titled “Judicial Department.” The appellate courts have also recognized that district attorneys are part of the judicial branch.¹⁷

In the budgeting process, too, prosecutors are treated as part of the judicial branch,¹⁸ and are paid from state funds. The General Assembly decides how many assistant district attorneys each elected district attorney shall have.¹⁹ It also sets the salaries of elected district attorneys and their assistants.²⁰ The legislature has established a specific salary for elected district attorneys.²¹ For assistants, it has mandated a minimum salary, and an average salary per office, with individual salaries within each office otherwise established by the elected district attorney with the approval of the Administrative Office of the Courts (AOC).²²

Besides its role in approving the salaries of assistant district attorneys, the AOC has additional authority over prosecutors and their offices. For example, when the prior feasibility report on this topic was created in 2012, the General Assembly had recently directed the AOC to reduce the number of support staff in the district attorneys’ offices²³; conversely, the FY 2019-20 budget directed the AOC to create ten new Assistant District Attorney positions and seven new Legal Assistant positions “to support implementation of ‘Raise the Age.’”²⁴ The AOC also makes decisions regarding purchasing, technology, and other matters that affect prosecutors.

¹⁷ See, e.g., *State v. Friend*, 219 N.C. App. 338, 341 (2012) (noting that “the district attorney is a judicial or quasi-judicial officer”).

¹⁸ S.L. 2019-209 § 3.4(a) (setting the salaries of certain “judicial branch officials,” including district attorneys).

¹⁹ G.S. 7A-60(a1).

²⁰ G.S. 7A-65(a).

²¹ The current salary is \$137,399, see S.L. 2019-209 § 3.4(a1), plus longevity pay as described in G.S. 7A-65.

²² Jeff Welty, *Prosecutors’ Pay*, N.C. Criminal Law Blog (UNC School of Government, Aug. 2, 2010), <http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1460>; see also S.L. 2019-209 § 3.4(b1), setting a minimum salary of \$44,329 and the average of all salaries may not exceed \$82,593.

²³ Senate Appropriations Committee, Report on the Continuation, Expansion and Capital Budgets, page 104 (May 24, 2011), available at http://www.ncleg.net/DocumentSites/Committees/SenateAppropriationsBaseBudget/2011%20Long%20session/2011-05-24/2011-05-24_Senate_Committee_Report_Web.pdf

²⁴ Senate Appropriations Committee, Report on the Current Operations Appropriation Act, page 315 (May 29, 2019), available at

North Carolina prosecutors are loosely organized through the Conference of District Attorneys, a body created by statute to coordinate among the district attorneys and to assist them with the administration of their offices.²⁵ The Conference does not have supervisory authority over the district attorneys.

Defense

Indigent defense services in North Carolina are provided by the Office of Indigent Defense Services, an independent agency within the Administrative Office of the Courts.

In 2000, the General Assembly created the Office of Indigent Defense Services (IDS), an agency that was originally “within the Judicial Department” and whose budget was “part of the Judicial Department’s budget.”²⁶ At that time, the AOC was required to provide general administrative support to IDS (purchasing, payroll, and similar services), but IDS also had substantial autonomy: it operated “independently of the head of the [AOC],” and although it was required to consult with the AOC regarding budget issues, IDS had “final authority” over its own budget requests and the AOC could not reduce or modify IDS’s budget without IDS’s consent.²⁷

G.S. 7A-498.2 was amended in 2015.²⁸ Under the current version of the statute, IDS still operates as an independent agency, but it now placed within, and budgeted under, “the Administrative Office of the Courts” rather than “the Judicial Department.”²⁹ Additionally, the revised statute provides that IDS “may” (rather than “shall”) continue to exercise its powers independently of the AOC, and it removes the provision that gave IDS “final authority” over its budget and representation in matters before the General Assembly; instead, the current statute provides that the Director of the AOC “may” modify the budget of IDS or use funds appropriated to IDS without its consent.³⁰ IDS reports that this override authority has not been used by the AOC in practice, but the fact that it is possible under the statutes is an issue they have to bear in mind.

Federal Prosecution

Federal prosecutors are part of the executive branch.

There is a United States Attorney for each federal judicial district. The United States Attorneys’ Offices are part of the U.S. Department of Justice,³¹ which in turn is part of the executive branch. The Department of Justice also contains an Executive Office for United States Attorneys, the purpose of which is to support the United States Attorneys (for example, by providing educational conferences and

https://www.ncleg.gov/Sessions/2019/Budget/2019/Committee_Report_Senate_Appropriation_Base_Budget_PC_S_as_amended_May_29_2019.pdf.

²⁵ G.S. 7A-411.

²⁶ G.S. 7A-498.2(a), (d) (eff. Aug 2, 2000).

²⁷ G.S. 7A-498.2(b), (d), (e) (eff. Aug 2, 2000).

²⁸ S.L. 2015-241, § 18A.17(b), eff. July 1, 2015.

²⁹ G.S. 7A-498.2(a), (d)

³⁰ G.S. 7A-498.2(b), (d), (e)

³¹ U.S. Department of Justice organization chart, <https://www.justice.gov/agencies/chart>.

publishing a manual), to evaluate them, and to provide a liaison between them and other agencies within the Department.³² The Department also handles certain types of prosecutions from its Criminal Division, headquartered in Washington, D.C., particularly terrorism, public integrity, and human rights cases.³³

Defense

Indigent defense services in the federal courts are provided by the judicial branch, typically through public defender offices that have partial autonomy from the rest of the branch.

The Criminal Justice Act³⁴ requires that each U.S. district court implement a plan for providing indigent defense services. Any district with at least 200 indigent defendants per year is permitted to establish a public defender or community defender office, and virtually all districts have done so.³⁵ The difference between a public defender and a community defender is described in 18 U.S.C. § 3006A(g). Generally, chief public defenders are appointed by the court of appeals for the appropriate circuit, may be removed by the same court, and are subject to the budgeting authority of the Administrative Office of the Courts. Community defenders are nonprofit corporations authorized by the district court's Criminal Justice Act plan to provide defense services, and are funded by grants authorized by the Judicial Conference of the United States. Thus, both public and community defenders are part of the judicial branch, but operate without much centralized control or day-to-day supervision.

Southeastern States

Georgia Prosecution

Georgia prosecutors are state officials within the judicial branch. Administratively, they are not part of the court system, but rather are organized under their own umbrella group, the Prosecuting Attorneys' Council of Georgia.

³² Executive Office for United States Attorneys organization chart and overview, <https://www.justice.gov/jmd/organization-mission-and-functions-manual-executive-office-united-states-attorneys>.

³³ Criminal Division organization chart and overview, <https://www.justice.gov/jmd/organization-mission-and-functions-manual-criminal-division>.

³⁴ 18 U.S.C. § 3006A.

³⁵ There are 94 federal judicial districts. See U.S. Courts: Federal Judges, Frequently Asked Questions, "Court Information," <http://www.uscourts.gov/Common/FAQS.aspx>. At least 81 of them have established a public or community defender office, collectively serving 91 out of 94 districts. See Federal Public & Community Defender Directory, https://fd.org/sites/default/files/cja_resources/defenderdir.pdf.

