



# Review of the Salem, Oregon Municipal Indigent Defense Delivery System

September 2022

Prepared for

The Salem Municipal Court

Prepared by

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On Behalf of

The U.S. Department of Justice, Office of Justice Programs,  
Bureau of Justice Assistance, Sixth Amendment Initiative



*This project was supported by grant number 2017-YJ-BX-K002 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the SMART Office. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.*

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## Executive Summary

The City of Salem, the capital of Oregon and the seat of Marion County, has a Municipal Court system where dedicated public servants work every day to promote justice and fairness for the people who are called before the Court and for the community of Salem more broadly, but structural inadequacies in the Municipal Court's indigent defense delivery system have undermined defender independence, led to frequent conflicts between the defense bar and the Presiding Judge, and have left the Court with an insufficient corps of attorneys to uphold the Sixth Amendment right to counsel.

The Salem, Oregon Municipal Court is a recipient of training and technical assistance (TTA) from the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance's (BJA) Sixth Amendment Initiative. The initiative seeks to help jurisdictions uphold their obligations under the Sixth Amendment to the U.S. Constitution. The Salem Municipal Court applied to BJA requesting subject matter expertise to examine the Court's adherence to national standards and best practices for public defense, particularly with respect to defender independence, the principle that the indigent defense function should be free from undue influence by the judiciary or by political officials. With indigent defense attorney recruiting, selection, and discipline administered by the Court, of particular interest was help in recommending a new governance structure that would ensure greater independence from the judiciary.

NLADA undertook an examination of the Salem Municipal Court's indigent defense delivery system to assess the system's strengths and areas for improvement. This assessment was grounded in national standards, including the American Bar Association (ABA) Ten Principles of a Public Defense Delivery System. Overall, NLADA finds that despite positive efforts by

professionals working in the system, the system itself needs structural reforms in several key areas.

The remainder of this executive summary outlines NLADA's findings and recommendations for the Salem Municipal Court and its indigent defense delivery system. The final chapter of this report goes into further detail on these findings and recommendations. The NLADA team is grateful for the cooperation of the Salem Municipal Court system's stakeholders, whose input and perspectives have been invaluable to this assessment.

## Findings

1. Because the City of Salem has decided to prosecute criminal offenses through its Municipal Court, it is required under the Sixth Amendment to the U.S. Constitution to provide effective assistance of defense counsel to people who are accused of crimes in the Court.
2. The Salem Municipal Court provides indigent defense services via a court-appointed attorney (CAA) rotation. The Presiding Judge is, by statute, responsible for hiring and firing the Court's indigent defense attorneys, for approving their billings, and for disciplining the attorneys.
3. The current structure of indigent defense delivery service at the Salem Municipal Court undermines defender independence, a core component of promoting fairness and effectiveness in the criminal legal system and upholding rights under the Sixth Amendment to the U.S. Constitution.
4. The Salem Municipal Court's current indigent defense delivery system does not have enough court-appointed defense attorneys to provide representation for the volume of criminal cases that the Court processes. The court-appointed

attorney pool has had a high rate of turnover due to four primary factors: interpersonal and professional dynamics between court-appointed attorneys and the Presiding Judge; attorneys' inability to effectively seek redress for grievances flowing from those dynamics; inadequate pay for court-appointed attorneys; and a lack of resources to provide effective indigent defense representation.

5. Insufficient attorney staffing for the CAA pool causes excessive workloads for CAAs, leading them to become less available or willing to take on additional Municipal Court cases, further exacerbating the attorney shortage. Overly burdensome workloads are sometimes worsened by CAAs being appointed to violation-only cases where there is no constitutional or statutory right to counsel.
6. The Presiding Judge of the Salem Municipal Court is an elected position, which is rare among Oregon municipalities.
7. Current statutes and rules governing the Municipal Court and the elected Presiding Judge provide insufficient buffers between defense counsel and the Presiding Judge. There are virtually no checks on the authority of the Presiding Judge, as an elected official, or effective oversight mechanisms to promote accountability for the Presiding Judge, short of a no-confidence recall process or being voted out at the next regular election.
8. The Salem Municipal Court suffers from irregularities in the administration of justice, particularly with respect to sentencing, probation, and diversion, which undercuts CAAs' ability to provide effective defense and reportedly results in harsher outcomes for accused

individuals than if their case had been cited to the Circuit Court.

9. The rate of pay for Salem Municipal Court CAAs is insufficient, which has driven turnover in the CAA pool and low interest from attorneys in participating in the program. The current compensation level is not sufficient either to achieve parity with City Attorneys' compensation, or to prove competitive in attracting and retaining attorneys who can seek higher pay taking indigent defense cases at the Marion County Circuit Court, engaging in private practice outside of indigent defense, or pursuing a prosecutorial position. The disparity between pay rates at the Municipal Court and these other competing opportunities for attorneys is likely to continue to undercut attorneys' willingness to participate in the Municipal Court CAA pool and deprive the Court and accused individuals of talented attorneys.
10. CAAs at the Salem Municipal Court are frequently less experienced attorneys, and the Court provides no mentorship or structured training or learning systems to help these attorneys develop their skills. Similarly, the Court does not provide CAAs with access to continuing legal education (CLE).
11. The Salem Municipal Court Administration structure does not lend itself to preparing a natural successor to the current Court Administrator, which is a critical role in the functioning of the Court. That role currently includes responsibility for court-appointed attorney panel administration. The hierarchy of Court Administration for the Municipal Court is fairly flat, and there is currently no deputy to the Court Administrator.
12. The Court relies heavily on paper forms, written motions, hard-copy records, and

- manual data collection. This reliance hampers the Court's efficiency and slows down processes for professionals working in the Court as well as for people who are subject to Municipal Court charges.
13. Many Municipal Court forms are outdated, and many are redundant, which undermines the efficiency and efficacy of the Court and of court-appointed attorneys.
  14. The Salem Municipal Court has no ability to easily review data about the CAA program, such as total number of cases appointed, average cost per case, average hours spent on a case, or individual activities performed.
  15. The Salem Municipal Court does not have an electronic billing and payment system for work of court-appointed attorneys.
  16. The use of non-integrated case management systems across the Salem Municipal Court stakeholder network unnecessarily impedes the flow and sharing of case information, leads to confusion among attorneys, and wastes time.
  17. The Salem Municipal Court resolves a worryingly low proportion of cases by trial, with the overwhelming majority of cases being resolved by plea.
  18. Disruptions to holding in-court proceedings caused by the COVID-19 pandemic halted the holding of criminal trials in the Salem Municipal Court from late March 2020 until July 2022, creating a substantial backlog of cases upon the resumption of trials.
  19. The Salem Municipal Court does not provide sufficient connections to social services for defendants. This disconnect hampers the ability of court-appointed counsel to provide holistic defense services and address underlying drivers of criminal legal system involvement that

foster recidivism, strain Municipal Court and police resources, and drive up system costs.

20. The Municipal Court embarked upon a Community Court program that was halted by pandemic-related court closures in 2020, and has yet to resume that program.
21. The Salem Municipal Court does not have adequate space for defense attorneys to meet confidentially with their clients.
22. Quarterly cross-stakeholder meetings with the Presiding Judge, City Attorneys, court-appointed defense counsel, and occasionally police and/or social service providers ceased in fall 2019. Some stakeholders were frustrated that they did not find the meetings productive.

## Recommendations

1. The City of Salem must restructure oversight of the Municipal Court indigent defense function to shift responsibility and influence away from the Presiding Judge and the Court, and toward an independent entity that does not present a conflict of interest for zealously promoting the interests of CAAs and their clients. This change is essential to establish independence of the indigent defense function at the Court. This necessary change will likely require increasing the budget allocated to indigent defense services.
2. The hourly compensation rate for court-appointed attorneys should be increased, taking into account not just comparable rates in other courts, but also parity with City Attorneys, as well as actual attorney overhead costs.
3. Salem officials should give serious consideration to whether it is a priority to retain criminal court jurisdiction, particularly in light of the additional investment of resources required to fully



- provide access to counsel for people charged with jailable misdemeanors .
4. Salem leadership should consider whether an appointed Presiding Judge model would better serve the city than the elected judge model.
  5. The Salem Municipal Court should consider the desirability and feasibility of becoming a court of record.
  6. The Salem Municipal Court should take measures to ensure that court-appointed attorneys are able to receive training specific to misdemeanors and Municipal Court work, and that CAAs are provided access to CLE courses without having to pay for those out-of-pocket.
  7. The Salem Municipal Court Administration should consider an internal reorganization to provide a deputy to assist the Court Administrator, provide more levels to staff hierarchy, and address other inefficiencies within Court Administration.
  8. Salem Municipal Court should upgrade to an electronic invoice processing system that will simplify CAA invoice submission, review and payment.
  9. Salem Municipal Court should use an electronic data tracking system for CAA appointments that will allow for easy production of reports on system performance.
  10. Salem Municipal Court and City leaders should continue working to resolve the backlog of criminal jury trials.
  11. Outside of the pandemic-related court closure context, the Salem Municipal Court should consider strategies to bring more cases to trial.
  12. Court-appointed attorneys should have greater access to social workers to help identify social service needs that intersect with advocacy in their clients' criminal cases. The Municipal Court should explore strategies to increase access to social workers and encourage attorneys to use them.
  13. The Salem Municipal Court should work to relaunch the Community Court program. Alternatively, the Municipal Court should seek ways to proactively connect defendants to social services like housing, mental health treatment, substance use disorder treatment, and employment.
  14. The City of Salem and the Salem Municipal Court should work together to identify a space that can be used as a confidential meeting area for defense attorneys and their clients to use that is near the Salem Municipal Court courtroom(s).
  15. Professionals working in the Salem Municipal Court system—including but not necessarily limited to judges, court staff, City Attorneys, CAAs, and City officials—should hold regular cross-collaborative meetings to discuss and resolve issues in the Court.

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## Chapter 1: Background and Methodology

### Background on the Project

The Salem, Oregon Municipal Court is a recipient of training and technical assistance (TTA) from the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance's (BJA) Sixth Amendment Initiative. The initiative seeks to help jurisdictions uphold their obligations under the Sixth Amendment to the U.S. Constitution. The Salem Municipal Court applied to BJA requesting subject matter expertise to examine the Court's adherence to national standards and best practices for public defense, including the American Bar Association (ABA) Ten Principles of a Public Defense Delivery System. A key motivation for the Court in seeking technical assistance was the desire to improve the system with respect to defender independence, the principle that the indigent defense function should be free from undue influence by the judiciary or by political officials.<sup>1</sup> With indigent defense attorney recruiting, selection, and discipline administered by the Court, of particular interest was help in recommending a new governance structure that would ensure greater independence from the judiciary.

Located in Washington, DC, the National Legal Aid & Defender Association (NLADA) is America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services to those who cannot afford counsel. NLADA is one of several providers of technical assistance and subject matter expertise for BJA's Sixth Amendment Initiative, and was asked to undertake the review in Salem. In 2020, NLADA published an assessment of the indigent defense delivery system at the Eugene (Oregon) Municipal Court,<sup>2</sup> which contributed to the Salem Municipal Court's request for technical assistance.

### Methodology

NLADA's assessment of Salem's indigent defense system is guided by consideration of relevant national, state, and local standards and guidelines, and relevant national, state, and local statutory and case law.<sup>3</sup>

A core component of NLADA's review of Salem's indigent defense system was a series of interviews conducted by three members of NLADA's Defender Legal Services Division, occurring in October and November 2021. Typically, interviews are conducted on-site and in-person, but due to travel restrictions stemming from the COVID-19 pandemic, interviews were conducted via online videoconferencing. The full methodology for NLADA's work incorporated:

- Review of budget and caseload data;
- Review of authorizing and governance materials;
- Semi-structured interviews (via Microsoft Teams);
- Remote court observation (via Microsoft Teams); and

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<sup>1</sup> See TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (AM. BAR ASS'N 2002), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_ten\\_principlesbooklet.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ten_principlesbooklet.pdf) [hereinafter ABA TEN PRINCIPLES] (discussing defender independence in Principle 1).

<sup>2</sup> MAREA BEEMAN, ROSALIE JOY & MICHAEL MROZINSKI, NAT'L LEGAL AID & DEF. ASS'N, REVIEW OF THE MUNICIPAL INDIGENT DEFENSE SERVICE DELIVERY: EUGENE, OREGON 18 (2020), <https://www.nlada.org/tools-and-technical-assistance/public-defense-resources/review-municipal-court-indigent-defense-delivery-eugene>.

<sup>3</sup> Examples of relevant national standards include the ABA Ten Principles of a Public Defense System and NLADA's Performance Guidelines for Criminal Defense Representation. Examples of relevant U.S. Supreme Court case law include Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972); and Alabama v. Shelton, 535 U.S. 654 (2002).

- Synthesis and analysis of observations in a written report.

NLADA greatly appreciates the willingness of all interview stakeholders to make time to meet with the evaluation team and to speak candidly. NLADA in particular wants to recognize the assistance provided by Salem Municipal Court Administrator Deborah Ingledew in identifying individuals to interview, and for her overall assistance compiling relevant data and reports for the TTA team. In total, NLADA interviewed 26 individuals about their perceptions of the current indigent defense system and to learn any suggestions for improvement. By professional category, interviewees included:

- Municipal Court judges (3);
- Court staff (5);
- Current and former court-appointed attorneys and staff (10);
- Current and former City Attorneys (4);
- City Police (2); and
- Other City officials and staff (2).

Court observations were conducted of:

- DUII (driving under the influence of intoxicants) diversions and DUII diversion show proofs;
- Status hearings;
- Unscheduled to clear warrants;
- Hearings for individuals who were arrested and released on their own recognizance;
- Telephone conferences with correctional facilities;
- Criminal arraignments; and
- Plea hearings.

The TTA team wishes to thank everyone who was interviewed for this assessment for their candor and time. Furthermore, the team thanks Court Administrator Deborah Ingledew for her extraordinary kindness and assistance in arranging interviews and sharing court data and information. The team is also grateful to Ms. Ingledew and TJ Theodoroff, Network Analyst in the City of Salem's Information Technology Department, for their outstanding efforts to allow the TTA team to observe court proceedings virtually.

### Report Roadmap

The balance of this report is divided into chapters as follows. Chapter 2 discusses the Salem Municipal Court's structure and operation. Chapter 3 focuses on the structure and operation of Salem's indigent defense system. Chapter 4 discusses a number of challenges that span across the Salem municipal criminal legal system. Chapter 5 outlines relevant national standards and best practices for indigent defense systems and uses those as a lens for analyzing the current system in Salem. Finally, Chapter 6 presents findings and recommendations.

## Chapter 2: Salem’s Municipal Court Structure and Operation

With a reported 2020 population of 168,970, Salem is the third-largest city in Oregon, behind Portland and Eugene.<sup>4</sup> Salem is located partially in Marion County and partially in Polk County. It is the county seat of Marion County, as well as the state capital. Table 1 outlines the racial composition of Salem residents in the 2020 Census, as compared with 2010 Census figures for the same.

**Table 1:  
City of Salem Population by Race and Ethnicity, 2010 and 2020<sup>5</sup>**

Race/Ethnicity	2010		2020		Change	
Hispanic/Latino Origin By Race						
<b>Not Hispanic/Latino Total</b>	123,278	79.7%	134,233	76.5%	10,955	8.9%
<b>American Indian or Alaska Native</b>	1,750	1.1%	1,776	1.0%	26	1.5%
<b>Asian</b>	4,134	2.7%	5,446	3.1%	1,312	31.7%
<b>Black or African-American</b>	2,081	1.3%	2,812	1.6%	731	35.1%
<b>Native Hawaiian or Pacific Islander</b>	1,429	0.9%	2,293	1.3%	864	60.5%
<b>Some other race</b>	214	0.1%	838	0.5%	624	291.6%
<b>White</b>	109,352	70.7%	111,430	63.5%	2,078	1.9%
<b>Two or more races</b>	4,318	2.8%	9,638	5.5%	5,320	123.2%
<b>Hispanic or Latino Total</b>	31,359	20.3%	41,302	23.5%	9,943	31.7%
<b>American Indian or Alaska Native</b>	534	0.3%	1,148	0.7%	614	115.0%
<b>Asian</b>	81	0.1%	152	0.1%	71	87.7%
<b>Black or African-American</b>	202	0.1%	237	0.1%	35	17.3%
<b>Native Hawaiian or Pacific Islander</b>	31	0.0%	80	0.0%	49	158.1%
<b>Some other race</b>	15,331	9.9%	18,303	10.4%	2,972	19.4%
<b>White</b>	12,861	8.3%	9,836	5.6%	-3,025	-23.5%
<b>Two or more races</b>	2,319	1.5%	11,546	6.6%	9,227	397.9%
Race Alone or in Combination*						
<b>American Indian or Alaska Native</b>	4,503	2.9%	8,104	4.6%	3,601	80.0%
<b>Asian</b>	6,029	3.9%	8,456	4.8%	2,427	40.3%
<b>Black or African American</b>	3,647	2.4%	5,315	3.0%	1,668	45.7%
<b>Native Hawaiian or Pacific Islander</b>	2,018	1.3%	3,303	1.9%	1,285	63.7%
<b>Some other race</b>	17,423	11.3%	31,411	17.9%	13,988	80.3%
<b>White</b>	128,226	82.9%	141,630	80.7%	13,404	10.5%

\* Race alone or in combination contains total races tallied and may sum to over 100% of the population.