The principal prosecutors in Georgia are called district attorneys. There is one district attorney for each judicial circuit, and there are currently 49 circuits³⁶ encompassing a total of 159 counties.³⁷ (There are also solicitors general who handle some misdemeanor and infraction cases, but there are currently only 27 full time solicitors general, and some parts of the state do without them entirely, so this survey focuses on district attorneys.³⁸) Article VI of the state constitution is entitled “Judicial Branch,” and section VIII of that article is entitled “District Attorneys,” indicating that Georgia prosecutors are state officers that fall under the judicial branch. By statute also, “[a]ll state paid personnel employed by the district attorneys . . . shall be employees of the judicial branch of state government.”³⁹

District attorneys are funded by a mix of state and local revenues.⁴⁰ The state pays the salaries of the elected district attorney and a number of assistants and support staff determined by a formula. Counties are free to supplement that appropriation, and many do so, to varying degrees. The net effect is that state funding predominates in rural areas, while wealthier urban areas are principally funded at the county level.⁴¹

Georgia prosecutors are organized under the banner of the Prosecuting Attorneys’ Council of Georgia,⁴² a state-funded agency that was created by Ga. Code § 15-18-40. The Council is the “fiscal officer for the prosecuting attorneys and shall prepare and submit budget estimates of state appropriations necessary for the maintenance and operation of the district attorneys’ . . . offices.”⁴³ Once state appropriations are made, the Council actually receives and disburses the funds.⁴⁴ The district attorneys and the Council are treated, for budget purposes, as independent of the rest of the court system.⁴⁵ The Council also provides human resources, purchasing, information technology, and other administrative support, as well as training, to the prosecutors.⁴⁶ At one time, the AOC provided some administrative support to the Council and to prosecutors, but the last vestige of that – the payroll function – was transferred from the AOC to the Council more than a decade ago.⁴⁷

³⁶ Legislation currently pending in the Georgia General Assembly (SB 9) would create a new Columbia Judicial Circuit, raising the total count from 49 to 50; if passed, it becomes effective July 1, 2021.

³⁷ Telephone conversation with Stan Gunter, former Executive Director, Prosecuting Attorneys’ Council of Georgia (PACGA) (Mar. 27, 2012); email correspondence with Pete Skandalakis, current Executive Director of PACGA and Carla Rieffel Bozeman, Director of Communications for PACGA (March 16, 2021).

³⁸ *Id.*

³⁹ Ga. Code § 15-18-19.

⁴⁰ Ga. Const. art. VI, § VIII, ¶ I(c) (stating that district attorneys may receive “local supplements to their compensation”). *See also* Ga. Code § 15-18-10; Ga. Code § 15-18-19.

⁴¹ Communications with Gunter, Skandalakis, and Bozeman *supra* note 37.

⁴² Prosecuting Attorneys’ Council of Georgia Website, <http://www.pacga.org/>.

⁴³ Ga. Code § 15-18-40(c)(1).

⁴⁴ Ga. Code § 15-18-19(e)(5) (“The compensation of [prosecutors and their staffs] shall be paid . . . by the Prosecuting Attorneys’ Council . . .”).

⁴⁵ Office of Planning and Budget, Amended FY 2019 and FY 2020 Budget in Brief, *available at* https://opb.georgia.gov/sites/opb.georgia.gov/files/related_files/site_page/FY%202020%20Budget%20in%20Brief%20%28FINAL%29.pdf.

⁴⁶ Communications with Gunter, Skandalakis, and Bozeman *supra* note 37.

⁴⁷ Communications with Gunter, Skandalakis, and Bozeman *supra* note 37.

Defense

Indigent defense in Georgia is provided through the Georgia Public Defender Council⁴⁸, an agency in the executive branch.

Since 2003, the Georgia Public Defender Council,⁴⁹ created by statute,⁵⁰ has administered the indigent defense system in Georgia. The Council is “is an independent agency within the executive branch of the state government of Georgia.”⁵¹ The director is appointed by the governor.⁵² The Council is the fiscal officer for all of the state’s public defender offices.⁵³ The legislature appropriates funding directly to the Council.⁵⁴

Maryland Prosecution

Prosecutors in Maryland are fundamentally county officials, paid for and supported by local governments.

Articles II, III, and IV of the Maryland Constitution are entitled “Executive Department,” “Legislative Department,” and “Judiciary Department,” respectively. Prosecutors are provided for in article V, entitled “Attorney-General and State’s Attorneys.” Generally, the constitution provides for an elected State’s Attorney for each of the state’s 23 counties, plus one for the City of Baltimore. (Baltimore functions like a separate county in the system described below.) State’s Attorneys handle virtually all criminal cases in the state at the trial level. Some low-level infractions and regulatory offenses are handled by the county attorneys. The attorney general’s office represents the state in criminal appeals.

Section 9 of article V of the state constitution provides that “[t]he State’s Attorney shall perform such duties and receive such salary as shall be prescribed by the General Assembly.” However, under Md. Code, Crim. Proc. § 15-401, the salary of each State’s Attorney is set, and paid, by his or her county. In practice, these provisions are reconciled by having each county establish and pay the salary of the State’s Attorney, subject to the approval of the legislature.⁵⁵ This method explains the existence of statutory salary provisions for each individual county: section 15-402 concerns Allegany County, section 15-403 concerns Anne Arundel County, and so on. Many of the provisions establish specific salaries, while a few simply provide that the elected prosecutor’s salary shall be set by the county.

⁴⁸ HB 328, enacted by the Georgia General Assembly on July 1, 2015, changed the organization’s name; it was previously known as the Georgia Public Defender Standards Council.

⁴⁹ Georgia Public Defender Council Website, <http://www.gapubdef.org/>.

⁵⁰ Ga. Code § 17-12-1.

⁵¹ Georgia Public Defender Council, Mission Statement, <http://www.gapubdef.org/>.

⁵² Ga. Code § 17-12-5(a).

⁵³ Ga. Code § 17-12-6(b)(1).

⁵⁴ Office of Planning and Budget, Amended FY 2019 and FY 2020 Budget in Brief, pages 271-75, *available at* https://opb.georgia.gov/sites/opb.georgia.gov/files/related_files/site_page/FY%202020%20Budget%20in%20Brief%20%28FINAL%29.pdf.

⁵⁵ Telephone conversation with Steven Kroll, State’s Attorneys’ Coordinator, State’s Attorneys’ Association (Mar. 21, 2012).

The county also provides for and pays any assistant prosecutors and support staff.⁵⁶ Accordingly, the State's Attorneys do not appear in the state budget.⁵⁷ However, Md. Code, Crim. Proc. § 15-201 et seq. establishes the State's Attorneys' Coordination Council,⁵⁸ which, through a State's Attorneys' Coordinator, provides training and technical assistance to the state's prosecutors. The permanent staff of the office is relatively small: the Coordinator, an administrative assistant, and a resource prosecutor.⁵⁹ The office is funded by an annual grant from the governor's office of crime control.⁶⁰

Defense

Indigent defense in Maryland is provided by a single, state-wide public defender system, which is part of the executive branch.