<sup>4</sup> POPULATION RSCH. CTR., PORTLAND STATE UNIV., 2020 ANNUAL OREGON POPULATION REPORT TABLES 17 (2021), <https://www.pdx.edu/population-research/sites/g/files/znlchr3261/files/2021-04/2020%20Annual%20Population%20Report%20Tables.pdf> (Table 6, Rank of Incorporated Cities by July 1, 2020 Population Size).

<sup>5</sup> POPULATION RSCH. CTR., PORTLAND STATE UNIV., 2020 CENSUS PROFILES: OREGON CITIES ALPHABETICALLY R-S 12 (2021), [https://www.pdx.edu/population-research/sites/g/files/znlchr3261/files/2021-08/city\\_R-S.pdf](https://www.pdx.edu/population-research/sites/g/files/znlchr3261/files/2021-08/city_R-S.pdf).

This chapter provides an overview of Salem’s municipal court.

## Salem Municipal Court

In Oregon, municipal courts, along with county and justice courts, are classified as "local" courts, operating outside of the state-funded, unified system of state circuit courts, appellate courts, and the Tax Court. These local courts are required to register with the Oregon Supreme Court as a precondition to operating. As of August 2022, the Office of the State Court Administrator’s registry shows 180 municipal and justice courts operating in Oregon.<sup>6</sup> The registry does not indicate which of these hear criminal matters. Municipal courts have concurrent jurisdiction with circuit and justice courts over all violations and misdemeanors committed or triable in the city in which the court is located.<sup>7</sup> They do not have jurisdiction over felonies.<sup>8</sup>

Salem is unusual in selecting the Presiding Judge<sup>9</sup> of its municipal court through elections. Most municipal judges in Oregon are appointed by, and serve at the pleasure of, the city council. Salem is reportedly one of just four municipalities in Oregon with an elected judge model. Once elected, the Presiding Judge serves a four-year term and there is no limit on the number of terms they can serve.<sup>10</sup> The Salem City Charter grants the Presiding Judge a significant level of independence: per the Charter, the City Manager “may not control . . . [t]he municipal judge in the judge’s judicial functions.”<sup>11</sup>

As set out by section 4.015 of the Salem Revised Code (SRC), to serve as the municipal judge, one must be at least twenty-one years of age, a citizen of the United States, a resident of the City for one year immediately preceding election or appointment, and an active member in good standing of the Oregon State Bar. Oregon state statute reiterates the bar membership requirement and also mandates that a municipal court judge complete a National Judicial College course on courts of special jurisdiction, or an equivalent course, within twelve months after being appointed judge.<sup>12</sup>

Salem’s sole elected judge is authorized by City Charter to wield judicial authority for the Salem Municipal Court.<sup>13</sup> In the Presiding Judge’s absence—practically, when the Presiding Judge is sick, on vacation, or taking time to work on other cases, or when there is a scheduling conflict for the Court—one or more pro tempore (pro tem) judges, nominated by the Presiding Judge and approved by City Council, are empowered to preside over court and issue rulings in the Presiding Judge’s stead. Pro tem judges serve two-year terms and there is no limit to the number of terms they can serve.<sup>14</sup> Pro tem judges must meet the same qualifications as the municipal judge except they need not be Salem residents. As of August 2022, Salem is served by five pro tem judges, with two more joining in

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<sup>6</sup> See *Other Courts*, OR. JUD. BRANCH, (last visited Sep. 7, 2022), <https://www.courts.oregon.gov/courts/Pages/other-courts.aspx> (listing a Registry of Municipal/Justice Courts & Their Judges).

<sup>7</sup> OR. REV. STAT. § 221.339(1).

<sup>8</sup> *Id.* § 221.339(3).

<sup>9</sup> The Presiding Judge of the Salem Municipal Court is termed as the “municipal judge” in Salem city ordinances. SALEM, OR., REV. CODE § 4.005, [https://library.municode.com/or/salem/codes/code\\_of\\_ordinances?nodeId=PTIICOOR\\_TITIGO\\_CH4MUCO](https://library.municode.com/or/salem/codes/code_of_ordinances?nodeId=PTIICOOR_TITIGO_CH4MUCO).

<sup>10</sup> SALEM, OR., CITY CHARTER § 24(8).

<sup>11</sup> *Id.* § 23(7)(b).

<sup>12</sup> OR. REV. STAT. § 221.142.

<sup>13</sup> See SALEM, OR., CITY CHARTER § 24.

<sup>14</sup> *Id.* § 24(7).

September. Historically, Salem’s elected judges have served lengthy terms: there have been just three Presiding Judges from 1976 to 2022, with the current Presiding Judge having been in office since 2007. Her predecessor served for sixteen years.

As allowed by state law,<sup>15</sup> the Salem Municipal Court was established by City Charter to adjudicate violations of the City's municipal laws occurring within the city limits.<sup>16</sup> Those violations include misdemeanors that carry a possible sentence involving loss of liberty.<sup>17</sup> In addition, the City of Salem has adopted the Oregon State Vehicle Code<sup>18</sup> by ordinance, which gives the Salem Municipal Court jurisdiction over vehicular offenses occurring within the City.<sup>19</sup> Sentences handed down by the Municipal Court may include fines,<sup>20</sup> time in jail, community service,<sup>21</sup> diversion/probation, or other alternative programs, depending upon the severity of the offense and the defendant's history with the Court.<sup>22</sup> The maximum sentence that the Salem Municipal Court can hand down is one year in jail and a fine of \$6,500, the maximum exposure for a Class A misdemeanor (e.g., DUII, hit-and-run, misdemeanor driving with a suspended license, and reckless driving). For most offenses heard in Municipal Court, the maximum is six months in jail, and for some the maximum is thirty days. If a court in Oregon imposes a sentence that includes probation, the court can only impose 50% of the jail time available.

The Sixth Amendment to the U.S. Constitution guarantees the right to counsel for any person accused of a jailable criminal offense, where there is a potential for the loss of liberty.<sup>23</sup> As such, any defendant facing charges for a jailable offense in the Salem Municipal Court who cannot afford to hire his or her own attorney is entitled under federal and state law to have counsel provided at public expense.

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<sup>15</sup> OR. REV. STAT. § 221.336.

<sup>16</sup> SALEM, OR., REV. CODE § 24. Municipal courts in Oregon have concurrent jurisdiction with circuit and justice courts over all violations and misdemeanors committed or triable in the city in which the court is located. They do not have jurisdiction over felonies. See *Oregon Blue Book: Municipal Courts*, OR. SEC’Y OF STATE, <https://sos.oregon.gov/blue-book/Pages/state/judicial/municipal-courts.aspx>.

<sup>17</sup> See SALEM, OR., REV. CODE § 4.180.

<sup>18</sup> OR. REV. STAT. tit. 59 (chs. 801-826).

<sup>19</sup> SALEM, OR., REV. CODE § 4.010.

<sup>20</sup> For people who are sentenced to pay a fine but are unable to pay it immediately, the Court routinely offers payment plans to allow for repayment in monthly installments, with typical installment amounts of \$15 to \$20 per month.

<sup>21</sup> The Court can, and frequently does, offer to people who are sentenced to serve time in jail or pay fines an opportunity to receive a credit toward their sentence—\$15 per month for fines—if the person performs Court-supervised community service. That community service can be performed anywhere if being done in lieu of jail time, but if it is in lieu of paying a fine, because the performance of community service replaces a payment that would have gone into City coffers, that service must be performed within the city of Salem. Community service must be performed at a non-profit.

<sup>22</sup> See SALEM, OR., REV. CODE § 4.180. In addition, they may not exercise jurisdiction over any “designated drug-related misdemeanor,” which includes possession of Schedule I, Schedule II, methadone, oxycodone, heroin, methylenedioxymethamphetamine, and cocaine. OR. REV. STAT. § 423.478 (2017).

<sup>23</sup> The right applies to state and local courts through the Due Process and Equal Protection Clauses of the Fourteenth Amendment and for purposes of misdemeanors is clarified in *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and *Alabama v. Shelton*, 505 U.S. 654 (2002). At the state level, see section 11 of the Oregon Constitution and *Stevenson v. Holzman*, 458 P.2d 414, 418-19 (Or. 1969).

In misdemeanor cases, law enforcement officers typically make the decision whether to make an arrest or issue a citation to an alleged offender. Law enforcement officers also decide whether to direct the case to proceed in the state circuit court or in the justice/municipal court. The only cases that are cited to the Salem Municipal Court are those where the Salem Police made the citation or arrest. Charges involving drugs are filed with the Circuit Court. If the same incident involves a charge that would normally be filed with the Municipal Court (such as a traffic offense) and a drug charge, the case would be filed in the Circuit Court.

The booking process for people jailed on Salem Municipal Court charges changed in the past two years in light of COVID-19-related lockdowns. Pre-COVID, people who were arrested and held on Salem Municipal Court charges, or who received a jail sentence at the disposition of their Salem Municipal Court case, were to be held in the Marion County Jail (providing there is no superseding term of imprisonment from a different court). The jail, which is run by the Marion County Sherriff's Office, houses a maximum of 415 people.<sup>24</sup> When the population exceeds 403, a Capacity Management Plan is initiated whereby the jail releases approximately 2.5 people per day in order to leave beds for people being held on more serious offenses.<sup>25</sup> The Salem Municipal Court and the Marion County Sherriff's Office do not have an agreement that reserves a certain number of beds for Municipal Court detainees.<sup>26</sup> Under the Capacity Management Plan, the Salem Municipal Court's pretrial detainees and people sentenced to jail terms are the first to be released.<sup>27</sup> After COVID lockdowns began in spring 2020, the Presiding Judge ordered that all new citations to the Salem Municipal Court be cited and released, so pursuant to that order, technically no one should have been held in the jail on a municipal court charge. A court staffer noted in an interview that this procedure was not followed because of a lack of coordination among the Municipal Court, the police, and the jail: a police officer would arrest someone and cite their charge to the Municipal Court, and book them in the county jail on that charge, then the jail would not inform Municipal Court staff to let them know someone was booked on a Municipal Court charge, so the person would be jailed even though they were supposed to be released upon citation. Another court staffer observed that, to their knowledge, people who were held in jail were held on Circuit Court charges, and anyone arrested only on Municipal Court charges was not jailed.

Like most of Oregon's municipal courts, the Salem Municipal Court is not a court of record,<sup>28</sup> so proceedings are not transcribed or otherwise recorded. Appeals proceed to the Marion County Circuit Court and are heard essentially as de novo matters, where the case proceeds anew, without a detailed record of the proceedings from the Municipal Court.<sup>29</sup>

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<sup>24</sup> JANICE RADOVICK-DEAN & DON TRAPP, NAT'L INST. OF CORR. TECHNICAL ASSISTANCE NO. 17C1040, MARION COUNTY OREGON: AN ASSESSMENT OF THE MARION COUNTY PRETRIAL RELEASE SYSTEM 3 (2017), <https://www.co.marion.or.us/BOC/PSCC/Documents/Monthly%20Meeting%20Material/Marion%20County%20Pretrial%20Release%20Assessment%20Report%20NIC%20Fall%202017.pdf>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> State Court Administrator records show just six municipal courts in Oregon have officially declared themselves to be courts of record. See *Other Courts*, OR. STATE CTS., <https://www.courts.oregon.gov/courts/Pages/other-courts.aspx>.

<sup>29</sup> For each appeal, a certified copy of the Municipal Court case file and a Notice of Appeal from the Municipal Court is filed with the Circuit Court.



The City of Salem governance structure includes a Mayor, a City Council and a City Manager's Office. Oversight of justice system entities falls under the City Manager's Office. Court administration is a division under the City Manager's Finance Department. With responsibility over indigent defense administration falling under the Court Administrator, organizationally, indigent defense also falls under the Finance Department. Acknowledgement was made of the somewhat odd fit for oversight of the court function. In the past it has been positioned directly under the City Manager as well as under Administrative Services. However, there was agreement by interviewees that the current placement under the Finance Department is the best fit to receive support. As will be discussed in Chapter 3, there is no individual dedicated to regularly voicing indigent defense system needs of the current appointed attorney program.

### Scope of Salem Municipal Court Cases

The Salem Municipal Court has jurisdiction over all offenses made punishable under the ordinances of the City; all violations, as defined by Oregon Revised Statutes (ORS) section 153.005(3); and all traffic offenses, as defined by ORS section 801.555, that are made punishable under ORS title 59, other than felony traffic crimes.<sup>30</sup> Charge categories filed in the Municipal Court include Misdemeanor A, B, C, D, and unspecified. More detail about criminal filings appears in Chapter 3.

As discussed in Chapter 3, and detailed in Table 4 therein, the Salem Municipal Court has seen charges filed in over 50 different sections of Salem municipal code, with the most common charges being for trespass<sup>31</sup> and charges related to driving,<sup>32</sup> which collectively make up over 83% of all charges. Trespass alone makes up 25% of all filings, which is consistent with findings of a 2012 study of the Salem Municipal Court, which found that quality of life crimes comprise about 48% of misdemeanors filed at the Court.<sup>33</sup>

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<sup>30</sup> SALEM, OR., REV. CODE § 4.010.

<sup>31</sup> Under SALEM, OR., REV. CODE § 95.550.

<sup>32</sup> Including: Unauthorized Entering, Maneuvering, Tampering with, etc., Motor Vehicle (under SALEM (OR.) REV. CODE § 100.260); Fail to Carry or Present License (§ 100.331(1)); Driving Under the Influence of Intoxicants (§ 100.331(10)); Giving False Information to a Police Officer (§ 100.331(2)); Reckless Driving (§§ 100.331(4), 811.140); Criminal Driving While Suspended or Revoked (§ 100.331(7)); Attempt to Elude Police Officer (§ 100.331(8)); Failure to Perform Duties of Driver in an Accident (§§ 100.331(9), 811.700); Obstructing Enforcement (§ 102.090); Operating Motor Vehicle While Using Mobile Electronic Device (Cell Phone Law Third Offense) (§ 811.507(d)); Fail to Obey a Police Officer (§ 811.535); and File a False Accident Report (§ 811.740).

<sup>33</sup> CHERYL STONE, ACCESS TO JUSTICE FOR DISPLACED DEFENDANTS 20 (2012), <https://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.362.1615>.

## Chapter 3: Indigent Defense: National Models and the Salem System’s Structure, Operation, and Compensation

With the background of the Salem Municipal Court and local justice system laid out, this chapter continues with an in-depth look at the City’s indigent defense system. The chapter begins by describing the broader context, with a general overview of public defense nationally, focusing on defender independence and delivery models used in the U.S., followed by a look at examples of how municipal court systems provide defense representation for people who cannot afford a lawyer. The discussion then delves into Salem’s indigent defense system. The Salem-specific discussion begins with a look at the structure of the current court-appointed attorney system. The focus then shifts to caseloads and compensation for attorneys, paying special attention to compensation structure and how Salem’s compensation system compares to the rest of Oregon. The chapter concludes with a look at the system of budgeting for indigent defense in Salem.

### The Principle of Defender Independence

Attorneys who provide public defense services are perhaps the most critical figures in maintaining rights under the Sixth Amendment to the U.S. Constitution generally, and the right to counsel specifically. Defenders are tasked with zealous representation of their clients’ interests, while adhering to professional ethics—which includes zealous representation.<sup>34</sup> It is especially important, therefore, that the indigent defense function be independent, both in structure and in practice.

Defender independence is the focus of the first of the ABA Ten Principles of a Public Defense Delivery System.<sup>35</sup> Principle 1 and its accompanying commentary,<sup>36</sup> reproduced below, provide insight on several key factors in independence, including hiring, payment, and oversight of defenders:

**The public defense function, including the selection, funding, and payment of defense counsel, is independent.** The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.

<sup>34</sup> See, e.g., MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS’N 2020), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_2\\_scope\\_of\\_representation\\_allocation\\_of\\_authority\\_between\\_client\\_lawyer](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_2_scope_of_representation_allocation_of_authority_between_client_lawyer); PERFORMANCE GUIDELINES FOR CRIM. DEF. REPRESENTATION § 1.1 (NAT’L LEGAL AID & DEF. ASS’N 2006), <https://www.nlada.org/defender-standards/performance-guidelines/black-letter>.

<sup>35</sup> ABA TEN PRINCIPLES, *supra* note 1.

<sup>36</sup> *Id.* at 2.

Without independence of the indigent defense function, particularly when defenders are not independent of the judiciary, people who are accused of crimes cannot trust that they will receive effective assistance of counsel as guaranteed by the Sixth Amendment, because the conflict of interest posed by the lack of independence interferes with the attorney’s ability to provide full-throated, zealous representation. For example, a defender arguing in front of a judge who controls their workload, payment, and oversight may be inclined, even subconsciously, to prioritize the health of their own career ahead of their client’s interests. Such a conflict of interest undermines the constitutional right to counsel and core notions of fairness in criminal court proceedings.

### National Public Defense System Delivery Models

Broadly speaking, the U.S. relies on three primary delivery systems to provide constitutionally required legal services to individuals who cannot afford defense counsel at the state and local levels: a public defender office, private attorneys who undertake appointments on a case-by-case basis, and the contract model. Variations of these models exist but general characteristics are described in Table 2.

**Table 2:  
Public Defense Delivery Models**

Public Defender:	All attorneys work in one office under the direction of a chief public defender.
Court-Appointed:	Individual attorneys are appointed by the court and compensated on a per-case basis.
Contract System:	Attorneys, law firms, or non-profit organizations enter into contracts with the governing body to provide defense services to people who cannot afford counsel.

Many jurisdictions use two or all three of these models. For instance, they might use a public defender office to handle the majority of cases, and assign overflow and conflict of interest cases to assigned or contract counsel. There are multiple types of contracting arrangements, including fixed-fee contracts to handle all cases in a given jurisdiction in a given year, contracts establishing flat fees paid for handling particular case types, and contracts applying an hourly flat fee paid for all work performed up to a particular dollar amount.<sup>37</sup>

### State-Level Public Defense Services in Oregon

Indigent defense services at the state court level in Oregon are administered by the Office of Public Defense Services (OPDS). OPDS has an in-house, staffed appellate division but all state trial court-level services are handled by providers working under contract with OPDS. Contracts are issued for providers in all counties working under several delivery models: a public defender office, law firm, or consortium.

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<sup>37</sup> U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE ASSISTANCE, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 4 (2000), NCJ 181160, <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf> [hereinafter CONTRACTING FOR INDIGENT DEFENSE SERVICES].

The OPDS Public Defense Legal Services Contract Terms for January 1, 2021 to December 31, 2021 defined the different models as follows:

A “public defender” is a nonprofit organization employing attorneys and other staff established to provide contract services to persons qualifying for court-appointed legal representation.<sup>38</sup>

A “consortium” is a group of attorneys and/or law firms that is formed for the sole purpose of providing contract services to persons qualifying for court-appointed legal representation. All attorneys providing contract services through a consortium must be members of the consortium. In addition to participating jointly to provide contract services, Consortium members retain their separate identities and may engage in non-court-appointed legal representation.<sup>39</sup>

A “law firm” is a sole practitioner, partnership, or professional corporation which provides contract services to persons qualifying for court-appointed legal representation and which may also engage in non-court-appointed legal representation.<sup>40</sup>

OPDS is not responsible for indigent defense in municipal courts.

National information on public defense systems used across the country is available from the Bureau of Justice Statistics.<sup>41</sup> However, this information in large part overlooks misdemeanor case delivery systems in general, and municipal court operations in particular, focusing instead on systems that handle felony and juvenile delinquency cases. Reliable information about public defense systems operating at the municipal level is scant. What is known from review of available information is that about forty-three states currently operate some form of a municipal court that processes city ordinance violations and, in some jurisdictions, misdemeanors as well. Not all of these entities are called “municipal courts,” but where there is a local court structure, municipalities provide representation for indigent defendants primarily through individual case court appointments, contract systems, or a combination of the two. Municipal court public defender offices are rare. And unfortunately, some municipal court systems do not provide counsel as required at all.

### Salem’s Indigent Defense System

The city of Salem is also the state capital of Oregon and the county seat of Marion County. Most of the city lies in Marion County, whereas the city’s neighborhood of West Salem lies across the Willamette River in Polk County. In Marion County, OPDS contracts with a public defender office, the Public Defender of Marion County, as well as a consortium, the Marion County Association of Defenders (MCAD), to provide indigent defense services for the state trial court system. Some of the attorneys who take court-appointed cases in Salem Municipal Court are also members of MCAD, through which they

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<sup>38</sup> OR. OFF. OF PUB. DEF. SERVS., PUBLIC DEFENSE LEGAL SERVICES CONTRACT TERMS: JANUARY 1, 2021 TO DECEMBER 31, 2021 p. 4 (2021), <https://www.oregon.gov/opds/provider/ModelContractTerms/General%20Contract%20Terms%202021.pdf> (sec. 1.4.3).

<sup>39</sup> *Id.* at 5 (sec. 1.4.5).

<sup>40</sup> *Id.* at 4 (sec. 1.4.4).

<sup>41</sup> For relevant past studies, see *Indigent Defense Systems*, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/index.cfm?ty=tp&tid=28>.

handle cases in Circuit Court. Currently, the City of Salem provides indigent defense services through a court-appointed counsel system, which is administered by the Court Administrator.

To attract participants to serve as Court-Appointed Attorneys (CAAs,) the Court Administrator occasionally advertises openings through the Oregon State Bar and other outlets. Applicants submit a cover letter and resume. Personal and Bar references are checked and applicants are interviewed by the Court Administrator and two pro tem judges, who make recommendations to the Presiding Judge. The Presiding Judge has final say over attorney selection. There is no specified experience required but one CAA was told when applying that “a little” indigent defense experience was desirable.

New panel attorneys attend an orientation by the Court Administrator about billing procedures. The Court provides no case handling training or mentorship, although the Presiding Judge suggests during orientation that less experienced attorneys contact a current member of the CAA roster for mentorship regarding the Court’s processes and procedures. CAAs are under no requirements to secure and attend training on their own (apart from Oregon State Bar continuing legal education (CLE) requirements). Some CAAs rent office space together and engage in informal mentorship by having other attorneys nearby. Nevertheless, the lack of more structured and substantive training or mentorship is particularly concerning, given that attorneys who have no prior experience can and have joined the panel. One CAA noted that the relatively low pay rate for Municipal Court CAAs precluded being able to afford training such as attendance at Oregon Criminal Defense Lawyers Association (OCDLA) training conferences. Several interviewees noted that CAAs at the Municipal Court tend to be newer, relatively inexperienced attorneys. As one interviewee described it, the Salem Municipal Court “is entry-level court.” In contrast, any attorney – new or experienced – joining the Circuit Court MCAD consortium is assigned a mentor and has access to training resources through the consortium. Historically, many attorneys who serve as Salem Municipal Court CAAs have also been members of MCAD and thus had access to MCAD resources. However, those resources are more likely to be focused on representation for felonies and more serious misdemeanors that are heard at the Circuit Court, not the traffic crimes and quality-of-life crimes that comprise most Municipal Court criminal proceedings.

By contrast, other stakeholders in the Municipal Court system are provided with initial and ongoing training. City Attorneys have historically received prosecution-specific training, and the City Attorneys’ collective bargaining agreement requires the City to pay for Assistant City Attorneys to attend at least forty-five hours of CLE related to their work every three years. Notably, the two City Attorneys who currently prosecute cases at the Municipal Court, have had relatively lengthy tenures in their positions. Police officers reportedly have a sixteen-week training for their orientation.

#### Attorney of the Day Roster

The ideal size for Salem’s CAA panel is reportedly six to eight attorneys, where each attorney serves as Attorney of the Day (AOD) two or three times a month. The “AOD roster” is the mechanism for assigning cases to attorneys. Attorneys advise the Court of their available dates to serve as AOD, and the Court Administrator creates and maintains the AOD calendar. Court Administration currently informs CAAs of their AOD assignments one month in advance of the month in question, but when the AOD roster is full, the calendar is created and posted on a quarterly basis. One CAA per day is scheduled to serve as AOD, Monday through Thursday. All new cases coming into the court – typically by arraignment – with clients seeking appointed counsel are assigned to the on-duty AOD. Another CAA is scheduled to serve in an on-

call capacity for Fridays, when no court sessions are regularly scheduled. See Appendix A for a sample Municipal Court schedule that details when criminal matters are heard.

In recent years, the Salem Municipal Court has suffered from having too few attorneys willing to serve as CAAs. The panel began 2021 with five attorneys until one abruptly quit, leaving three attorneys taking case appointments full-time, one part-time, and one new attorney who joined the panel just as the fact-finding phase of this assessment concluded. By August 2022, the number of attorneys on the CAA panel fell to just three, although at least three more attorneys are expected to rejoin the panel in mid-January 2023. The result has been that, rather than staffing the expected two AOD sessions and one on-call session each month, CAAs have taken three to six AOD shifts per month. The number of assignments a CAA picks up as Attorney of the Day varies from a low of three to four and up to twelve or thirteen. The average, one attorney said, is five to six new cases per shift. As a result, caseloads of the remaining CAAs are high, reportedly making it more challenging to adequately serve all of the needs of each client.

Some days, there is simply no attorney available to staff the AOD session, due to the low number of CAAs. On days where there is no assigned AOD, the first five cases will be assigned to one attorney on the rotation, then the next five will be assigned to the next attorney, and so on, looping back to the first attorney and starting through the list again if needed. A court clerk sends out assignments via email with the next court date and tell the client to contact the attorney before then. This default rotation on unassigned days, can pose problems for attorneys who are already overwhelmed by their workloads, including those who have asked to be assigned fewer AOD days per month in order to lighten their caseload. At least one CAA noted that the assignment of cases on days when there is no designated AOD has produced a higher number of Salem Municipal Court cases in their workload than they had expected, which has disrupted their overall workload.

Regarding the client's experience on days with no AOD assigned, the judge and court staff try to make sure that each client has their assigned attorney's phone number and that the attorney can be told the client's phone number. Furthermore, immediately after the docket concludes, court staff emails the assigned attorney copies of the court documents, including notification of the assigned defendant/case, client information, charging instrument/criminal information, hearing notice, and a half-sheet noting judicial direction. If the client is in custody, this email also includes the custodial order.

Attorneys are told that if they are getting to the point of having too many cases that they can ask to be taken off the AOD rotation. It is up to attorneys to monitor that themselves and ask for relief. Court Administration is receptive to their requests.

#### Court-Appointed Attorney Oversight: Discipline and Billings

The Presiding Judge has authority over discipline for court-appointed attorneys and can remove CAAs from the panel at will. It was reported that she has exercised this authority in various instances due to attorneys being rude and verbally abusive to Court staff, coming to court under the influence of alcohol, and being arrested on drug charges. In these instances, the Presiding Judge has been proactive in not just removing the attorneys from the CAA list, but also referring them to programs for assistance and, where appropriate, providing a path back to representing clients at the Municipal Court again.

The Presiding Judge takes it upon herself to review attorney billings personally, in conjunction with the Court Administrator and a clerk. Under current practice, the Presiding Judge reviews all billings submitted to the Court by appointed counsel. The Salem Code of Ordinances requires the Court to

review appointed counsel's statement of fees and expenses for each case and determine whether the amount requested is appropriate,<sup>42</sup> and in practice this responsibility resides with the Presiding Judge, with assistance from Court Administration. Stakeholders across the system noted that the Presiding Judge's taking this task upon herself did not seem to be an appropriate use of her time or authority. Attorneys noted that the Presiding Judge insists on reviewing all submitted billings in detail to protect against any excessive or unjustified billings, but this process creates a bottleneck for reviews and results in substantial backlogs in billing. One attorney noted that it takes the Presiding Judge about a month to approve a given case's billings, and because payments are then made in the next billing cycle, there are significant delays in the Court paying CAAs for representation.<sup>43</sup>

With respect to both discipline and billings, the Presiding Judge's central role makes it impossible to achieve and maintain defender independence. For a defense attorney, having to argue cases before the same judge who can remove them from the CAA list or control whether they are paid for their work heightens the likelihood of a conflict of interest between preserving one's own employment by not upsetting the judge on one hand, and zealously advocating for all of their client's interests on the other. Interviewed stakeholders across the system called for these responsibilities to no longer run through the Presiding Judge. These responsibilities should be removed from the Court and placed instead with an independent, defense-specific oversight entity such as a newly created municipal indigent defense commission or an existing oversight entity like MCAD.

#### Earlier Indigent Defense System Restructuring Considerations

The Presiding Judge and Municipal Court stakeholders are aware of the importance of defender independence, and there was an attempt several years ago to address independence concerns in the Court's indigent defense system. The TTA team learned that in 2008, then-City Attorney Randall Tosh was working with Presiding Judge Aiken to amend chapter 4 of the Salem Revised Code as it relates to the right to counsel and the Municipal Court's indigent defense delivery structure. The plan at that time was to upgrade the code to provide for a more independent indigent defense delivery system, whether through a standalone public defender office or another model. Mr. Tosh's retirement derailed that process before it could be completed. The issue of a more independent structure has not been addressed formally through changes to the code since then.

#### Indigency Determination and Appointment of Counsel

If an individual seeks appointed counsel in Salem, the court gives them a packet of information to complete. In-custody indigency arraignment is conducted over a video feed between the Municipal Court and either the Marion County Jail or the Polk County Jail, as appropriate. If an individual is in jail, the court assumes indigency and appoints counsel. Eligibility for counsel appointment is made solely at the determination of the judge at the time of arraignment. Court staff do not perform verification of debt or income reported by individuals who request court-appointed counsel. No complaints were heard by the TTA team about appointed counsel appointment being too stringent. If anything, it was said, the court over-appoints, e.g., for non-lodgeable violations. One CAA estimated that 5% to 10% of cases have no attorney involved and the court "questions people hard" when they indicate an interest in waiving counsel. Indeed, the Municipal Court's Waiver of Counsel form repeatedly emphasizes the

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<sup>42</sup> SALEM, OR., REV. CODE § 4.095(d)-(e).

<sup>43</sup> For further discussion of the Court's CAA billing processes, see "Billing and Payment Processes for Court-Appointed Attorneys," *infra* in this chapter.

dangers of proceeding without counsel and the benefits of an attorney’s guidance, and is framed to dissuade waivers. See Appendix B for a copy of the Waiver of Counsel form.

### Caseload and Compensation

Turning to data on caseload and compensation, this section examines criminal case filings at the Salem Municipal Court; the indigent defense caseload; the indigent defense budget; CAAs’ billing and payment; CAAs’ compensation structure, compensation and parity considerations; cost-per-case extrapolations; and a comparison with cost-per-case figures at the Eugene Municipal Court.<sup>44</sup>

### Criminal Case Filings

Criminal case filings make up a fraction of all Salem Municipal Court activity. The Court Administrator estimates that total court filings, which include traffic and ordinance violations and other matters that carry no possible jail sentence, and thus have no right to counsel, average 50,000 to 55,000 cases per year. Meanwhile, criminal cases average 1,300 to 1,500 filings per year. Detailed figures on criminal cases filings for fiscal years 2019-2021 supplied by the City Attorney appear in Tables 3 and 4 below.

**Table 3:  
Salem Municipal Court Misdemeanor Cases Filed and Charges Disposed, FY 2019-2021<sup>45</sup>**

	2019	2020	2021	Total
Misdemeanor Cases Filed	1458	1090	760	3308
Misdemeanor Charges Disposed	1579	804	858	3241
<i>Dismissed</i>	55	11	37	103
<i>Plea</i>	614	309	346	1269
<i>Trial</i>	910	484	475	1869

Table 3 provides the number of misdemeanor cases filed in Salem Municipal Court, along with the corresponding number of misdemeanor charges filed, for fiscal years 2019, 2020 and 2021. Note that the charges disposed tally is larger than the number of cases filed because some individual cases involve two or more charges. The filings for FY 2021 are noticeably lower than prior years because of the temporary cessation of court operations that year due to COVID-19 safety concerns.