Indigent defense in Maryland is provided through the Office of the Public Defender, a state-wide public defender system that was created and is defined by Title 16 of the Maryland Code of Criminal Procedure.⁶¹ A board of directors appoints the public defender to a six-year term.⁶² The agency is located within the executive branch.⁶³ However, the agency's website⁶⁴ indicates that it is an "independent [s]tate [a]gency," and the state budget treats the Office of the Public Defender as a stand-alone agency.⁶⁵

South Carolina Prosecution

South Carolina prosecutors are principally state officials, although they are funded by a mix of state and local revenues. They fall within the executive branch of the state government.

The principal prosecutors in South Carolina are called "solicitors." Solicitors prosecute all serious criminal cases and ostensibly have one civil duty as well (asset forfeiture), but in practice forfeitures are

⁵⁶ *Id.*

⁵⁷ Maryland Department of Budget and Management, FY 2021 Maryland Budget Highlights, available at <https://dbm.maryland.gov/budget/Documents/operbudget/2021/proposed/FY2021MarylandStateBudgetHighlights.pdf>.

⁵⁸ For more information, see Maryland State's Attorneys' Association Website, <http://www.mdsaa.org/>, and State's Attorneys' Coordination Council Website, <http://www.msa.md.gov/msa/mdmanual/26excom/html/33statt.html>.

⁵⁹ Telephone conversation with Kroll, *supra* note 55.

⁶⁰ Telephone conversation with Kroll, *supra* note 55.

⁶¹ 2019 annual report for the Maryland Office of the Public Defender, available at <https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/024200/024245/20200040e.pdf>.

⁶² Md. Code, Crim. Proc. § 16-203.

⁶³ Md. Code, Crim. Proc. § 16-202 ("There is an Office of the Public Defender in the Executive Branch of State government.").

⁶⁴ Maryland Office of the Public Defender Website, "About Us," at <https://www.opd.state.md.us/about-us>.

⁶⁵ Maryland Department of Budget and Management, FY 2021 Maryland Budget Highlights, available at <https://dbm.maryland.gov/budget/Documents/operbudget/2021/proposed/FY2021MarylandStateBudgetHighlights.pdf> (see pages 53 and 113 of PDF, showing a 2020 budget of \$115 million for 888.5 employees).

usually contracted out to an attorney outside the solicitor's office.⁶⁶ Minor criminal cases arising within city limits are prosecuted in municipal court by city attorneys, while minor cases arising in unincorporated areas may be handled by solicitors, but are more often prosecuted by police officers in summary court.⁶⁷

Article V of the South Carolina Constitution is entitled "the Judicial Department." Section 24 of that article provides that "[t]here shall be . . . in each judicial circuit a solicitor . . . elected by the electors thereof [for a four-year term]. . . . The General Assembly shall provide by law for their duties and compensation." The same section of the constitution states that "[t]he Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record." Although this may appear to indicate that solicitors are part of the judicial branch, S.C. Code § 1-1-110 specifies that certain officers, including "the Attorney General and the solicitors," constitute "the executive department of this State."⁶⁸

S.C. Code § 1-7-320 states that solicitors "shall perform the duty of the Attorney General" when requested, and S.C. Code § 1-7-100 authorizes the Attorney General to assume responsibility for any prosecution in the interest of justice (e.g., conflict cases) and directs the Attorney General to advise solicitors in their official duties. However, this does not mean that solicitors are a part of the Attorney General's structure; both circuit solicitors and the Attorney General are independent elected officials⁶⁹, and in practice the Attorney General does not supervise or control solicitors closely.⁷⁰

The South Carolina Commission on Prosecution Coordination is an independent state agency under the executive branch, established by S.C. Code § 1-7-910 et seq. The Commission's primary role is to provide training, education, support, and some administrative services for prosecutors, and it also serves a pass-through fiscal role explained below.⁷¹

The elected solicitors are paid by the state, as is one administrative assistant in each office.⁷² Assistant solicitors, legal assistants, and other staff are paid in part by the state and in part by counties.⁷³ A limited number of counties also provide some additional support such as technology services.⁷⁴ An administering county is designated for each circuit solicitor (each of the 16 judicial circuits is made up of between 2-5 counties), and the designated administering county is responsible for receiving funds for

⁶⁶ Email correspondence with Lisa Catalanotto, Executive Director of the South Carolina Commission on Prosecution Coordination (March 17, 2021).

⁶⁷ Telephone conversation with David Ross, Executive Director, Commission on Prosecution Coordination (Mar. 21, 2012); email correspondence with Catalanotto, *supra* note 66.

⁶⁸ See also *State v. Tootle*, 330 S.C. 512, 500 S.E.2d 481 (1998) ("The solicitors and Attorney General are members of the executive branch of government").

⁶⁹ See S.C. Const. art. VI, § 7 (establishing the elected offices of Attorney General, Treasurer, etc.).

⁷⁰ Communications with Catalanato and Ross, *supra* note 67.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*; see also S.C. Code § 1-7-490 (designating the source of various assistants' salaries, including several to be paid by counties).

⁷⁴ Communications with Catalanato and Ross, *supra* note 67.

and distributing such funds to the solicitor.⁷⁵ The solicitors' budget requests to the legislature are prepared and presented by the Commission, and state allocations flow through the Commission.⁷⁶

Defense

Indigent defense services are provided in South Carolina through an independent agency in the executive branch state government.

Indigent defense services are coordinated by the Commission on Indigent Defense, created by S.C. Code § 17-3-310, through the Office of Indigent Defense, created by S.C. Code § 17-3-320. The Commission is an independent executive agency for budget purposes.⁷⁷ There is a public defender for each circuit, selected by a panel comprised of local lawyers.⁷⁸

As with the Circuit Solicitors, the salary and benefits for the Circuit Public Defenders and one administrative assistant per circuit are paid by the State; assistant defenders and other staff in the defender offices are paid in part by the state and the counties, and state funds allocated for the operation of the defender offices flow through the Commission.⁷⁹

Tennessee Prosecution

Tennessee prosecutors are state officials and part of the judicial branch. A prosecutors' conference handles budgetary and administrative matters for all prosecutors' offices.

Prosecutors are part of the judicial branch of state government in Tennessee. Article VI of the Tennessee Constitution is entitled "Judicial Department." Section 5 of that article, "Attorney general; state reporter; district attorneys," provides for an elected "Attorney for the State" for each circuit or district. Chapter 7 ("District Attorneys General") of Title 8 ("Public Officers and Employees")⁸⁰ of the Tennessee Code further details the nature of Tennessee's prosecutors. The salaries of District Attorneys General and their assistants are set by statute.⁸¹ The District Attorneys General Conference, created by Tenn.

⁷⁵ Communications with Catalanato and Ross, *supra* note 67.

⁷⁶ S.C. 2020-2021 General Appropriations Bill (H 4100) § 60, https://www.scstatehouse.gov/sess124_2021-2022/appropriations2021/wmp1a.htm#s60; see also S.C. Code § 1-7-940(A)(2) (requiring the Commission to submit the solicitors' budgets to the General Assembly).

⁷⁷ S.C. 2020-2021 General Appropriations Bill (H 4100) § 61, https://www.scstatehouse.gov/sess124_2021-2022/appropriations2021/wmp1a.htm#s61.

⁷⁸ S.C. Code § 17-3-510; communications with Catalanato and Ross, *supra* note 67.