As seen in Table 4 below, of all misdemeanor filings between FY 2019 and FY 2021, the three largest case type categories are Trespass (984 charges, or 25%), Driving Under the Influence of Intoxicants (854 charges, or 22%), and Reckless Driving (654 charges, or 17%). Collectively, charges relating to driving<sup>46</sup> and charges of Trespass were the largest drivers of criminal workload for Salem Municipal Court, on aggregate comprising over 83% of all charges filed at the Court in that time.

<sup>44</sup> The Eugene Municipal Court’s indigent defense delivery system – which also relies on assigned counsel – was the subject of an NLADA assessment published in 2020. See BEEMAN, JOY & MROZINSKI, *supra* note 2, at 18.

<sup>45</sup> Data provided by the Salem City Attorney’s Office. Data excludes probation violations.

<sup>46</sup> Including: Unauthorized Entering, Maneuvering, Tampering with, etc., Motor Vehicle (under SALEM (OR.) REV. CODE § 100.260); Fail to Carry or Present License (§ 100.331(1)); Driving Under the Influence of Intoxicants (§ 100.331(10)); Giving False Information to a Police Officer (§ 100.331(2)); Reckless Driving (§§ 100.331(4), 811.140); Criminal Driving While Suspended or Revoked (§ 100.331(7)); Attempt to Elude Police Officer (§ 100.331(8)); Failure to Perform Duties of Driver in an Accident (§§ 100.331(9), 811.700); Obstructing Enforcement (§ 102.090); Operating Motor Vehicle While Using Mobile Electronic Device (Cell Phone Law Third Offense) (§ 811.507(d)); Fail to Obey a Police Officer (§ 811.535); and File a False Accident Report (§ 811.740).



**Table 4:  
Salem Municipal Court Misdemeanors Charged by Offense Type, FY 2019-2021**

SRC Section	Offense Description	2019	2020	2021	Total
100.260	Unauthorized Entering, Maneuvering, Tampering with, etc., Motor Vehicle	11	9	4	24
100.331(1)	Fail to Carry or Present License	58	58	25	141
100.331(10)	Driving Under the Influence of Intoxicants	334	280	240	854
100.331(2)	Giving False Information to a Police Officer	12	4	4	20
100.331(4)	Reckless Driving	240	231	183	654
100.331(7)	Criminal Driving While Suspended or Revoked	130	113	66	309
100.331(8)	Attempt to Elude Police Officer	0	1	0	1
100.331(9)	Failure to Perform Duties of Driver in an Accident	94	115	82	291
102.090	Obstructing Enforcement	1	0	0	1
163.195	Recklessly Endangering Another Person	1	1	1	3
163.465	Public Indecency	1	0	0	1
164.245	Criminal Trespass in the Second Degree	0	1	0	1
164.345	Criminal Mischief in the Third Degree	0	1	0	1
164.805	Offensive Littering	1	1	0	2
166.025	Disorderly Conduct in the Second Degree	0	1	0	1
166.065	Harassment	0	0	1	1
33.015	Contempt of Court	0	1	2	3
33.105	Contempt of Court Sanctions	0	1	0	1
47.200	Accumulation of Solid Waste Prohibited	1	0	0	1
47.220	Dumping of Solid Waste Prohibited	6	2	1	9
47.230	Offensive Littering	17	14	12	43
471.430	Purchase or Possession of Liquor by Person Under 21	11	2	0	13
471.430(1)	Purchase or Possession of Alcohol by Person Under 21 While Driving	1	1	1	3
471.430(2)	Minor in Possession of Alcohol (MIP)	1	0	0	1
475.864	Unlawful Possession of Marijuana	1	0	0	1
50.060	Failure to Obey Health Officer	3	2	0	5
50.260	Keeping of Junk Prohibited	1	0	0	1
50.610	Prohibited Habitation - Order by Health Officer	0	0	2	2
50.800	Public Nuisance Prohibited	8	7	4	19
811.140	Reckless Driving	2	3	6	11
811.507(d)	Operating motor vehicle while using mobile electronic device (cell phone law third offense)	0	1	0	1
811.535	Fail to Obey a Police Officer	0	1	0	1
811.700	Fail to Perform Duties of Driver in an Accident	1	1	0	2
811.740	File a False Accident Report	0	1	0	1
813.010	Driving Under the Influence of Intoxicants	0	0	1	1
90.020	Consumption, Sale of Alcoholic Liquor in Certain Places	26	11	3	40
93.010	Noise Disturbance	3	1	1	5
94.190	Unlawful Overnight Use of Parks	0	0	1	1
94.195	Unlawful Use of Alcoholic Beverages in Parks	6	2	2	10
95.020	Airguns, Discharge Prohibited	1	3	0	4
95.040	Assault	0	5	6	11
95.043	Recklessly Endangering Another	1	91	55	147
95.085	Defacing or Injuring City Property	0	1	0	1
95.100	Concealed Weapons	1	0	0	1
95.120	Disorderly Conduct	33	31	23	87
95.125	Urinating or Defecating in Public	24	30	13	67
95.160	Unlawful Discharge of Firearm	3	0	2	5
95.395	False Swearing	1	0	1	2
95.400	Failure to Appear	29	0	2	31
95.420	Interfering with a Peace Officer	4	2	1	7
95.430	Resisting Officers	4	9	13	26
95.432	Giving False Information to Police Officers	37	15	11	63
95.540	Unauthorized Removal or Destruction of Trees and Shrubs	0	0	1	1
95.550	Trespass	466	304	214	984
95.560	Vagrancy	0	0	1	1
96.220	Public Indecency	3	5	1	9
	<b>Total</b>	<b>1578</b>	<b>1363</b>	<b>986</b>	<b>3927</b>

In terms of case outcomes, the overwhelming majority of criminal cases in Salem are resolved by plea. Nationally, the portion of all misdemeanor and felony cases that proceed to trial hovers around just 5%, but in Salem Municipal Court, trials are even scarcer: merely 8 of 1,579 misdemeanor charges, or 0.51%, were resolved by trial in FY 2019. That trended even lower in the pandemic-disrupted fiscal years 2020 and 2021. This phenomenon of almost non-existent criminal trials begs examination.

The observation of one CAA illuminates the problem:

There is a long delay in resolving cases and court dates are moved – we aren’t able to set things for trial within three months a lot of the time – so without a court date it is difficult to work on a case. The prosecutor and judges will get frustrated with me and other defenders for not having information to share, but it’s an incredibly frustrating system that seriously harms clients who can’t get a trial for months and then are pressured to take a plea deal.

One City Attorney estimated that there was a backlog of 70 to 80 cases where the accused individual had requested a trial, and none of them had been set at that time, noting that because none of those people were incarcerated, they could not invoke the right to a speedy trial under Oregon state statute. One court staffer interviewed estimated that 50 cases were presently set for trial, but that typically just four cases go to trial per year. Even of those that proceed with a seated jury, “maybe half” go to judgment, it was said, and the rest end in mistrial. City Attorney data on case outcomes for the past three fiscal years appear in Table 5 below.

**Table 5:  
Salem Municipal Court Misdemeanor Charge Outcomes, FY 2019-2021**

Misdemeanor Charges Disposed	2019	2020	2021	Total
<b>Dismissed</b>	55	11	37	<b>103</b>
<b>Plea</b>	1516	792	821	<b>3129</b>
<b>Trial</b>	8	1	0	<b>9</b>
<b>Total</b>	<b>1579</b>	<b>804</b>	<b>858</b>	<b>3241</b>

One reason provided for the low trial rate was the limited number of days made available for trials to be heard, typically just two days a month. On those two days, multiple trials are scheduled, but only one can be seated. The Court should explore ways to allow a second trial to go forward in case the first scheduled trial is unable to proceed at the last minute. Some courts, for example, will have a second trial scheduled “on call” in case the first trial does not proceed. CAAs prepare for all cases slated for trial, but inevitably, many will have to be re-scheduled for a later date, at least 45 to 60 days later. Another interviewee noted frankly:

I feel like the Presiding Judge doesn’t like taking things to trial. If the Presiding Judge is covering a trial, it’s a crapshoot whether it’ll actually go to judgment. Something happens in every trial that becomes an issue and everything gets pulled off. It’s something we have no control over because we have an elected judge.

*Indigent Defense Caseload*

Precise data are not available on the total number of court-appointed attorney cases in Salem. However, both Court Administration and the City Attorney’s Office shared estimates on the portion of criminal cases in recent years that involved court-appointed attorneys from their organizations’ respective case management systems (Full Court and Justware). The numbers differ slightly, but follow similar trends, as seen in Table 6.

**Table 6:  
Percent of Criminal Cases Involving Court-Appointed Attorneys, FY 2019-2021**

Year	Court Administration Data	City Attorney Data
2019	90%	79.5%
2020	87%	71.2%
2021	83%	81.3%
Avg.	87%	77%

The City Attorney’s Office reports that its figure for FY 2020 is notably lower than FY 2019 and FY 2021 because many cases did not advance through the system that year due to the pandemic, or were delayed in moving forward until 2021. Even with that outlier year, the overall portion of Salem Municipal Court criminal cases involving court-appointed counsel between FY 2019 and 2021 is significant, ranging from 77% to 87% of all cases, depending on data source.<sup>47</sup>

Anecdotally, attorneys at the Salem Municipal Court reported feeling overburdened by their caseloads, particularly as the low number of attorneys on the CAA rotation necessitated each attorney taking more cases. One attorney who takes cases both at Salem Municipal Court and the Marion County Circuit Court described concerns about excessive Municipal Court workloads:

Salem, for sure, I feel overburdened at Salem Municipal and I also feel obligated to keep taking cases because they don’t have enough attorneys. . . . [T]hat’s why I finally had to say, “I’ve got to stop,” because I can’t keep doing that because it affects my ability to work on their cases. And I work for myself, so I work way past what regular hours are for an eight-to-five job. But that’s because I’ve got to do all the business stuff too, but just taking on those cases takes more time than you have in an eight-to-five day.

An exacerbating factor that further burdens CAAs’ workloads is that the Presiding Judge sometimes assigns the attorney on AOD duty to represent clients who are only charged with violations, in addition to the usual misdemeanor cases assigned to the on-duty attorney. It was suggested that the additional guidance being provided by defense attorneys for charges that do not trigger the right to counsel could instead be provided by the Court through fact sheets and other resources that do not take time away from CAAs’ misdemeanor cases.

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<sup>47</sup> It is worth noting, and perhaps further examining, the discrepancy in figures reported by Court Administration and the City Attorney, particularly in 2019 and 2020.

### Indigent Defense Budget

Salem has one budget line item that covers the services of court-appointed attorneys, interpreters, evaluations, aid and assist evaluations,<sup>48</sup> investigators, and jury fees. The budget is developed in what was described as a simple process, by looking at what has been paid in the past. Expenditures can run over the budgeted amount, but more commonly in the past five years, they have been below the budget, as shown in data provided by the City Finance Office in Table 7. Fiscal year<sup>49</sup> 2021 expenditures were notably lower than prior years, as that period encompassed months when court services were substantially delayed due to COVID-19 safety concerns.<sup>50</sup>

**Table 7:  
Budgeted and Actual Expenditures for Salem Municipal Court Legal/Court Services, FY 2017-2021**

	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
<b>Budgeted</b>	\$380,000	\$388,910	\$400,650	\$377,590	\$386,580
<b>Actual</b>	\$328,808	\$443,013	\$374,250	\$312,558	\$274,568

Data isolating expenditures for just Court-Appointed Attorney services were provided by the Court Administrator for FY 2019-2021 and appear in Table 8 below. Expenditures trended down sizably in that time, with a 22% decrease between FY 2019 and FY 2020 and an 11.5% decrease between FY 2020 and FY 2021.

**Table 8:  
Salem Municipal Court Court-Appointed Attorney Expenditures, FY 2019-2021**

	FY 2019	FY 2020	FY 2021
<b>CAA Expenditures</b>	\$289,479	\$225,669	\$199,702

Costs for the City Attorney's Office, it was noted, are more predictable than costs for court-appointed attorneys, as the former is driven by employees' salaries.

One final point of analysis is average cost per charge for CAA cases, as seen in Table 9. With case outcome data expressed as counts of charges, not cases (see Table 5), it is likely that the average cost per case is higher, as some cases involve multiple charges. Still, cost per charge is under \$300 all three years, and in 2019 and 2021 well under that amount. The average cost across all three years is \$220.56 per charge.

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<sup>48</sup> In Oregon, people who are accused of crimes and who are not fit to stand trial due to mental illness may be ordered by the court to be sent for mental health treatment so they can become fit to "aid and assist" in their own defense. OR. REV. STAT. § 161.370; *see also* OR. HEALTH AUTH., OREGON STATE HOSPITAL – AID AND ASSIST (2019), <https://www.oregon.gov/oha/Documents/Aid-and-Assist-Fact-Sheet.pdf>.

<sup>49</sup> The fiscal year runs from July 1 to June 30.

<sup>50</sup> See "Effect of COVID-19 on Court Proceedings," *infra* in this chapter.

**Table 9:  
Salem Municipal Court Average Cost Per Charge, 2019-2021**

	2019	2020	2021	Average
<b>CAA Expenditures</b>	\$289,479	\$225,669	\$199,702	\$238,283
<b>Charges Disposed</b>	1579	804	858	1080
<b>Avg. Cost Per Charge</b>	\$183	\$281	\$233	\$220.56

*Extrapolating Cost Per Case and More*

Because Salem lacks complete and accurate data on CAA case appointments and case activity, it is impossible to provide precise figures on average cost per case or average caseload per attorney. Accurate data on the number of appointments, both aggregate and per attorney; time expended per case; and amount billed per case are types of minimal information required to monitor basic functioning of the CAA system that are not currently accessible. However, the TTA Team produced an estimate of current cost per case, using data provided by the Court, City Attorney’s Office, and City Finance Office.

Tables 10 and 11 show an extrapolation of CAA average cost-per-case figures produced by applying:

1. the actual case filings reported by the City Attorney’s Office (from Table 3),
2. the estimates of proportions of criminal cases involving court-appointed attorneys provided by the Court (87% of cases) and the City Attorney’s Office (77% of cases) (from Table 6), and
3. the information about Salem Municipal Court Court-Appointed Attorney Expenditures provided by the City Finance Office (from Table 8).

**Table 10:  
Number of Misdemeanor Cases Filed and Estimated Number Handled by Court-Appointed Attorneys,  
FY 2019-2021<sup>51</sup>**

	2019	2020	2021
<b>Total (all misdemeanor cases reported by City Attorney’s Office)</b>	1458	1090	760
<b>CAA cases estimated at 87% representation rate</b>	1268	948	661
<b>CAA cases estimated at 77% representation rate</b>	1123	839	585

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<sup>51</sup> Excerpted and extrapolated from Table 3 (Salem Municipal Court Misdemeanor Cases Filed and Disposed, FY 2019-2021) and Table 6 (Percent of Criminal Cases Involving Court-Appointed Attorneys, FY 2019-2021).

**Table 11:  
Extrapolation: Estimated Average Cost Per CAA Case, FY 2019-2021<sup>52</sup>**

	FY 2019	FY 2020	FY 2021
<b>Court-appointed attorney expenditures*</b>	\$289,479	\$225,669	\$199,702
<b>Cost per case estimated at 87% representation rate</b>	\$228	\$238	\$302
<b>Cost per case estimated at 77% representation rate</b>	\$258	\$269	\$341

\*Does not include expenditures of interpreters, evaluations, and jury fees.

This exercise illustrates the type of information that would assist Salem in making more fully informed decisions about resource needs and performance of court-appointed attorney casework. Having to piece together such information from three entities – the City Attorney’s Office, Court, and Finance Office, and with some of it being just estimates – is not a reliable process.

Again, the figures in Table 11 are not official, validated information on the average cost per case for court-appointed attorney work in Salem. But the extrapolations suggest how data can be used to raise implications and questions. For instance, from a strict expense analysis, an average cost per case of \$228, the lowest figure in Table 11, is quite different – almost 50% less – from the highest average cost per case figure of \$341. Digging more into questions of quality, \$341 reflects average attorney time of 5.2 hours per case for work performed at the current hourly rate of \$65/hour. An average case cost of \$228 divided by \$50 an hour, which is what was paid in 2019, is 4.6 hours, roughly half an hour less time. These figures raise questions, such as whether participating attorneys had more cases apiece in 2019, so cut back on time per case? Did they have too many cases apiece? Did attorneys devote less time because the lower level of pay was a disincentive to do all that was necessary? Further, if accurate cost and time per case figures were known, they could be compared to national standards<sup>53</sup> as well as estimates from other cities of average time and cost-per-case spent in municipal court misdemeanors.

*Comparison to Eugene Cost-Per-Case Amounts*

One comparison is found in Eugene, Oregon, where most municipal court indigent defense work in recent years was provided by two law firms who receive annual contracts to handle particular case types. As of July 2019, rather than billing individually for each case, contract attorneys were paid a flat fee per case that varied depending on the case type, and based on a \$65/hour fee and average projected time-per-case as follows:

- Traditional Court (“non-specialty court”) Case: \$290 (average time 4.4 hours per case)
- DUII Diversion Case: \$290 (average time 4.4 municipal court hours per case)
- Mental Health Court Case: \$290 (average time 4.4 hours per case)

<sup>52</sup> Excerpted and extrapolated from Table 10 (Number of Misdemeanor Cases Filed and Estimated Number Handled by Court-Appointed Attorneys, FY 2019-2021) and Table 8 (Salem Municipal Court Court-Appointed Attorney Expenditures, FY 2019- 2021).

<sup>53</sup> See “Principle 5: Workloads,” *infra* in Chapter 5.

- Problem Solving Docket Case: \$325 (average time 5 hours per case)
- Withdrawal: \$145 (average time 2.2 hours per case)
- Community Court, all services: flat rate of \$118,320, up from \$90,000.<sup>54</sup>

Salem pays appointed attorneys for the time required in each case individually. Therefore, it should be able to produce more accurate cost-per-case and time-per-case information than Eugene, if it implements a program to capture that data.

#### *Determining Need for Court-Appointed Attorneys and Support Staff*

Along with budgeted and actual costs and attorney caseloads, a key component of quantitatively assessing an indigent defense system is the determination of how many attorneys and support staff are required to meet the system’s needs. Such an analysis would look to reverse-engineer the number of full-time equivalent (FTE) CAAs and support staff based on an average of new misdemeanor case filings at the Municipal Court, an average of misdemeanor filings that are “reactivated” from previous cases (arrests on probation violations or warrants), case weighting based on type and complexity of cases, and annual maximum caseload standards for the kinds of cases heard in the Municipal Court.<sup>55</sup>

In order to calculate the need for court-appointed attorneys effectively, however, further study is warranted to determine reasonable workload for attorneys on the CAA panel,<sup>56</sup> expressed as a maximum number of Salem Municipal Court cases that a full-time defense attorney can reasonably take on per year while providing quality representation to all of their clients. Since most panel attorneys do not devote 100 percent of their practice time to appointed municipal cases, case appointments should be made according to the percent of time they have available for it. In other words, some attorneys are likely to be less than 1.0 FTE, depending on how many Municipal Court cases they take on compared with their other work, which may well mean that some attorneys should take on more AOD shifts while others take on fewer shifts. Monitoring would be handled by a dedicated panel administrator.

This heightened sensitivity to workload is intended to permit attorneys to devote the time necessary to each and every case they handle. The effort can be facilitated by requiring panel attorneys to use a single case management system that collects accurate data on case filings and attorney hours, and automates billing. Individual attorney data can then be aggregated and used to determine overall system performance and needs. Ideally the setting of caseload standards would involve a weighted caseload study that is tailored to practice in the Salem Municipal Court, accounting for the types of

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<sup>54</sup> BEEMAN, JOY & MROZINSKI, *supra* note 2, at 14.

<sup>55</sup> An example of this type of calculation is available in the Oregon public defense workload standards report published by the ABA Standing Committee on Legal Aid and Indigent Defense (SCLAID) in January 2022. See AM. BAR ASS’N STANDING COMM. ON LEGAL AID & INDIGENT DEF. & MOSS ADAMS LLP, THE OREGON PROJECT: AN ANALYSIS OF THE OREGON PUBLIC DEFENSE SYSTEM AND ATTORNEY WORKLOAD STANDARDS 4 (2022), [https://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defense/indigent\\_defense\\_systems\\_improvement/publications/or-project](https://www.americanbar.org/groups/legal_aid_indigent_defense/indigent_defense_systems_improvement/publications/or-project) [hereinafter THE OREGON PROJECT].

<sup>56</sup> Workload differs from caseload in that it accounts for the entirety of an attorney’s professional responsibilities, both those that are case-related and those that are non-case related activities.

charges and cases that the Court processes, while also relying on normative opinions of experts and practitioners through a Delphi method of setting caseload standards.<sup>57</sup>

The field of public defense lacks credible, up-to-date national caseload standards. The only national standards ever produced date to 1973,<sup>58</sup> although numerous states have undertaken efforts since then to develop empirically based defender caseload standards. Case-weighting studies are an accepted method of developing workload standards for a public defender program.<sup>59</sup> Policy and practice norms change over time, so to be meaningful, workload standards should be revisited periodically. For example, the relatively recent introduction of body-worn cameras, and the need to watch and analyze that footage, markedly increases the amount of defender time required for case investigation in all cases involving body-worn camera evidence. On the other hand, the national trend toward integration of social workers into public defense practice can lessen the time required of attorneys on cases that are also served by a social worker.

It is important to underscore that the number of FTE court-appointed attorneys needed to fulfill the Municipal Court's needs is not the same as the number of court-appointed attorneys that are needed to serve in the Court's CAA pool. The CAA pool as of the writing of this report has three attorneys, with three more expected to re-join the pool in January 2023, which will not necessarily add 3.0 FTE attorneys to the CAA pool's capacity. The Municipal Court should engage in a deeper analysis along these lines to determine how many FTE attorneys should be in the CAA pool. Similarly, the Municipal Court should account for how many dedicated FTE support staff are assisting those attorneys.

FTE estimates for attorneys and support staff are a powerful tool to guide the Court's budget planning process. If it is determined that there is not enough funding to support the required number of FTE attorneys and FTE support staff estimated through the analysis outlined above, the variables to be adjusted are new misdemeanor filings and reactivated misdemeanor filings. Put another way, if the Municipal Court does not want to hire more attorneys and support staff, then City Attorneys need to reduce the number of cases they file.

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<sup>57</sup> The ABA SCLAID indigent defense workload standards report for Oregon may provide a helpful starting point for this process. See THE OREGON PROJECT, *supra* note 55.

<sup>58</sup> The National Advisory Commission on Criminal Justice Standards and Goals (NAC), established by the federal government, recommended maximum annual caseload standards for public defense organizations in 1973 that have been widely influential, largely because there have been no other attempts to develop national defender caseload standards. In his 2011 book, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, Norman Lefstein set out in detail the history and limitations of the standards, most notably that they were not based on an empirical study. The NAC-recommended annual maximum caseloads of a public defender office are: not more than 150 felonies per attorney per year; not more than 400 misdemeanors per attorney per year (excluding traffic); not more than 200 juvenile court cases per attorney per year; not more than 200 Mental Health Act cases per attorney per year; and not more than 25 appeals per attorney per year. Notably, these caseload figures are designed for attorneys working full-time in institutional defender offices, not as solo or small-firm private practitioners who accept case-by-case appointments as in Salem.

<sup>59</sup> See, e.g., STEPHEN F. HANLON, MALIA N. BRINK & NORMAN LEFSTEIN, *USE OF DELPHI METHOD IN ABA SCLAID PUBLIC DEFENSE WORKLOAD STUDIES: A REPORT ON LESSONS LEARNED* (2021), [https://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/ls-sclaid-indef-delphimethod-lessons.pdf](https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/ls-sclaid-indef-delphimethod-lessons.pdf).



### *Billing and Payment Processes for Court-Appointed Attorneys*

The Salem Municipal Court's CAA invoicing and payment system is entirely paper-based and manually administered. There is no electronic submission of invoices or direct payment made through Automated Clearing House (ACH). Court-appointed attorneys are expected to submit bills for adjudicated cases to Court Administration within 70 days from closing; within 100 days if the defendant fails to appear and a warrant is issued for arrest.<sup>60</sup> Some attorneys submit a couple of bills at a time, while others wait until they have a batch of cases that are closed.

For each client, attorneys must complete and submit a form called the Salem Municipal Court's Affidavit and Order for Compensation.<sup>61</sup> Each form must be accompanied by a summary billing statement, which acts as a detailed backup of the activities performed and time devoted.<sup>62</sup> Requests may be made for interim payment by indicating so on the Affidavit. Salem Municipal Court does not specify use of a format or software program for preparation of the summary billing statement; attorneys may use whatever billing system they prefer. For instance, some use Excel, while others use Clio. Invoices are submitted as hard copies that are either dropped off at the Court or submitted by mail. See Appendix C for the Affidavit and Order for Compensation form.

Other litigation expenses of CAAs, such as paying for an investigator, interpreter, or an expert, must be approved separately by the Court as "non-routine fees."<sup>63</sup> Multiple CAAs voiced displeasure with the current system of oversight and approval for these expenses, noting that the additional steps needed to obtain approval are not only inconvenient but have at times dissuaded attorneys from using investigators or experts. The Presiding Judge's role, in particular, as a gatekeeper to the use of these resources was cited as a source of discomfort. One CAA explained:

I don't like the level of nitpicking oversight in place. I don't like the hoops we have to jump through to get additional funds for investigators or experts. I'd like if there was someone independent we could go to to get expenses approved as they come up. . . . I do [have access to investigators and experts], but I have to go through a process to get it approved and it goes to the Presiding Judge for approval. Sometimes that'll be approved easily; others, I have to go rounds. . . . It used to [dissuade me from using experts and investigators]. I'm no longer concerned by the judge's opinion.

For each invoice received, Court Administration staff check to see that it is timely submitted, verify the math, and list it on a summary document for inclusion in batch payments to the attorney. Once Court staff have completed their review, the invoices are sent for entry into the City's financial system and encumbered, and then sent back to the Presiding Judge for review. The Presiding Judge signs the Affidavit authorizing the bill, and returns it to the Court Administrator for final approval of payment. The Presiding Judge does not have any authority to spend money. She may, however, pose a question; for instance, about the amount of time spent on a particular case or the contact, or lack of contact, made

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<sup>60</sup> N.B. These are the deadlines that Court Administration applies in practice; Salem Municipal Trial Court Rules set these deadlines at 60 days and 90 days, respectively. See SALEM, OR., MUN. TRIAL CT. R. 22.010(3), <https://www.cityofsalem.net/home/showpublisheddocument/452/637783628330470000>.

<sup>61</sup> *Id.* r. 22.010.

<sup>62</sup> *Id.*

<sup>63</sup> SALEM, OR., REV. CODE § 4.095(d).

with a defendant. Judicial second-guessing about attorney performance is improper, as it constitutes an exercise of judicial authority that is likely to unduly influence the provision of indigent defense.<sup>64</sup> Overall, however, in interviews, CAAs did not report an issue with vouchers being reduced by the Court.

With respect to bills being reduced, however, it is noteworthy that one CAA admitted to billing less than the actual number of hours spent on some cases out of feeling guilty about demanding so much money from a cash-strapped system:

[G]enerally, I feel like Salem Municipal cases, you probably get paid \$150 to \$250 for a pretty standard case that wasn't too complex or anything like that. And because you're the one billing as you go, I think what makes it a little bit hard with the Municipal Court cases too is—and I think this could just be a soft spot—is you know they don't have money, so sometimes you might not bill everything you do. . . . [W]ith Salem Municipal, I'm like, "God, I feel bad that things are horrible" . . . and I may not be billing everything that I should be billing, 'cause I don't want them to leave with a bill of \$600.

When court staff were asked how burdensome the billing and payment process is, the reply was that it is not burdensome when at full staffing, but there is always variability in volume: "It is consistently inconsistent," ranging from as few as two to five to as many as thirty to forty-five invoices to process per attorney.

CAA billing records are the responsibility of the Finance Department to maintain. The City's financial system tracks only the total amount paid to each CAA and the defendant's name. As a result, the Court and City have very little in way of producing automated analytics about the CAA system, such as average CAA costs, hours spent on a case, or individual activities performed (e.g., phone calls, motions, court appearances).

#### *Court-Appointed Attorney Compensation and Parity Considerations*

Court-appointed attorneys at the Salem Municipal Court are paid on an hourly basis at a rate of \$65 per hour, a rate that went into effect July 1, 2021. Prior to that, CAAs were paid a rate of \$50 per hour, a figure that had not been increased since 2008. The City agreed to increase the CAA rate of pay after reviewing results of a comparative study of pay for court-appointed attorneys in six other Oregon municipalities that was conducted by Court Administration. The survey found that hourly rates in other municipalities ranged from \$45 to \$70.<sup>65</sup>

Securing the first increase in CAA pay in thirteen years in 2021 was an important development for moving Salem toward a system that will attract and retain sufficient qualified attorneys to serve as CAAs. However, additional factors besides the comparative municipal court CAA pay survey should be considered in setting CAA compensation rates. In particular, the City should develop pay structures for

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<sup>64</sup> For further discussion of defender independence, see "Defender Independence and Interference," *infra* in Chapter 4, and "Principle 1: Defender Independence," *infra* in Chapter 5.

<sup>65</sup> Additional context that may prove helpful in comparing Salem's compensation structure with other municipal public defenders is available in NLADA's 2020 assessment of the Eugene Municipal Court's indigent defense delivery system, which provides detailed profiles of municipal public defender programs in Atlanta, Aurora (Colorado), and Denver. See BEEMAN, JOY & MROZINSKI, *supra* note 2, at 18.

CAAs by undertaking a parity analysis of pay and resources for CAAs and City Attorneys. In addition, pay should factor in consideration of actual attorney overhead costs.

Unlike City Attorneys, court-appointed attorneys must pay overhead costs, which can include rent, parking, malpractice insurance, office equipment, telephones, internet, bar dues, data access fees, required CLE programs, plus non-attorney employee salaries, and benefit programs. Three jurisdictions that have undertaken recent studies to determine average overhead costs for indigent defense attorneys have seen a range of \$39,096 per year in North Carolina,<sup>66</sup> \$54,455 per year in Indiana,<sup>67</sup> and approximately \$99,000 per year in Michigan.<sup>68</sup> The North Carolina study, for example, found that the average non-optional overhead costs per attorney per billable hour was \$46.71, meaning that a \$55 per hour pay rate, less FICA, health costs, retirement costs, and life insurance costs, translated to an effective pay rate of just \$2.71 per hour.<sup>69</sup> An overhead costs study in Salem may find that the effective pay rate for Salem Municipal Court CAAs is similarly paltry.

One interviewee mentioned that a consideration that had played into the compensation rate staying at \$50 per hour for so long was that the City felt it could still recruit attorneys to the panel at that rate. This particular piece of information is concerning from a pay parity standpoint, as the determinative factor in setting the rate for indigent defense attorneys' pay should be parity and equity, not simply whether the Court can continue to find attorneys willing to sign up at the lower rate. One way to address this that has been pursued by other jurisdictions is to build in a cost of living adjustment mechanism.

Considering the hourly rate paid to court-appointed attorneys alone does not comprehensively capture adequacy of compensation or disparity in resources afforded to City Attorney staff. In contrast with CAAs, City Attorney staff engage in a collective bargaining process, which results in greater resources and, importantly, a voice to consistently advocate for adequate pay, benefits, and resources. The person taking on the role of advocate for CAAs' compensation is the Court Administrator. That arrangement presents a conflict of interest that undermines defender independence, as the Court Administrator must temper CAAs' compensation needs with other operational costs of the Court. Either an independent indigent defense oversight entity or a collective of CAAs themselves should be the designated advocates for ensuring that pay rates and compensation structures meet CAAs' needs. Chapter 5 discusses parity further.

And unlike City Attorneys, as of the writing of this report, CAAs are not eligible to participate in the federal Public Service Loan Forgiveness (PSLF) program. That program helps professionals reduce federal

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<sup>66</sup> IND. PUB. DEF. COMM'N, INDIANA PUBLIC DEFENSE OVERHEAD COSTS: STATEWIDE SURVEY RESULTS & FINDINGS 7 (2020), <https://www.in.gov/publicdefender/files/Overhead-Survey-Results.pdf> (citing MARGARET A. GRESSENS, N.C. OFF. OF INDIGENT DEF. SERVS., FY19 PRIVATE APPOINTED COUNSEL (PAC) EFFECTIVE PAY RATE STUDY: PUBLIC DEFENSE ATTORNEY OVERHEAD RATES AND ACCESS TO BENEFITS 5 (2019), <https://www.ncids.org/wp-content/uploads/2021/03/FY19-Effective-Pay-Rate-Overhead-Report.pdf>).