⁷⁹ S.C. Code § 17-3-330(A)(1); communications with Catalanato and Ross, *supra* note 67.

⁸⁰ Note that the statutory provisions concerning prosecutors are not located in Title 16 ("Courts") or Title 17 ("Judges and Chancellors") of the Tennessee Code.

⁸¹ Tenn. Code § 8-7-105 (elected district attorneys general); Tenn. Code § 8-7-201 et seq. (assistant district attorneys general).

Code § 8-7-301 et seq., includes an executive director, elected by the District Attorneys General and paid a salary provided by statute, along with additional staff.⁸²

The state budget reflects the placement of prosecutors within the judicial branch.⁸³ In the budgeting process, Tennessee prosecutors are independent of the Administrative Office of the Courts and other judicial branch agencies.⁸⁴ The executive director of the Conference is entitled to a budget officer among other necessary assistants,⁸⁵ and is required to submit budget requests for the offices of district attorneys general to the legislature.⁸⁶ Funding for the various offices of the District Attorneys General is appropriated based on that request,⁸⁷ and once allocated, funds are transferred to the Conference for further distribution to the prosecutors' offices.

The Conference also provides administrative support services, such as human resources and information technology services, to prosecutors' offices.⁸⁸

Defense

Indigent defense in Tennessee is provided principally by state-funded public defender offices, which are part of the judicial branch. A public defenders' conference handles budgetary and administrative matters for all public defenders' offices.

The state budget⁸⁹ describes the judicial branch as consisting of several agencies, including the District Public Defenders Conference. Chapter 14 ("Public Defenders") of Title 8 ("Public Officers and Employees") of the Tennessee Code creates a public defender office for each district,⁹⁰ except for two districts in which local public defender offices apparently already existed.⁹¹ State law also creates a District Public Defenders Conference,⁹² which appears to be similar to the prosecutors' conference. The

⁸² Tenn. Code § 8-7-308; see also Tennessee District Attorneys General Conference website, "Who We Are," available at <https://www.tndagc.org/meet-the-team/>.

⁸³ State of Tennessee 2020-2021 Budget, page B-228, available at <https://www.tn.gov/content/dam/tn/finance/budget/documents/2021BudgetDocumentVol1.pdf>.

⁸⁴ Telephone conversation with Wally Kirby, Executive Director, District Attorneys General Conference (Mar. 20, 2012).

⁸⁵ Tenn. Code § 8-7-311.

⁸⁶ Tenn. Code § 8-7-309(a)(5).

⁸⁷ State of Tennessee 2020-2021 Budget, pages B-229 and B-231, available at <https://www.tn.gov/content/dam/tn/finance/budget/documents/2021BudgetDocumentVol1.pdf> (providing total 2020 allocation of \$145 million for the prosecutors' conference and \$64 million for the public defenders' conference, apportioned among various functions and programs).

⁸⁸ Telephone conversation with Kirby, *supra* note 84; see also State of Tennessee 2020-2021 Budget, pages B-228-229, available at <https://www.tn.gov/content/dam/tn/finance/budget/documents/2021BudgetDocumentVol1.pdf> (indicating that the Office of the Executive Director had 33 employees in 2020, providing administrative and other support to a total of 1,237 prosecutors, assistants, and staff).

⁸⁹ State of Tennessee 2020-2021 Budget pages B-230-31, available at <https://www.tn.gov/content/dam/tn/finance/budget/documents/2021BudgetDocumentVol1.pdf>.

⁹⁰ Tenn. Code § 8-14-201 et seq.

⁹¹ Tenn. Code § 8-14-210 (appropriating funds for the public defender offices in the 20th and 30th judicial districts).

⁹² Tenn. Code § 8-14-301.

statutes contain similar provisions for an executive director of the conference and for support staff. When the public defender offices are conflicted out of a case, the Administrative Office of the Courts pays for private appointed counsel.⁹³

Virginia Prosecution

Although funded principally by state appropriations, Virginia prosecutors are best described as local government officials. They do have a training and support agency within the executive branch of state government.

Prosecutors are not mentioned in the articles of the Virginia Constitution that define the legislative, executive, and judicial branches of state government.⁹⁴ Instead, section 4 (“County and City Officers”) of article VII (“Local Government”) of the constitution provides that “[t]here shall be elected by the qualified voters of each county and city a treasurer, a sheriff, an attorney for the Commonwealth, a clerk . . . and a commissioner of revenue. The duties and compensation of such officers shall be prescribed by general law or special act.” By statute, “[t]he attorney for the Commonwealth and assistant attorney for the Commonwealth shall be a part of the department of law enforcement of the county or city in which he is elected or appointed”⁹⁵ Although the state constitution and statutes categorize Virginia’s prosecutors as local officials, from an administrative standpoint, the elected Commonwealth’s Attorneys are state employees. Their salaries are paid entirely by the state, and they are eligible for state employee benefits.⁹⁶

Beyond the elected attorneys’ salaries, funding for prosecutors’ offices more generally comes primarily through “a single-item lump sum [appropriation by the legislature] to the Compensation Board for later distribution among Commonwealth’s Attorneys offices following an established formula,” with some additional funding coming from local government, particularly in more expensive areas such as Northern Virginia.⁹⁷ Local governments also generally provide office space and support functions such as human resources, purchasing, and information technology.⁹⁸ Assistant prosecutors and support staff are classified administratively as local employees.⁹⁹

Virginia’s statutes provide for a “Commonwealth Attorneys Services Council” to be established “in the executive branch of state government.”¹⁰⁰ The purpose of the Council is to provide “training, education and services for attorneys for the Commonwealth.”¹⁰¹ The Council is state funded, and falls within the

⁹³ Telephone conversation with Kirby, *supra* note 84.

⁹⁴ Va. Const. articles IV, V, and VI, respectively.

⁹⁵ Va. Code § 15.2-1627(b).

⁹⁶ Telephone conversation with Bob Harris, former Director, Commonwealth’s Attorneys’ Services Council (CASC) (Mar. 21, 2012); email correspondence with Jane Sherman Chambers, Director, CASC (March 16, 2021).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Va. Code § 2.2-2617.

¹⁰¹ *Id.*

Office of Public Safety, which is the equivalent of a North Carolina executive department.¹⁰² Recently, supplemental funding for prosecutor training also became available as a result of Virginia’s participation in the national Depakote settlement with Abbott Laboratories.¹⁰³

Defense

Indigent defense in Virginia is coordinated by a commission that is similar to IDS. For budget purposes, the commission is part of the judicial branch, though it appears to operate autonomously.

The Virginia Indigent Defense Commission, established by statute,¹⁰⁴ maintains and oversees the state’s public defender offices; sets the standards for and maintains the lists of attorneys eligible for court appointment; handles requests for appropriations; and otherwise coordinates indigent defense in the state.¹⁰⁵ The Commission is classified as a judicial agency for budget purposes,¹⁰⁶ though the members of the Commission come from all three branches of government.¹⁰⁷ The Commission appears to be autonomous, with a statutory directive stating it is “supervisory and shall have sole responsibility for the powers, duties, operations, and responsibilities” assigned to it by statute.¹⁰⁸

States Comparable to North Carolina in Size and Population Density

Kentucky Prosecution

Prosecutors in Kentucky are part of the executive branch of state government and, although independently elected, are under the authority of the attorney general.

There are two types of prosecutors in Kentucky.

- *Commonwealth’s Attorneys.* Sections 69 to 108 of the Kentucky Constitution define the “Executive Department.” While sections 69 to 96 concern “Officers for the State at Large,” sections 97 to 108 concern “Officers for Districts and Counties.” Section 97 provides for a “Commonwealth’s Attorney” to be elected for each judicial circuit. These prosecutors handle offenses within the jurisdiction of the circuit courts – generally, felonies. Under section 108 of the constitution, the legislature has the power, which it has not exercised, to abolish the office

¹⁰² Office of Public Safety and Homeland Security, Executive Budget Document (2020-2022), <https://dpb.virginia.gov/budget/buddoc20/partb/OfficeOfPublicSafetyAndHomelandSecurity.pdf>.

¹⁰³ Va. Code § 2.2-2619.1; correspondence with Chambers, *supra* note 96 (\$20 million allocated for Commonwealth Attorneys, with \$2 million disbursed immediately and the balance placed in a fund to be used for training; up to 6% of the balance may be accessed per year, subject to the same limitations as asset forfeiture funds).

¹⁰⁴ Va. Code § 19.2-163.01.

¹⁰⁵ *Id.*

¹⁰⁶ Virginia General Assembly LIS, FY 2021-2022 Budget Bill, HB 5505, Chapter 56, <https://budget.lis.virginia.gov/secretariat/2020/2/HB5005/Chapter/1/judicial-department/>.

¹⁰⁷ Va. Code § 19.2-163.02.

¹⁰⁸ Va. Code § 19.2-163.01.

of commonwealth’s attorney, in which case the duties of that office would fall to the county attorneys.¹⁰⁹

- *County Attorneys.* Section 99 of the state constitution provides for the election of a “County Attorney” in each county.¹¹⁰ County attorneys handle district court cases, including misdemeanors, juvenile cases, and preliminary proceedings in felony cases.¹¹¹ They also handle a variety of civil matters on behalf of their counties.

The statutory provisions regarding Kentucky’s prosecutors are contained in Chapter 15 of the Kentucky Statutes, “Department of Law,” which is a part of Title III, “Executive Branch.” The statutes provide for a system of prosecution that is unified under the control of the attorney general to an extent that is not common elsewhere. Under Ky. Rev. Stat. § 15.700, “a unified and integrated prosecutor system is . . . established with the Attorney General as chief prosecutor of the Commonwealth.”

The attorney general chairs the Prosecutors Advisory Council,¹¹² which provides continuing education and other assistance to prosecutors and is responsible for “the preparation of the budget of the unified prosecutorial system.”¹¹³ Funds allocated by the legislature for prosecutors are disbursed to the Prosecutors Advisory Council, which administers those funds to the prosecutors’ offices. The Council also provides human resources, purchasing, and other support services.¹¹⁴ The state pays the salaries and expenses of both types of prosecutors (commonwealth and county) and the prosecutors’ staffs, though counties are permitted to contribute if desired and are responsible for expenses incurred in connection with certain civil law responsibilities that are allocated to the county attorneys.¹¹⁵ In 2020, Kentucky allocated approximately \$64 million for commonwealth’s attorneys and \$55 million for county attorneys.¹¹⁶

Defense

Kentucky provides indigent defense services primarily through the Department of Public Advocacy, an “independent agency of state government” in the judicial branch.

¹⁰⁹ Ky. Const. §§ 69-108.

¹¹⁰ Ky. Const. § 99.

¹¹¹ Kentucky Office of State Budget Director, 2020-2021 Operating Budget, pages 37 (Commonwealth’s Attorneys) and 38 (County Attorneys), *available at* <https://osbd.ky.gov/Publications/Documents/Budget%20Documents/2020-2021%20Budget%20of%20the%20Commonwealth/2020-2021%20BOC%20Volume%20I%20-%20FINAL.pdf>. See also Ky. Rev. Stat. § 15.725 (stating the duties of the Commonwealth’s attorneys and county attorneys).

¹¹² Prosecutors Advisory Council Website, <https://ag.ky.gov/about/Office-Divisions/pac/Pages/default.aspx>.

¹¹³ Ky. Rev. Stat. § 15.705. The attorney general is specifically tasked with providing continuing education to the state’s prosecutors, which they must complete. Ky. Rev. Stat. § 15.718.

¹¹⁴ Telephone conversation with Gina Carey, Executive Advisor, Prosecutors Advisory Council (Mar. 20, 2012) (at that time, the Council had two HR staffers for approximately 1,150 prosecutorial personnel).

¹¹⁵ Ky. Rev. Stat. §§ 15.750, 15.755, 15.765, 15.770.

¹¹⁶ Kentucky Office of State Budget Director, 2020-2021 Operating Budget, pages 37 (Commonwealth’s Attorneys) and 38 (County Attorneys), *available at* <https://osbd.ky.gov/Publications/Documents/Budget%20Documents/2020-2021%20Budget%20of%20the%20Commonwealth/2020-2021%20BOC%20Volume%20I%20-%20FINAL.pdf>.

The Department of Public Advocacy was created by Chapter 31, “Department of Public Advocacy,” of Title IV, “Judicial Branch,” of the Kentucky Statutes “as an independent agency of state government, attached for administrative purposes to the Justice and Public Safety Cabinet.”¹¹⁷ Generally, there is a commission that nominates candidates for the head of the department; the governor chooses one of the candidates; and the head of the department then hires additional staff as needed.¹¹⁸ Larger counties must have public defender offices, while smaller counties may choose between having a public defender office and having a contract system, subject to the department’s approval.¹¹⁹ The costs of indigent defense are shared to some extent between the state and the counties. The state spent approximately \$72 million on the department in 2020.¹²⁰

Michigan Prosecution

Prosecutors in Michigan are local rather than state officials. However, there is a small state agency that coordinates, and provides training and technical assistance to, Michigan prosecutors. That agency is an “autonomous entity in the department of attorney general,” and so falls within the executive branch.

Article VII of the Michigan Constitution is entitled “Local Government,” and section 4 of that article provides that “[t]here shall be elected for four-year terms in each organized county a . . . prosecuting attorney, whose duties and powers shall be provided by law.”¹²¹ Prosecutors are not mentioned in article V, “Executive Branch,” or article VI, “Judicial Branch.”

Chapter 49 of the Michigan Compiled Laws is entitled “Prosecuting Attorneys.” “The prosecuting attorneys shall, in their respective counties, appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested.”¹²² State law gives the county the power to set the salary of the prosecuting attorney,¹²³ allows the county to authorize any number of assistant prosecutors, investigators, and the like,¹²⁴ and allows the county authorities to set the salaries of those additional personnel.¹²⁵ Counties also provide administrative support such as human resources and information technology services to prosecutors.¹²⁶

¹¹⁷ Ky. Rev. Stat. § 31.010. *See also* Kentucky Department of Public Advocacy Website, <http://dpa.ky.gov/>.

¹¹⁸ Ky. Rev. Stat. §§ 31.015 – 31.030.

¹¹⁹ Ky. Rev. Stat. §§ 31.060, 31.065.