<sup>67</sup> IND. PUB. DEF. COMM'N, *supra* note 66, at 5.

<sup>68</sup> See MICH. INDIGENT DEF. COMM'N, INCENTIVIZING QUALITY INDIGENT DEFENSE REPRESENTATION: RECOMMENDATIONS FOR REFORMING COMPENSATION MECHANISMS IN MICHIGAN 15-16 (2018), <https://michiganidc.gov/wp-content/uploads/2018/06/Incentivizing-Quality-Indigent-Defense-Representation.pdf>.

<sup>69</sup> MARGARET A. GRESSENS, N.C. OFF. OF INDIGENT DEF. SERVS., FY19 PRIVATE APPOINTED COUNSEL (PAC) EFFECTIVE PAY RATE STUDY: PUBLIC DEFENSE ATTORNEY OVERHEAD RATES AND ACCESS TO BENEFITS 5 (2019), <https://www.ncids.org/wp-content/uploads/2021/03/FY19-Effective-Pay-Rate-Overhead-Report.pdf>.

student loan debt by working full-time in designated public service roles, including as lawyers who work as prosecutors and public defenders, but not private attorneys who accept court-appointed criminal cases.<sup>70</sup>

Finally, another relevant point of comparison for Salem CAA pay is the Office of Public Defense Services' pay scale for attorneys. To determine a unit cost for each full-time attorney, OPDS applies a formula that includes funds to cover a level of support staff and assumes that the attorney will handle cases totaling up to 115% of the NAC standard.<sup>71</sup> For each full-time, case-carrying attorney in urban counties, which includes Marion County, annual OPDS pay ranges from \$200,000 to \$211,150 per 1.0 FTE.<sup>72</sup>

### Indigent Defense Analytics

Data and analytics on the functioning of Salem's court-appointed attorney system are limited, which impedes the ability to make fully informed resource requests and monitor performance. Data on indigent defense consists primarily of information kept by the Court on court-appointed attorney case closings and payments. There is no effort to review activities performed, such as use of investigators or social workers, motions filed, or trial rates, to assess patterns in quality of work. There is no automated system for court-appointed attorney billing and payment, reducing the ability to monitor appointment and billing trends. The City Attorney's Office has some data available on involvement of court-appointed attorneys. But as seen in the discussion of caseload data above, the different case tracking systems used by Court Administration and the City Attorney's Office show some inconsistencies in the rate of court-appointed attorney involvement in overall criminal cases.

Salem would benefit from having a dedicated electronic system for tracking court-appointed attorney activity. Ideally such a system would integrate with other justice system functions, including court administration, prosecution, policing, and incarceration. Even if not integrated with other functions, a dedicated case tracking and payment program for court-appointed attorney activity would ensure greater accuracy, centralize access to key information, and simplify analysis of overall activity and trends. Information should be collected on an individual case basis about inputs and outputs, including factors such as:

- case appointments by case type,
- client demographics,
- attorney activity,

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<sup>70</sup> In a promising development, a new proposed rulemaking by the U.S. Department of Education that is pending as of the writing of this report would, *inter alia*, extend PSLF eligibility to people working in public service capacities and are not an employee of a PSLF-qualifying employer but instead contract with qualifying employers. See Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 87 Fed. Reg. 41878 (proposed July 13, 2022) (to be codified at 34 C.F.R. pts. 600, 668, 674, 682, 685), <https://www.federalregister.gov/documents/2022/07/13/2022-14631/student-assistance-general-provisions-federal-perkins-loan-program-federal-family-education-loan>.

<sup>71</sup> The NAC-recommended annual maximum misdemeanor caseload of a public defender office is: not more than 400 misdemeanors per attorney per year (excluding traffic). Adding 15% to the NAC standard of 400 misdemeanors is 460 cases. That figure will be changing, as OPDS is completing a case-weighting study that will lead to development of updated caseload standards.

<sup>72</sup> Email from Erin Severe, Deputy General Counsel, Or. Off. of Pub. Def. Servs., to author (Oct. 26, 2021) (on file with NLADA).

- case outcomes, and
- case costs.

The program should be able to easily produce aggregate reports on overall system performance and assist in determining resource needs. If Salem were to introduce an independent entity or person that is responsible for CAA oversight, data collected at the individual case and attorney level would be invaluable to monitor training needs and workload allocation, and otherwise support overall quality of service provided.

### Effect of COVID-19 on Court Proceedings

The COVID-19 pandemic affected Salem Municipal Court proceedings starting in March 2020 and has continued to do so more than two years later. Perhaps the starkest effect has been on defendants who seek to have their cases adjudicated by a jury trial. Criminal jury trials were discontinued in late March 2020 due to concerns over inadequate space to safely convene prospective jurors and all other participants – including City Attorney, defense attorney, judge, court staff, and witnesses – required at jury trials. Jury trials (along with violations trials) only resumed in July 2022, sixteen months later. In November and December 2021, the NLADA TTA team was able to observe court proceedings remotely. Team members observed multiple defendants appear at status hearings in which their attorneys stated that their client was awaiting a trial date. The judge could only tell them that the court was not yet holding jury trials, so to return for another status date. That delay is worrisome for multiple reasons.

Criminal case defendants have a constitutional right to a speedy and public trial by an impartial jury. Continued delay in the ability to fulfill that right perpetuates uncertainty that may result in someone pleading guilty simply for the sake of closure. The need to repeatedly appear at court, only to be told to keep coming back, is disruptive to anyone with job or family care obligations. The possibility of a failure to appear (FTA) increases, sometimes because of those other competing obligations. An FTA can trigger additional criminal charge entanglement. Even if a client can join a status conference by telephone, protracted pendency of the case affects an individual's ability to make life decisions about employment, education, housing, and more.

As of February 2022, Court Administration staff were working toward convening key stakeholders to explore opportunities to use another city facility that can safely accommodate the multiple participants involved in seating and holding jury trials while COVID health concerns remain.

Other court proceedings, such as arraignments and status hearings, were also halted in late March 2020 but, unlike trials, resumed much earlier. They are conducted in hybrid fashion with court staff located in the courtroom but other participants, including City Attorney, defense attorney, and defendant, able to choose to join by telephone or appear in person. The Court does not have a regular video docket option, but as mentioned, the initial appearance of those defendants who are detained at the jail following arrest is always done over a video feed, even without a public health crisis. In court observations, the TTA team saw a mix of some defense attorneys choosing to appear in court with clients, and some defense counsel calling in while their clients appeared in court. Some defendants phoned into the proceeding and were told to remain on the line and listen until their case was called. In all cases observed, the City Attorney participated by phone.

Having the defense counsel and client located in different places, with no ability to see and confer with one another, raises questions about their ability to meaningfully communicate. While COVID health

concerns forced courts across the country to resort to less than optimal measures to allow courts to continue operating, any temporary work-arounds where clients are not able to freely confer with counsel and observe the demeanor of other participants should be discontinued.

Now that trials have resumed, the Court has made it a priority to work through its backlog of trials. Since resuming trials, the Court is scheduling approximately two to three jury trials per month.

### Interviewee Suggestions for Improvement

To close out this chapter, the TTA Team felt it worth mentioning some thoughtful suggestions from interviewees about desired improvements for Salem's indigent defense system. They speak to the Team's overall perception of a justice system whose various stakeholders are committed to improving responsiveness to those involved in the criminal legal system.

- Several interviewees focused their suggestions on court-appointed attorney recruitment and retention, and ways to achieve those ends. A court staffer called for the CAA roster to be three times bigger than it currently is, so that the system is not "constantly overloading the same group and basically breaking them." One judge noted, "Having adequate compensation will help attract and retain more qualified attorneys," noting that many attorneys see the overall experience of the Municipal Court as not worthwhile for the pay being offered. Similarly, another judge called for CAAs to be paid competitively relative to what attorneys can make elsewhere, and for the system to provide training for CAAs, and a defense attorney said that CAAs should be paid similarly to prosecution. One court staffer wants the Court to spend more time in the hiring process to get "a better mix of attorneys in the Court," so that they are better equipped with expectations on how Court Administration conducts business, on behavior in the courtroom, and on submitting bills. A prosecutor called for the Municipal Court to be made a more attractive place for practicing law by making the Court "more client- and lawyer-friendly."
- Oversight of CAAs was also a central topic for interviewees' recommendations. One suggestion from a court employee was for there to be "better oversight in general for all CAAs. [T]here needs to be one point of contact: the person handling the billing should be the person handling the schedule should be the person participating in the hiring process; all of those things." One court staffer recommended that CAAs' caseloads be monitored more closely, noting that monitoring currently is not done at all, which leaving the court without accurate information on how many cases any attorney has or what impact an attorney leaving the rotation would have. A defense attorney called for the Municipal Court's indigent defense function to be operated by a defender-led consortium where the Presiding Judge would have no involvement in compensation or discipline. In a similar vein, another defense attorney sought accountability and oversight for the Court, as there is currently no recourse to address treatment of CAAs in and out of court, and compensation levels for CAAs.
- A variety of stakeholders believe that the Municipal Court should be made a court of record. One prosecutor felt that would provide "more formality" and allow for post-conviction relief in case of an ineffective defense attorney. Some felt that it would provide more accountability if inappropriate or unprofessional remarks are made in court.
- One defense attorney demanded a reassessment of how a "reasonable" offer from the prosecution is defined, with more perspective needed to avoid disproportionately harsh punishments for the relatively low-level offenses charged in the Court.

- A city prosecutor thought the Court would benefit if there were standards set for minimal defense counsel infrastructure and staffing. For instance, requirements that CAAs have adequate computers and other office equipment, as well as a way to collect messages, a way to receive data, and a private place to meet with clients, would help ensure that defense counsel can do their job well. It was noted that at least one previous CAA would meet with clients at the library because she did not have an office in Salem. Similarly, a former prosecutor said that the Court should consider standards for CAAs, including requiring training or mentoring to better understand courtroom protocol, case processes, communication with clients, available or unavailable defenses, and motions.
- One stakeholder spoke to the impact of support staff for CAAs, noting that having an assistant greatly increases case handling efficiency, provides better client contact, and allows the attorney to focus on legal work instead of administrative tasks.
- Access to social services was also a topic called out in multiple interviews. A judge would like the Community Court program to be relaunched. A prosecutor called for the Court to have more mental health treatment options, more meaningful sentencing options, and something equivalent to a probation officer or case manager in certain cases to monitor people in need of ongoing accountability.
- Various suggestions centered on improvements to Court Administration. One court staffer called for improvements in the court administration hierarchy to provide more clear direction beneath the Court Administrator role. Another court staffer recommended the creation of a position within Court Administration that was dedicated to training staff full-time and auditing, and overall for a better distribution of work within Court Administration.
- Interviews with court staff probed the various Court Administration tasks performed and level of effort entailed to administer the CAA system. Work entails billing responsibilities, including reviewing the accuracy of math entered on vouchers, and, separately, reviewing the descriptions of work performed; scheduling attorneys for duty days; and calling to make appointments when no attorneys are available for the AOD slot. But there is no single person at the Court who serves as a point of contact for CAAs. If CAAs have questions, it was said, it is not obvious whom among court staff to contact for assistance.

## Chapter 4: System-Wide Challenges

In the course of NLADA’s evaluation, the TTA Team encountered a number of challenges that are systemic in nature, directly involving stakeholders across the Salem Municipal Court system apart from just court-appointed defense attorneys, that affect the delivery of indigent defense services and are important to mention in this report. These issues are as follows: defender independence and interference, the lack of judicial oversight and limited recourse to promote accountability of the elected municipal judge, irregularities in the administration of justice, the question of whether the Salem Municipal Court should become a court of record, lack of community resources and holistic defense capacity, system-wide race equity data, the status of maintaining the Municipal Court’s criminal docket, Court operations and efficiency and the integration of technology, Court Administration structure and staffing, the Municipal Court’s physical infrastructure, and cross-stakeholder coordination.

### Defender Independence and Interference

The structure of public defense delivery oversight at the Salem Municipal Court undermines defender independence, a key component in ensuring fair trials and upholding the Sixth Amendment right to counsel. This section discusses defender independence generally, threats to defender independence through system structures and processes as well as individual actions, and necessary steps going forward.

#### Defender Independence Generally

The American Bar Association has promulgated guidance that functions to ensure the constitutional mandate of providing effective assistance of counsel is met. The ABA *Ten Principles of a Public Defender Delivery System* are covered in detail in Chapter 5 below and include the need to ensure that counsel is able to represent clients without interference or fear of reprisal from any person or entity not representing the client. If counsel in Salem is interviewed, selected, supervised, subject to firing or otherwise controlled by the court, or indeed by the singular Presiding Judge, this structure threatens the ability to provide zealous representation that by nature is adversarial and cannot be subject to outside influence.

In any jurisdiction, the safeguarding of defender independence is a responsibility borne not simply by indigent defense attorneys, but by stakeholders across and adjacent to the criminal legal system as well as by the system itself. Both the structures of rules and processes with regard to the provision of indigent defense as well as the actions of key individuals – such as the head of the judiciary, court administrators, and government executives – are necessary to consider in assessing defender independence.

#### Issues in the Salem Municipal Court System

Defender independence is an issue that has had the attention of stakeholders within and around the Salem Municipal Court, including the Presiding Judge and the Court Administrator. The Presiding Judge and the previous City Attorney had collaborated to restructure the city ordinances governing the municipal indigent defense delivery system in 2008 before those efforts were derailed by the City Attorney’s retirement. A return to serious reconsideration of the Salem municipal indigent defense function’s structure and oversight is long overdue.



Current indigent defense system structures and processes are rife with potential conflicts of interest. City laws empower the Presiding Judge to hire attorneys for the CAA pool, fire attorneys from the pool at will, approve all CAA billings before payment is rendered, and discipline CAAs as needed. This arrangement is problematic not only in having the judiciary exert such broad control over the defense – particularly when the prosecution operates free from such control – but also in having CAAs argue cases on a regular basis in front of the same Presiding Judge who controls their employment and compensation. Individual attorneys are at a heightened risk of a conflict of interest between career self-preservation and zealous representation of their clients’ interests on the basis of feeling that have to appease the Presiding Judge. Similarly, having the Presiding Judge control access to non-routine expenses is likely to chill attorneys’ interest in leveraging the assistance of investigators and experts to achieve the best case outcomes for their clients, as the Presiding Judge’s control not only imposes additional administrative hurdles but also injects the non-routine expenses approval process with a consideration of balancing a client’s interests against not upsetting the figure who controls the attorney’s employment.

It should be noted that the Presiding Judge and others have taken steps to mitigate systemic deficiencies in defender independence. When the Presiding Judge took office, the practice was for that position to be singularly responsible for attorney hiring, firing, payment, and discipline. She has installed intermediate processes to separate herself from much of the decision-making with respect to indigent defense. For example, previous Presiding Judges would privately call attorneys and ask them to serve as CAAs. Hiring now involves a public call for applicants, with review of candidates by the Court Administrator and two pro tem judges, who deliver hiring recommendations to the Presiding Judge.

The TTA Team identified a number of Individual actions and behaviors that undermine defender independence and risk interference in the defense function. Interviews with CAAs and other stakeholders revealed numerous instances of inappropriate interference by the Municipal Court and its judges in the defense function. Several CAAs and other stakeholders reported that the Presiding Judge has openly antagonized attorneys in court and questioned their professional integrity in front of their clients, which is deeply harmful to attorney-client relationships and the provision of quality indigent defense. Further discussion of inappropriate remarks by the Presiding Judge follows later in this chapter. This kind of individual behavior brings undue influence to bear against indigent defense attorneys and constitutes judicial interference in the defense function.

### Necessary Reforms for Salem

In order to properly address concerns around defender independence, a number of steps are necessary. Foremost among these is that responsibility for municipal indigent defense attorney oversight must be removed from the Presiding Judge and the Municipal Court and placed instead with an indigent defense entity that is independent of the Municipal Court and aligns with the interests of defenders and their clients. Salem can consider various avenues to ensure defender independence.