¹²⁰ Kentucky Office of State Budget Director, 2020-2021 Operating Budget, page 220, *available at* <https://osbd.ky.gov/Publications/Documents/Budget%20Documents/2020-2021%20Budget%20of%20the%20Commonwealth/2020-2021%20BOC%20Volume%20I%20-%20FINAL.pdf>.

¹²¹ Mich. Const. art. VII, § 4.

¹²² Mich. Comp. Laws § 49.153.

¹²³ Mich. Comp. Laws § 49.159.

¹²⁴ Mich. Comp. Laws § 49.31.

¹²⁵ Mich. Comp. Laws § 49.34.

¹²⁶ Telephone conversation with Tom Robertson, former Executive Secretary, Prosecuting Attorneys Coordinating Council (PACC) (Mar. 20, 2012); email correspondence with Cheri Bruinsma, Executive Director of PACC (March 18, 2021).

There is an “office of prosecuting attorneys coordination,” which is an “autonomous entity in the department of attorney general.”¹²⁷ (The attorney general is part of the executive branch of state government, under article V, section 3 of the Michigan Constitution.) The office is autonomous in the sense that it prepares and submits its own budget requests, separate and apart from the attorney general, and is not directly supervised by the attorney general.¹²⁸ The office is controlled by a council comprised of the attorney general or his designee, the president of the Michigan Prosecuting Attorneys Association,¹²⁹ and three prosecuting attorneys who must be from counties of varied sizes.¹³⁰ It is run on a day to day basis by an executive secretary, who is appointed by the council,¹³¹ and provides services such as continuing education, legal updates, and legal research assistance.

A line item the FY 2020-2021 budget allocated approximately \$2.2 million for the Prosecuting Attorneys Coordinating Council.¹³² There appears to be no other state funding of the prosecuting attorneys themselves.

Defense

Michigan’s system of providing indigent defense changed in 2013. The state now provides indigent defense services through the Michigan Indigent Defense Council, “an autonomous entity” within the judicial department.

When the School prepared its previous report in 2012, there was no state funding or coordination of indigent defense in Michigan, other than a State Appellate Defender Office to handle indigent defendants’ appeals.¹³³ Instead, indigent defense was provided through a patchwork system of county funding and varying local practices, which led to heavy criticism and calls for reform.¹³⁴ An advisory committee was formed, and based on their recommendations the state created the Michigan Indigent Defense Council in 2013 as an independent agency within the judicial branch.¹³⁵ The Council is required to develop and oversee the implementation and enforcement of minimum standards, rules, and

¹²⁷ Mich. Comp. Laws § 49.103.

¹²⁸ Communications with Robertson and Bruinsma, *supra* note 126.

¹²⁹ Michigan Prosecuting Attorneys Association Website, <http://www.michiganprosecutor.org>. The website describes the Association as a “voluntary association of the 83 county prosecutors, the Attorney General, and the U.S. Attorneys serving in Michigan.”

¹³⁰ Mich. Comp. Laws § 49.104. *See also* Prosecuting Attorneys Coordinating Council Website, <http://www.michiganprosecutor.org/PACC.htm>.

¹³¹ Mich. Comp. Laws § 49.103.

¹³² Michigan FY 2020-2021 Budget, Article 5, Part 1, available at <https://www.legislature.mi.gov/documents/2019-2020/publicact/pdf/2020-PA-0166.pdf>.

¹³³ Michigan State Appellate Defender Office Website, <http://www.sado.org/>.

¹³⁴ See, e.g., National Legal Aid & Defender Association, *A Race to the Bottom, Speed & Savings over Due Process: A Constitutional Crisis* (June 2008), available at http://www.mynlada.org/michigan/michigan_report.pdf. Another recent critical report is here: American Civil Liberties Union, *Faces of Failing Public Defense Systems: Portraits of Michigan’s Constitutional Crisis* (Apr. 2011), available at http://www.aclu.org/files/assets/MI_failedjustice_bookletsm.pdf.

¹³⁵ *Report of the Michigan Advisory Commission on Indigent Defense* (June 22, 2012), available at <https://michiganidc.gov/wp-content/uploads/2015/05/Final-Report-Advisory-Commission.pdf>; Michigan Indigent Defense Commission Act, Mich. Comp. Laws § 780.981, et seq.

procedures for defense services, but the local system still decides whether defense services will be provided by public defenders, appointed counsel, or a mix of both.¹³⁶ The FY 2020-2021 budget allocated approximately \$8.6 million for the Council.¹³⁷

Minnesota Prosecution

Prosecutors in Minnesota are county officials, not state officials. They are paid by their county boards, subject to certain constraints.

Prosecutors are not mentioned in the Minnesota Constitution.¹³⁸

The title of the Minnesota Statutes headed “Counties, County Officers, Regional Authorities” includes Chapter 388, “County Attorney.” The county attorney is the principal prosecutor in Minnesota, and is responsible for prosecuting all felony cases as well as certain other criminal cases, and for handling some non-criminal cases.¹³⁹ Some low-level offenses are prosecuted by city attorneys, or by private lawyers pursuant to a contract with a city.¹⁴⁰ Counties may also contract with private lawyers to prosecute misdemeanors.¹⁴¹

The salaries of elected county attorneys are determined by the county board, subject to statutory minimums in certain smaller counties and with the prosecutor having the right to appeal to a judge if he or she believes that the board’s actions were “arbitrary, capricious, oppressive, or in unreasonable disregard for the responsibilities and duties of said office, and the county attorney's experience, qualifications, and performance.”¹⁴² The salaries of assistant prosecutors are also determined and paid by the county.¹⁴³ Further, the county provides administrative support such as human resources and information technology to the county attorney.¹⁴⁴

Minnesota’s statutes provide for a County Attorneys Council, comprised of the 87 elected county attorneys and the attorney general. Its board of governors is authorized to hire an executive director, who in turn may hire appropriate staff to provide training, legal updates, and technical assistance to the

¹³⁶ Mich. Comp. Laws § 780.989, 991, 993; see also Michigan Indigent Defense Commission Website FAQ (“The local system will select their desired indigent defense system, and multiple models ranging from a public defender office to a court appointed system to a mixed system will be available”), available at <https://michiganidc.gov/faq/#toggle-id-28>.

¹³⁷ Michigan FY 2020-2021 Budget, Article 5, Part 1, Section 107, available at <https://www.legislature.mi.gov/documents/2019-2020/publicact/pdf/2020-PA-0166.pdf>.

¹³⁸ Minn. Const., available at <http://www.house.leg.state.mn.us/cc/rules/mncon/mncon.htm>.

¹³⁹ Minn. Stat. § 388.051.

¹⁴⁰ Telephone conversation with John Kingrey, former Executive Director, Minnesota County Attorneys Association (MCAA) (Mar. 20, 2012); email correspondence with Robert Small, Executive Director of MCAA (March 16, 2021).

¹⁴¹ Minn. Stat. § 388.09.

¹⁴² Minn. Stat. §§ 388.18, 388.22.

¹⁴³ Minn. Stat. § 388.10.

¹⁴⁴ Communication with Kingrey and Small, *supra* note 140.

prosecutors of the state.¹⁴⁵ However, the state legislature has ceased funding the Council.¹⁴⁶ Its function has been assumed by an organization called the Minnesota County Attorneys Association, which describes itself as a non-profit, “independent, voluntary organization of County Attorneys.”¹⁴⁷ The Association is funded in part by dues paid by the county attorneys, in part from grants and contracts, and in part from the sales of legal forms and other products.¹⁴⁸

Defense

Minnesota has a state-wide public defender system. The State Board of Public Defense is an independent agency in the judicial branch.

Chapter 611 of the Minnesota Statutes, “Rights of Accused,” includes provisions concerning the state’s public defender system.¹⁴⁹ The statutes provide for a “State Board of Public Defense,”¹⁵⁰ which “is a part of, but is not subject to the administrative control of, the judicial branch of government.”¹⁵¹ The board selects the state public defender,¹⁵² sets his or her salary within statutory limits,¹⁵³ and appoints chief public defenders for each of the state’s judicial districts.¹⁵⁴ The board also prepares and submits budget requests to the state legislature.¹⁵⁵ The state generally pays for the public defender system, subject to certain caveats.¹⁵⁶ The state currently appropriates approximately \$89 million per year to pay for the system, which includes an administrative office.¹⁵⁷ Roughly 90% of the Board’s budget goes towards attorneys and staff.¹⁵⁸

Missouri Prosecution

¹⁴⁵ Minn. Stat. §§ 388.19-20.

¹⁴⁶ Communication with Kingrey and Small, *supra* note 140.

¹⁴⁷ Minnesota County Attorneys Association Website, <http://www.mcaa-mn.org/default.aspx>. According to a history of the Association, the Council is a “semi-state agency” while the Association is a private non-profit, but at one time the two organizations “met at the same time and had the same officers.” William Jeronimus, *Evolution of the Minnesota County Attorney’s Association*, previously available at <http://www.mcaa-mn.org/docs/2007/Evolution.pdf>. The Council now appears to exist in name only.

¹⁴⁸ Communication with Kingrey and Small, *supra* note 140.

¹⁴⁹ Minn. Stat. § 611.14 et seq.

¹⁵⁰ Minn. Stat. § 611.215. See also Minnesota Board of Public Defense Website, <http://www.pubdef.state.mn.us/>.

¹⁵¹ Accordingly, public defenders generally are “are state employees in the judicial branch.” Minn. Stat. § 611.265.

¹⁵² Minn. Stat. § 611.23.

¹⁵³ Minn. Stat. § 15A.083.

¹⁵⁴ Minn. Stat. § 611.26.

¹⁵⁵ Minn. Stat. § 611.215.

¹⁵⁶ Minn. Stat. § 611.27. See also Minnesota Management & Budget, 2020-2021 Public Defense Board Biennial Budget, available at <https://mn.gov/mmb-stat/documents/budget/2020-21-biennial-budget-books/base-budget-november/public-defense-board.pdf>. The budget indicates that “public defender services are almost exclusively financed by the general fund,” with tiny fractions coming from grants, the federal government, or cost-sharing with certain counties.

¹⁵⁷ Public Defense Board Biennial Budget, *supra* note 156.

¹⁵⁸ *Id.*

Missouri's prosecutors are county officials, elected and funded at the county level. They are not part of any of the branches of state government.

Missouri's constitution mentions the prosecution function generally but does not set out in detail the structure through which prosecution services shall be provided. The state's statutes, however, do address the issue. Title VI of the Missouri Statutes is entitled "County, Township and Political Subdivision Government." Chapter 56, which is located in that title, is entitled "Circuit and Prosecuting Attorneys and County Counselors." The statutes provide for a prosecuting attorney for each county; the prosecutor must "commence and prosecute all civil and criminal actions in the prosecuting attorney's county in which the county or state is concerned,"¹⁵⁹ among other duties.¹⁶⁰ Elected prosecuting attorneys, their assistants, and any support personnel are paid entirely by their counties,¹⁶¹ and are county employees.¹⁶² The state sets the salary of the elected prosecuting attorney,¹⁶³ which is generally uniform across the state. The number and salaries of any assistant prosecutors and support staff is dependent entirely on the will of the county commissioners, to whom the elected prosecuting attorney submits a budget proposal each year. The county likewise provides human resources, information technology, purchasing, and other support functions.¹⁶⁴

Missouri prosecutors are neither part of, nor under the authority of, any branch of state government. However, state law provides for the Missouri Office of Prosecution Services¹⁶⁵ which is an "autonomous entity in the . . . attorney general's office."¹⁶⁶ The office provides education, training, and technical and research assistance to prosecutors in the state. It is funded by a \$2.50 court cost in all criminal cases,¹⁶⁷ as well as legislative appropriations, federal grants, and other revenue streams (e.g., surcharge on bad check prosecution).¹⁶⁸ The head of the office is appointed by the Prosecutors Coordinators Training Council, which is essentially a state agency mirroring the composition of the Missouri Association of Prosecuting Attorneys, an organization "established to provide uniformity in the discharge of duties to

¹⁵⁹ Mo. Rev. Stat. § 56.060.

¹⁶⁰ Larger counties often have a separate lawyer to handle civil matters, leaving prosecuting attorneys to criminal work exclusively. Telephone conversation with Jason Lamb, former Executive Director, Missouri Office of Prosecution Services (MOPS) (Mar. 21, 2012); telephone conversation with Darrell Moore, Executive Director of MOPS (Mar. 26, 2021).

¹⁶¹ See, e.g., Mo. Rev. Stat. § 56.151 (compensation for investigators and staff); Mo. Rev. Stat. § 56.240 (compensation for assistant prosecuting attorneys).

¹⁶² Telephone conversations with Lamb and Moore, *supra* note 160.

¹⁶³ Mo. Rev. Stat. § 56.265.

¹⁶⁴ Telephone conversations with Lamb and Moore, *supra* note 160.

¹⁶⁵ Missouri Office of Prosecution Services Website, <https://www.prosecutors.mo.gov/programs#>.

¹⁶⁶ Mo. Rev. Stat. § 56.750.

¹⁶⁷ Mo. Rev. Stat. § 56.765 (assessing a court cost surcharge of \$5, with one half allocated to the "Missouri Office of Prosecution Services Fund"); see also Missouri State Auditor Report: Missouri Office of Prosecution Services (June 2013), Appendix (showing sources of funding) and page 5 (auditee response, noting that the office "is funded primarily by sources other than General Revenue"), available at <https://app.auditor.mo.gov/repository/press/2013-048.pdf>.

¹⁶⁸ Mo. Rev. Stat. § 570.120; telephone conversations with Lamb and Moore, *supra* note 160.

Missouri’s 115 elected prosecuting and circuit attorneys,”¹⁶⁹ along with the attorney general or his designee.¹⁷⁰

Defense

Indigent defense in Missouri is state-funded and is organized under the Office of the State Public Defender, an “independent department of the judicial branch.”