One possible route would be for the Municipal Court to contract with the Marion County Association of Defenders, the consortium that oversees court-appointed attorneys at the Marion County Circuit Court. MCAD already has infrastructure and experience to support indigent defense oversight, including providing attorneys with access to training and mentorship, and MCAD taking on the Municipal Court defense docket would be akin to the consortium adding a specialty docket to its repertoire. Historically,

many attorneys providing indigent defense at the Municipal Court have simultaneously taken indigent defense cases at the Circuit Court through MCAD.

Another possibility would be for the City to establish an independent, nonpartisan commission to oversee the delivery of indigent defense services. Most commonly seen at the state and not the municipal level, the scope of indigent defense commissions' roles vary across the country, but core responsibilities are to participate in budgeting for the system, and authority to select the administrator or chief public defender to carry out day-to-day operations. If Salem continues to operate a panel, a commission could promulgate policies, such as qualifications for panel membership, attorney invoicing and payment, and creation of attorney oversight and discipline procedures, which a CAA panel administrator would carry out. Another feature of the commission model is the voice it lends to speak out on core issues to city officials and the judiciary.

The City may want to establish an institutional municipal public defender office, which can hire attorneys as salaried employees to take on Municipal Court indigent defense cases and conduct the essential oversight activities that currently lie with the Presiding Judge. This option can be particularly suited to ensuring that there is a strong voice for defender independence, although it is recommended that an independent commission at least be responsible for hiring the chief defender and helping establish the program budget. The City of Aurora, Colorado has an independent commission to oversee its institutional municipal public defender office, and has achieved substantial progress and benefits using this model.<sup>73</sup> The cost of building out personnel and infrastructure, the availability of attorneys to work on municipal public defense full-time, and the size of the Salem Municipal Court's criminal docket would be critical factors to consider.

Whichever path the City chooses, the necessary reforms will require statutory changes and investment. The portions of city laws that bear on the municipal indigent defense system and the Presiding Judge's authority – primarily City Charter sections 23 and 24, Salem Revised Code chapter 4, and Salem Municipal Trial Court Rules section 22 – will need to be amended, and other new laws written, in order to fully institute the changes. This will likely require action by the City Council, the City Manager, the Presiding Judge, the Court Administrator, and the City Attorney's Office, and may necessitate one or more ballot measures.

The institution of independent oversight of the municipal indigent defense function will also likely require additional investment by the City. If MCAD were to take over the Municipal Court's indigent defense docket, it is possible they would require compensation higher than the current \$65-per-hour rate given to CAAs. Setting up an oversight entity would probably be more expensive, considering the costs of hiring a manager and support staff to oversee municipal indigent defense. Of an estimated \$500,000 annual budget for Municipal Court costs, approximately \$350,000 is allocated to indigent defense. Independent oversight of the public defense function will require management and staffing: if a manager costs roughly \$175,000 per year and an assistant to help manage the assigned counsel structure costs another \$65,000 or so, the original \$350,000 for indigent defense is pared down to about \$110,000 for attorneys. Simply put, the current budgetary allocations are not likely to be sufficient to

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<sup>73</sup> See generally MAREA BEEMAN, ROSALIE JOY & MICHAEL MROZINSKI, NAT'L LEGAL AID & DEF. ASS'N, REVIEW OF THE AURORA, COLORADO MUNICIPAL PUBLIC DEFENSE SYSTEM 18-21 (2021), <https://www.nlada.org/review-aurora-sept-2021>.

institute and maintain independent oversight of municipal indigent defense. Improving public systems requires funding.

It should be noted that multiple stakeholders raised concerns that the investment required for independent oversight would not be politically viable and may ultimately result in the Municipal Court eliminating its criminal docket and only handling violations that do not carry a possible jail sentence. It will be worthwhile for the City to take stock of whether it wants to prosecute the quality-of-life crimes and ordinance violations that would almost certainly not be prosecuted at the Circuit Court otherwise.

Safeguards to prevent interference and ensure independence of the indigent defense function are necessary to promote public trust in the judiciary and ensure access to counsel who is free to represent the best interests of their client, just like a privately retained attorney is.

### Structural Concerns Realized: Frustrations with the Presiding Judge and the Absence of Judicial Oversight

Structural problems related to independence of the Municipal Court's indigent defense function and a lack of judicial accountability, have led to a breakdown in the working relationships between current Presiding Judge Jane Aiken and several court-appointed attorneys. Compared to many other parts of Oregon, Salem has a relatively robust pipeline of attorneys, both seasoned and newly minted; scarcity of attorneys serving on the Salem panel was attributed in interviews, by and large, to one primary factor: difficulty practicing in front of the current Presiding Judge. A combination of the Presiding Judge's control over the indigent defense function, professional and interpersonal clashes between the Presiding Judge and CAAs, and the absence of effective recourse for CAAs to address breakdowns in working relationships with the Presiding Judge has bred frustration and resentment among many court-appointed attorneys and prompted many to curb or end their participation in the CAA pool. This deterioration seriously threatens the delivery of Sixth Amendment rights at the Salem Municipal Court. The following discussion first examines patterns found in stakeholder feedback about these working relationships, followed by a look at the absence of pathways to addressing concerns with the Presiding Judge.

### Breakdowns in Working Relationships Between the Presiding Judge and Court-Appointed Attorneys

The TTA Team's investigation encountered a series of complaints about interactions between court-appointed attorneys the current Presiding Judge. These concerns have been raised consistently over a considerable period of time, including practitioner comments provided to the Court in 2016, a survey of Municipal Court stakeholders conducted by the Court in 2017, and interviews conducted for NLADA's assessment. Multiple interviewees reported behavior by the Presiding Judge as "inappropriate," with problematic behavior flagged with respect to professionalism, case administration, and procedural decisions. These concerns are illustrated not to call for action to be taken against the outgoing Presiding Judge, but instead to demonstrate the ways in which structural deficiencies in indigent defense control and oversight, as well as the absence of realistic options for addressing these concerns, leads to broader dysfunction.

With respect to professionalism, reported examples of inappropriate behavior by the Presiding Judge included dressing down attorneys in front of clients, questioning whether an attorney is prepared or is doing their job properly in front of clients when such commentary is unfounded, questioning attorneys'

integrity in open court, accusing attorneys of malpractice in the courtroom, and mocking attorneys for raising behavioral and systemic concerns with the Court. The TTA Team learned that at least some instances of abrasive comments were attempts by the Presiding Judge to address what she felt were inadequate levels of representation by CAAs. One interviewee observed, “The Presiding Judge very much feels the authority of her position and has some very distinct views about how people should conduct themselves, and woe to them if they don’t meet her perceived standards.” Many stakeholders felt that the Presiding Judge made unprofessional comments in court that she would not have if the Municipal Court were a court of record and her words were preserved for posterity, and it was reported that the Presiding Judge herself was concerned about her in-court statements being publicized if proceedings were recorded. Other frustrations stemmed from the Judge’s repeated late arrival to court as well as keeping others past closing hours while subjecting those there to lengthy personal stories. In these recurring instances, the Presiding Judge’s unfettered authority over the Court’s indigent defense system, coupled with the absence of a transcript, discourages attorneys from attempting to seek redress for perceived impropriety.

A number of attorneys called out odd or inappropriate decisions related to case administration and procedural decisions. Specific complaints raised in interviews included the Presiding Judge appointing attorneys to handle violations and other matters that do not carry right to counsel guarantees, sowing confusion by requiring the filing of written motions in situations where pro tem judges did not, refusing to move forward with certain pleas when filling in for a pro tem judge who was absent for their assigned day on the bench, and attempting to diagnose clients’ mental health conditions from the bench. Additional concerns were raised over the Presiding Judge’s meticulous and time-consuming review of CAA billings, which led to backlogs and delays in the Court paying out for cases. Multiple stakeholders also believe that the Presiding Judge is reluctant to take cases to trial, and it is uncertain whether those that do go to trial will go to judgment. The lack of trials – even preceding the pandemic-related hiatus in scheduling trials – places extra pressure on accused individuals to accept a plea deal and thereby undercuts CAAs’ ability to provide robust defense of their clients.

Viewed through a different lens, many of these instances are exercises of a judge’s prerogative that are not too different from how judges in other courts wield their authority; but the problems in the Salem Municipal Court are distinguished by the absence of buffers to insulate the defense function from the judiciary, and from the Presiding Judge in particular.

In other practice settings, attorneys or other system stakeholders might have available avenues to have complaints about these interactions addressed by an authority that has oversight over judges, but the lack of such recourse for Salem’s elected judge, particularly in light of her control over the indigent defense system, has led to frustration and dysfunction. The inability to effectively address these concerns has generally repelled attorneys, pushing them either to evade interactions with the Presiding Judge or to cease their practice in the Salem Municipal Court altogether. Several attorneys interviewed described how they actively avoid having to appear in front of the Presiding Judge, with many trying to set return dates for cases when they know the Presiding Judge will not be on duty. Attorneys who have left the rotation pointed to the Presiding Judge as a significant reason why they stopped practicing at the Salem Municipal Court.

Although the current Presiding Judge has been the focus of intense criticism from stakeholders, the criticism described here is not a complete picture of her work at the Municipal Court. The TTA team

noted that Judge Aiken has a remarkable sense of empathy for people who are charged in the Salem Municipal Court, and her approach appears to be centered on the rights and experience of accused individuals, particularly the right to counsel. That genuine concern for those who appear before her seems to underlie behavior that has stood out as misguided or odd to other stakeholders, including making inquiries about mental health or personal background of accused individuals in order to troubleshoot needs that may intersect with their criminal case, and assigning CAAs to violation-only cases where the accused individual is not technically entitled to an attorney in order to ensure that they had guidance through the court process. Indeed, one defense attorney noted that, in the context of recent Presiding Judges of the Salem Municipal Court, Judge Aiken stood out for taking measures to protect the rights of people who are accused of offenses. Judge Aiken's forward thinking in modernizing the Municipal Court is also to be praised, particularly with respect to establishing and expanding a diversion program, and spurring the creation of Salem's Community Court program.

It must also be noted that, although interviewees predominantly cited inappropriate behavior by the Presiding Judge, they also reported actions by pro tem judges that were unusual or problematic in a similar vein, if to a lesser degree. Two pro tem judges were reported to improperly set additional terms to diversion agreements, without the defendant having been advised of the additions, using a stamp that orders the defendant to "Obey all laws and city ordinances," which would frequently result in diversion being terminated for something as innocuous as a traffic ticket. A similar issue with use of added conditions arose over a prohibition on visiting bars and taverns, which led to similarly disproportionately harsh outcomes for defendants. One attorney noted that there are concerns with a couple of judges regarding impartiality and independence.

#### Lack of Judicial Oversight and Limited Recourse to Promote Accountability of the Elected Municipal Judge

Judges hold great sway over courtroom decorum. Attorney disgruntlement with particular personalities or practices is not uncommon in courts across the country. However, certain situations rise to the level of seeking independent review. Unfortunately, there are limited avenues for review of elected municipal court judges in Oregon.

Pursuant to section 24 of the Salem City Charter, the position of Presiding Judge in Salem is an elected office with a four-year term. The Salem Code of Ordinances provides that a person holding this position must be an active member in good standing with the Oregon State Bar, which requires adhering to the Code of Professional Conduct.

Municipal judges in Oregon that are appointed by city authorities are subject to some form of oversight; for municipal judges who are elected, however, there is no mechanism by which they can be held accountable for complaints lodged against them. This lack of oversight is unique to just the four municipal jurisdictions in Oregon, including Salem, that have an elected judge. In other cities, such as Eugene, where municipal presiding judges are appointed by the city council, concerns about judicial conduct could be reviewed and, if necessary, acted upon by the city. Other than the electorate, elected municipal court judges do not have a boss. The Salem City Manager is barred by the City Charter from exerting control over the Presiding Judge's judicial function.<sup>74</sup> Apart from voting the municipal judge out

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<sup>74</sup> SALEM, OR., CITY CHARTER § 23(7)(b).

in regular quadrennial elections, the only mechanism in Salem to remove an elected municipal judge is to subject the official to a no-confidence recall process.

In contrast, state court judges in Oregon are required to comply with the Oregon Code of Judicial Conduct, which establishes standards for the ethical conduct of judges and judicial candidates.<sup>75</sup> Rule 2.1 of the Code sets out that “A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary and access to justice are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system.”<sup>76</sup> Enforcement of all rules contained in this code is governed by the state Commission on Judicial Fitness and Disability. The commission investigates complaints lodged against state judges and justices of the peace and investigates when alleged conduct might violate the state’s Code of Judicial Conduct or Article VII (amended), section 8 of the state constitution.<sup>77</sup> If the Commission files formal charges, a public hearing is held. The Commission then makes a recommendation to the Oregon Supreme Court. Recommendations include dismissal of the charges, and censure, suspension or removal of the judge. The Commission, however, does not have jurisdiction over municipal court judges, whether appointed or elected.<sup>78</sup>

The entity that oversees complaints of possible misbehavior by attorneys who are licensed to practice in Oregon is the Oregon State Bar. However, it was said, a municipal court judge’s actions performed in her role as a judge, rather than as a lawyer, are not subject to review by the State Bar.

Thus the only real mechanism of recourse for dissatisfaction with an elected municipal court judge would be a no-confidence recall process, whereby a recall petition is filed against an elected official and a special election is held to determine whether to remove the official from their position.<sup>79</sup> Interviewees observed that the public’s awareness of municipal court operations is generally quite low. It is highly unlikely that public awareness about temperament of a municipal court judge would ever rise to the level of concern by the general Salem electorate. Historically in Salem, incumbent judges have run unopposed and are handily re-elected.

With Court Administration overseeing indigent defense attorneys, including their participation on the panel and their payment in individual cases, the lack of recourse to question judicial decorum raises grave concerns about attorney independence. Attorneys whose pay is to large extent perceived to be approved by a particular judicial officer are not likely to challenge comments or orders made by that judge.

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<sup>75</sup> See *State ex rel. Kaino v. Comm’n on Jud. Fitness & Disability*, No. JFC 01-302 (Or. Aug. 14, 2003) (holding that municipal courts in Oregon are not state courts and that therefore municipal court judges are not bound by the state’s Code of Judicial Conduct).

<sup>76</sup> OR. CODE OF JUD. CONDUCT R. 2.1 (2013), <https://www.courts.oregon.gov/rules/Other%20Rules/CodeJudicialConduct.pdf>.

<sup>77</sup> See *Rules & Laws*, OR. JUD. BRANCH (last visited Sep. 7, 2022), <https://www.courts.oregon.gov/programs/cjfd/rules/Pages/default.aspx>.

<sup>78</sup> See *Complaint Form*, OR. JUD. BRANCH (last visited Sep. 7, 2022), <https://www.courts.oregon.gov/programs/cjfd/complaint/Pages/form.aspx>.

<sup>79</sup> See OR. CONST. art. II, § 18 (outlining the recall process for public officers in Oregon).

The result then, for some court-appointed attorneys in Salem who feel they or their clients were treated inappropriately or with disrespect by the elected judge, has been to choose not to participate in the Municipal Court's CAA program, even if it is a practice for which they are skilled and interested.

One way to build in more accountability for the Presiding Judge would be to amend the City Charter to change the position from being elected by the public to being appointed by the City Manager or the City Council. That would allow an informed official to make decisions on retaining or dismissing the Presiding Judge in case of egregiously inappropriate behavior.

A chief disappointment with the limited means available to encourage accountability of municipal court elected judges is that the situation observed in Salem is likely something that could be addressed far short of a no-confidence recall initiative. Interviews led the TTA team to conclude that current elected judge cares deeply about the right to counsel and about helping individuals confront factors that contributed to their entanglement with the criminal legal system. That care was reportedly sometimes expressed through inappropriate actions or orders, such as dressing down attorneys in front of clients, or ordering attorneys to help clients with ancillary matters such as getting copies of birth certificates. If there was some entity empowered to review, or to request a third party review, and offer suggestions to municipal court judges, the outcome could be basic awareness building that mitigates continued occurrences.

### Irregularities in Administration of Justice

A variety of stakeholders called the TTA Team's attention to unusual decisions made by Salem Municipal Court judges, and processes in place, that raise concerns about consistency and regularity in the administration of justice. Many of the examples cited in interviews centered on the Presiding Judge, but stakeholders also flagged actions by pro tem judges. These complaints involve decisions and processes in sentencing, probation, and diversion.