Title XXXVIII of the Missouri Statutes is entitled “Crime and Punishment; Peace Officers and Public Defenders.” Chapter 600, located in that title, is entitled “Public Defenders.” It provides for an Office of the State Public Defender, which is an “independent department of the judicial branch of state government.”¹⁷¹ It also provides for a Public Defender Commission, which selects the head public defender for the state, assists with developing and submitting a budget request, and performs other duties.¹⁷² The public defender system provides indigent criminal defense directly in all cases except those in which a conflict of interest exists.¹⁷³ In conflict cases, the system provides for private appointed counsel.¹⁷⁴

In fiscal year 2020, the Missouri State Public Defender had a state appropriation of \$48.3 million.¹⁷⁵ Some defender offices also receive local support for non-salary expenses such as office space and supplies.¹⁷⁶ However, chronic underfunding of the state’s indigent defense system appears to be an ongoing issue for the state; in February of 2021, a judge declared the current public defender waiting lists unconstitutional and ordered the state to remedy the issue.¹⁷⁷

Washington Prosecution

Washington prosecutors are fundamentally county officials, although the state pays a portion of the elected prosecutors’ salaries.

Article XI of the Washington Constitution is entitled “County, City, and Township Organization.” Section 5 of that article provides in part that “[t]he legislature . . . shall provide for the election in the several counties of . . . prosecuting attorneys and other . . . officers . . . and shall prescribe their duties, and fix

¹⁶⁹ Missouri Association of Prosecuting Attorneys Website, <https://www.prosecutors.mo.gov/about>.

¹⁷⁰ Mo. Rev. Stat. § 56.760.

¹⁷¹ Mo. Rev. Stat. § 600.019.

¹⁷² Mo. Rev. Stat. §§ 600.015, 600.017

¹⁷³ History of the Missouri State Public Defender, <https://publicdefender.mo.gov/about-mspd/history-of-mspd/>.

¹⁷⁴ Telephone conversations with Lamb and Moore, *supra* note 160.

¹⁷⁵ State of Missouri Public Defender Commission, Fiscal Year 2020 Annual Report, page 19, *available at* <https://publicdefender.mo.gov/wp-content/uploads/2020/10/FY2020-Annual-Report-Web-Copy.pdf>.

¹⁷⁶ Telephone conversations with Lamb and Moore, *supra* note 160.

¹⁷⁷ See Dave Helling, “Defenseless: Missouri justice system violates the Constitution every day,” Kansas City Star (Dec. 15, 2019), *available at* <https://www.kansascity.com/opinion/article237130749.html>; Ashley Smith, “Judge finds Missouri’s public defender waiting list unconstitutional; gives legislature four months to fix it,” KFVS News 12 (February 19, 2021), *available at* <https://www.kfvs12.com/2021/02/19/judge-finds-missouris-public-defender-waiting-list-unconstitutional-gives-legislature-four-months-fix-it/>.

their terms of office . . . [and it] shall regulate the compensation of all such officers . . . [though] it may delegate to the legislative authority of the counties the right to prescribe the salaries of its own members and the salaries of other county officers.” Prosecutors are not discussed in article III, “The Executive,” or article IV, “The Judiciary.”

Title 36 of the Washington Code is entitled “Counties.” Chapter 36.27 is entitled “Prosecuting attorneys.” The duties of Washington prosecutors, as described in that chapter, are very broad. For example, they serve as “legal adviser to all county and precinct officers and school directors in all matters relating to their official business,”¹⁷⁸ and represent the state and the county in a range of civil and criminal matters. Prosecutors are county officials: the prosecutor’s office must be at the county seat,¹⁷⁹ and when deputy prosecutors are appointed, a notice must be filed with the county auditor.¹⁸⁰ However, because prosecutors also represent the state, under Wash. Rev. Code § 36.17.020, compensation for the elected prosecuting attorney is divided between the state and the county.¹⁸¹ The state is required to contribute “one-half the salary of a superior court judge” and the county must contribute “an amount that equals or exceeds that contributed by the county in 2008.”¹⁸² The county pays for all assistant prosecutors, support staff, and overhead expenses, meaning that the vast majority of the cost of prosecution is borne by the county.¹⁸³

Other than providing some funding, the state does little to support or to control prosecutors. There is an organization called the Washington Association of Prosecuting Attorneys. It is not a state agency, but rather is “a non-partisan, non-profit service organization dedicated to the training and support of county prosecutors” that “serves as a spokesman for county prosecutors at the state and national levels and acts as a liaison between counties and other levels of government through research, training and lobbying.”¹⁸⁴ It is funded in part by dues paid by counties, and in part through grants and contracts.¹⁸⁵

Defense

Indigent defense in Washington is provided by cities and counties, though the state provides supplemental funding to those cities and counties that meet standards established by a state indigent defense agency, which is located in the judicial branch.

In Washington, cities and counties are responsible for providing indigent defense services. According to statute, “[e]ach county or city . . . shall adopt standards for the delivery of public defense services,

¹⁷⁸ Wash. Rev. Code § 36.27.020(2).

¹⁷⁹ Wash. Rev. Code § 36.27.070.

¹⁸⁰ Wash. Rev. Code § 36.27.040.

¹⁸¹ The Official Commentary to Wash. Rev. Code § 36.17.020 notes that “the elected prosecuting attorney’s dual role as a state officer and a county officer is reflected in various provisions of the state Constitution and within state statute.”

¹⁸² Wash. Rev. Code § 36.17.020(11).

¹⁸³ Telephone conversation with Tom McBride, former Executive Secretary, Washington Association of Prosecuting Attorneys (WAPA) (Mar. 20, 2012); email correspondence with Russell Brown, Executive Secretary of WAPA (March 16, 2021).

¹⁸⁴ Washington Association of Prosecuting Attorneys Website, <http://www.waprosecutors.org/>.

¹⁸⁵ Communications with McBride and Brown, *supra* note 183.

whether those services are provided by contract, assigned counsel, or a public defender office.”¹⁸⁶ The bulk of this responsibility falls on counties, but cities may choose to assume responsibility for prosecuting misdemeanors that are committed within city limits, and if they do so, they may also bear responsibility for providing indigent defense services in such cases.

The state provides some assistance to local governments in meeting this obligation. Cities and counties that meet certain standards may receive state funding through the office of public defense, which is “an independent agency of the judicial branch.”¹⁸⁷ The office is run by a director, who is appointed by the supreme court. The office submits its own budget requests and administers its own budget. Its job is not to represent clients, but rather to “[a]dminister all state-funded services” in indigent criminal defense and certain other areas of representation.¹⁸⁸ To do so, the office sets standards for city and county indigent defense systems and awards funding to those local governments that meet the standards.¹⁸⁹ According to the state budget, about \$46 million per year is allocated to the office, although some portions of that funding are earmarked for specific uses outside of traditional indigent defense, such as city and county funding to improve trial services or social welfare programs.¹⁹⁰ It is estimated that the state bears about 5% of the cost of indigent defense in the trial courts, with cities and counties paying the balance.¹⁹¹

¹⁸⁶ Wash. Rev. Code § 10.101.030.

¹⁸⁷ Wash. Rev. Code § 2.70.005.

¹⁸⁸ Wash. Rev. Code § 2.70.020.

¹⁸⁹ Wash. Rev. Code §§ 10.101.050 – 10.101.080.

¹⁹⁰ Washington 2019 Regular Session Operating Budget, Section 116, pages 9-11, *available at* <https://lawfilesexternal.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/House/1109-S.SL.pdf?q=20210320161146>.

¹⁹¹ Communications with McBride and Brown, *supra* note 183.