### Sentencing

A number of CAAs who take cases both at the Salem Municipal Court and the Marion County Circuit Court reported in interviews that their clients receive harsher punishment for offenses at the Municipal Court than what they would have received for the same offense(s) at the Circuit Court. One CAA noted:

You get a worse sentence in Salem Municipal than you would in the same charge in a Circuit Court case. They [the Salem City Attorney's Office] are much more strict on their offers. And it's "policy." "My policy is every DUI has to be 38 months of probation," or "The policy is we don't do a deferred offer." And I just feel like they are more strict. And the judges will go with what the prosecutors say most of—they're like, "Whoops, I'm sorry, that's Salem Municipal's policy, so we all follow that as the minimum for what you can get on this case." So I don't think that the offers that come out of there are necessarily reasonable, but I can only holler only so much at the judge. But I already know what the judge is going to do, because it's "policy" that they impose those kinds of standard offers. So I think that's kind of the worst part, is that if you had just gotten caught at the Circuit Court, you probably would've gotten a little bit of a better deal.

The attorney also noted that the Presiding Judge often does not follow stipulated agreements and imposes a different sentence than neither the CAA, the defendant, nor the City Attorney were expecting:

Sometimes [the Presiding Judge] is a little unpredictable on what she wants to do and doesn't really follow forward on a lot of stipulated agreements, which is kind of hard because you and the DA know these cases better and you've worked on an outcome that you think's gonna be appropriate and which makes sense, and sometimes it's hard when she comes in and makes changes because, one, you're client's not been expecting it, and it's just not the right outcome for the client.

This particular issue of judges altering stipulated agreements is not unique to the Salem Municipal Court, but warrants mention in the context of the other problems of consistency described in this section.

### Probation

Several stakeholders pointed out that sometimes the Presiding Judge requires unusual terms of probation. For example, sometimes the Presiding Judge requires the person to read a particular book and write a book report, or write a letter. Court administration staff admitted that they do not have capacity to run reports on those conditions and therefore are not conditions that the Municipal Court as a whole can reasonably manage or enforce.

Some stakeholders seemed to shrug these conditions off as merely odd or unusual, but other conditions have been more concretely problematic. One court staffer described that the Presiding Judge had ordered a person who had been charged with a DUII to attend an alcohol treatment program every other week that was run by another municipal court over forty miles away, but because he did not have a valid driver's license and there was not daily bus service between the two cities, the condition seemed unreasonably difficult to fulfill. As the court staffer noted regarding the Presiding Judge's decision to impose the condition, "In my opinion, she was setting him up to fail. He did it, though. I was impressed. He did it, and he got everything done. But the sentences she gives out sometimes, in my opinion, aren't okay."

A defense attorney explained an odd instance pertaining to both sentencing and probation:

I think one time in particular [the Presiding Judge] just did a sentence that made absolutely no sense for somebody who was going to be going to prison, and then had me stay on the case, which is not—if you get sentenced to probation, I'm supposed to be taken off the case, but instead—and the offer was to be an executed sentence to run concurrent with this prison time, which makes sense, but instead she changed it to the probationary offer with community service and kept me on the case. And of course the person's in trouble again. They got released for a day and now are in prison for two years or something like that. I feel like that just set the person up to fail on probation.

Similarly, one court staffer observed, "There's been a recent desire to keep people on probation when it makes no sense to keep them on probation. A person was sent to prison for three years and was kept on probation after they got out."

Furthermore, an unequal distribution of work within Court Administration has resulted in a substantial backlog of probation conditions monitoring. One clerk in Court Administration is tasked with monitoring all probationers at a certain point during each person's period of probation to ensure that they are on track to complete the conditions of their probation. If the person is found not to be on track to complete



their conditions, the Court will issue a show-cause and hold a hearing where the terms of probation may be amended or probation may be revoked. The demands on this clerk's time sometimes prevent this monitoring from taking place. In many instances, the prescribed time period for a person's probation will run out without the person having completed the conditions of their probation, because Court Administration was not able to monitor the person and flag that they still have terms to complete.

### Diversions

Multiple CAAs flagged a problem of judges improperly adding terms to diversion agreements. One pro tem judge would routinely stamp the document that laid out the terms of a person's diversion, and that stamp would say that in addition to the terms of the diversion agreement, they must "obey all laws and city ordinances," which would result in a subsequent traffic ticket terminating their diversion even though that was not an overtly agreed-upon term of their diversion. In another instance, a stamp was used that added a term to a DUII diversion that the person could not enter any bars or taverns. CAAs responded by filing motions objecting to the use of these stamps, which they argue are not statutorily permitted. It appears that such use of such generic blanket orders has become less frequent.

Speaking about the use of these blanket added conditions, one defense attorney characterized the situation as "the Court's trying to terminate their diversion when other courts would not be terminating somebody's diversion on those conditions. So I feel like you're getting unfair outcomes because you're in Salem Municipal."

### Becoming a Court of Record

One topic that arose numerous times in the course of interviews with Salem Municipal Court stakeholders was the question of whether the Municipal Court should become a court of record. This section will examine the TTA Team's findings with respect to legal processes, technological and infrastructural considerations, and practical consequences related to being a court of record.

#### Legal Processes

Currently, all proceedings at the Court are off the record, meaning that no transcript or recording is made of any hearings, trials, or other matters before the Court, and the Court's orders are the only official record to be considered by another court.

Legally, the steps for becoming a court of record are straightforward. The guidelines for the Salem Municipal Court becoming a court of record are set forth in ORS section 221.342. In order for the Court to become a court of record, the City Council would need to pass an ordinance declaring the Municipal Court to be a court of record, the City of Salem would need to file a declaration with the Oregon Supreme Court, and the Supreme Court would need to acknowledge the filing of that declaration.<sup>80</sup> Additionally, state statute requires that the City provide the Municipal Court with a court reporter or audio recording device, and that any judge must be a member of the Oregon State Bar.<sup>81</sup>

Becoming a court of record would spur changes to legal procedures directly affecting the trajectory of criminal cases. Because the Municipal Court is not a court of record, appeals of Municipal Court decisions currently are heard *de novo*—i.e., as a completely new trial instead of appellate proceedings

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<sup>80</sup> OR. REV. STAT. § 221.342.

<sup>81</sup> *Id.*

based on the trial record—at the Marion County Circuit Court. If the Municipal Court were to become a court of record, appeals would be heard at the Oregon Court of Appeals, based on the trial record.

#### Technology and Infrastructure Considerations

The shift to recording would also require technological upgrades, specifically in recording equipment and storage space. Currently, the spaces used as municipal courtrooms do not have the technological upgrades needed to record proceedings. Of course, this equipment will require an up-front investment, as well as some ongoing costs (e.g., server maintenance, additional staff time for a court reporter and for I.T. support), which is not a small ask for a system already strapped for funds.

The TTA team’s interviews indicated that the City’s information technology department is capable of providing the digital storage space needed to maintain recordings of Municipal Court proceedings.

Another obstacle is logistical. Right now, the Municipal Court uses two spaces as courtrooms: a space that is designed specifically to serve as a courtroom; and the City Council chamber, which is used for City Council meetings and is used by other specialty groups in addition to serving as the Municipal Court’s secondary courtroom. Court administration indicated that it is currently not possible to record proceedings in the Council chambers. Becoming a court of record would require upgrading this second space with recording technology. Two difficulties hamper the accomplishment of that task: first, the other functions of the space may interfere with the installation of court recording equipment; and second, the recording equipment would need to be reliably installed and functioning so that recordings of Municipal Court proceedings in the City Council chamber are less reliable or useful than recordings in the primary courtroom.

#### Practical Considerations

If the Municipal Court were to become a court of record, it is unclear precisely how the change would play out in practical terms. Nevertheless, this discussion will outline considerations that the Court and City should take into account when considering a potential change.

As a preliminary matter, it is practically necessary for the Presiding Judge to agree to shift the court to a court of record, and the current Presiding Judge has refused to adopt that change, believing that without adequate staffing, technology, and tools, it would be unfair to defendants and court staff to record court proceedings.

When the TTA Team asked Municipal Court stakeholders what one thing they would change about the Court, responses varied widely, but many interviewees called for the Court to become a court of record. One prosecutor said that recording would “allow more formality” and also allow relief for defendants who did not receive effective assistance of counsel at their trial. One judge said that with technological advancements making recording easier and less expensive, the Court should consider adopting recording both for the sake of procedure and to improve the course of some cases.

The initiation of recorded proceedings at the Municipal Court may serve as a deterrent to unprofessional or unbecoming behavior by judges, attorneys, and court staff during court proceedings. Multiple stakeholders interviewed for this assessment specifically suggested that recorded proceedings might serve as a check and a form of oversight for the Presiding Judge. One interviewee suggested that the current Presiding Judge opposes recording proceedings because videos of the judge’s less flattering in-court statements may be publicized online.

A concern was raised in stakeholder interviews that recording would place excessive pressure on defense attorneys, who in the Municipal Court tend to be less experienced. The current informality of the Court, it was said, provides a more amenable atmosphere for a new attorney to learn and develop their law practice.

There was divided opinion on the appellate aspect of becoming a court of record. Some interviewees pointed out that recording would allow someone whose attorney did not represent them effectively at trial to bring that record to an appellate court to overturn their conviction. On the other hand, one interviewee argued that the current procedural posture of Municipal Court appeals, where the case is tried *de novo* at the Circuit Court, essentially allows a “do-over” of the original case with a new attorney.

A related consideration not discussed by any interviewee was whether in a *de novo* trial, the Circuit Court defense attorney may be aware of mistakes made by the Municipal Court attorney and therefore be able to avoid those same errors, or instead if errors by the Municipal Court attorney in preparing the case, finding or preparing evidence, or preparing witnesses may hinder the new trial and, because the Municipal Court is not recorded, ultimately take those errors out of consideration for a potential subsequent ineffective assistance of counsel claim. If the Municipal Court became a court of record, however, an appealed conviction would be heard at the Oregon Court of Appeals based on the record from the Municipal Court. In such an appeal, defense counsel would be able to argue procedural flaws at the trial level, including ineffective assistance of counsel.

In deciding whether to become a court of record, the Presiding Judge should consult substantively with other system stakeholders, including Court Administration, CAAs, MCAD (whose attorneys are currently in line to represent clients in appeals from the Municipal Court), the defense bar more broadly, City Attorneys, Court information technology staff, and people who have been accused of crimes.

### Lack of Community Resources and Holistic Defense Capacity

One problem that extends far beyond the Municipal Court itself but directly affects the delivery of indigent defense services there—particularly because the Court sees so many quality-of-life crimes charged—is the limited access to community services to address housing, mental health, substance use disorders, and employment in the Salem area. As one CAA explained, “The Salem Municipal Court never refers anyone for mental health treatment, which is unfortunate, but there are resources. People have to find it on their own.” Such services and resources are an essential component to the delivery of holistic defense services, and conversely their absence hampers the ability of CAAs to provide holistic defense.

Prior to the onset of COVID-19 pandemic lockdowns in spring 2020, the Presiding Judge and Court Administrator had arranged for the creation of a Community Court modeled off of a program established by the municipal court in Eugene, Oregon.<sup>82</sup> The Community Court model offers diversion for certain enumerated offenses or offense types, in conjunction with connections to social services such as housing, substance use disorder treatment, mental health, and employment. The Salem Court Administrator had identified a group of social service providers, the program had staff and courtroom space in place, and the Community Court held one session before the pandemic put an indefinite hold on those plans, a delay that continues as of the writing of this report. It was said that, due to the backlog of trials and the need to reassemble program personnel, resumption of the Community Court program

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<sup>82</sup> See BEEMAN, JOY & MROZINSKI, *supra* note 2, at 8-10 (describing the operation of Eugene’s Community Court).

will not be possible until after Presiding Judge Aiken’s term ends and Presiding Judge-Elect Eleanor Beatty’s term begins in January 2023. There is some uncertainty as to whether Presiding Judge-Elect Beatty will continue the Community Court program or provide access to services via a different route. If it were to resume, the Community Court’s return would be a welcome and important step forward for the improvement of the Salem Municipal Court and the city of Salem more broadly.

Beyond the criminal legal system, gaps in services for people experiencing homelessness create a burden on the Salem Municipal Court. According to Mid-Willamette Valley Homeless Alliance, who run coordinated entry for homeless services in Marion and Polk Counties, reported that chronic homelessness increased 15% from 2019-2020.<sup>83</sup> To meet the need for permanent housing, Marion County would need to invest in 1,384 more affordable housing units.<sup>84</sup> For people experiencing homelessness, 74% of individuals, families, and children do not have access to a shelter bed.

The Salem Police Department has taken steps to address issues of homelessness, drug use, and mental health through a Mental Health Unit. The Mental Health Unit sends out a trained specialist to police calls that have potential mental health needs. Officers are also trained in de-escalation techniques. The Salem Police Department has four mental health officers working on the Marion County side of the city (east of the Willamette River) and three working on the Polk County side (west of the river).

Although it is important for law enforcement officials to be trained in properly identifying, responding to, and deescalating mental health and substance use disorder crises, law enforcement and the criminal legal system are not appropriate replacements for social services. This is particularly true in light of race- and ethnicity-based disparities in access to effective mental health treatment,<sup>85</sup> which can entrench racial and ethnic disparities in criminal legal system involvement and outcomes. In this vein, it was worrying to the TTA Team that police officers expressed concern in interviews that, with reduced jail capacity, they could not offer services such as drug and alcohol detox and housing without the ability to lock people up, suggesting that jail either equates to services or is a necessary link to services. Instead of trying to have the criminal legal system stand in for social services, focus needs to be on providing access to actual social services.

### System-wide Race Equity Data

Nationally, individuals who are accused of crime tend to be disproportionately non-white, and Black and Brown individuals are system-involved in far larger percentages than their overall proportion of the local population. Salem Municipal Court staff are not able to easily produce reports on the race or ethnicity of those accused of crime in Salem Municipal Court. That lack of system information makes it impossible to

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<sup>83</sup> MID-WILLAMETTE VALLEY HOMELESS ALLIANCE, MARION AND POLK COUNTIES’ HOMELESS AND HOUSING SERVICES GAPS ANALYSIS 5 (2021), <https://mwvhomelessalliance.org/wp-content/uploads/2021/08/MWVHA-Gaps-Analysis-August-2021-FINAL-8.5.21.pdf>.

<sup>84</sup> *Id.* at 13.

<sup>85</sup> See generally AM. PSYCHIATRIC ASS’N, MENTAL HEALTH DISPARITIES: DIVERSE POPULATIONS (2017), <https://www.psychiatry.org/File%20Library/Psychiatrists/Cultural-Competency/Mental-Health-Disparities/Mental-Health-Facts-for-Diverse-Populations.pdf> (noting that mental health issues are prevalent among people in the criminal legal system, and that despite similar rates of mental health issues across racial and ethnic groups generally, minorities have less access to mental health resources and suffer worse long-term outcomes). See also *Mental Health Disparities: Diverse Populations*, AM. PSYCHIATRIC ASS’N (last visited Sep. 7, 2022), <https://www.psychiatry.org/psychiatrists/cultural-competency/education/mental-health-facts> (providing demographic-specific fact sheets on mental health disparities).

monitor race equity patterns, such as in case filings or case outcomes. That information would benefit all of Salem’s criminal case entities, including the police, City Attorney, jail, Court, and court-appointed attorneys, and would support decisions about future innovation in meeting needs of those who are court-involved.

A more robust data collection system should be able to provide reports on case/charge type prevalence, attorney caseloads, attorney activities (such as filing of motions), and motion and case outcomes. It should also be able to track budgeted and spent costs, which would allow for stakeholders to advocate for budget requests and allocations that are more responsive to system needs. A data system should also facilitate the collection and aggregation of client feedback on defense representation.

If the indigent defense system in Salem were to have a centralized oversight function, it would be able to use race, ethnicity, and gender data for practice and policy purposes, as other defender programs across the country do. Defender programs leverage such data to file more persuasive motions in court, identify training needs, make more compelling arguments to funders and policymakers, and evaluate their own program’s performance with respect to race equity.

### Status of Maintaining the Municipal Court’s Criminal Docket

In light of the City’s limited budget for the Municipal Court and for court-appointed defense counsel, discussions about system reforms that would require substantial additional investment in indigent defense counsel have led to questions about whether the Municipal Court should continue to maintain a criminal docket. If the Municipal Court became a violations-only court, where no offenses carried a possibility of jail time, the city’s constitutional mandate of providing indigent persons with access to defense counsel would no longer apply. Indeed, many municipal courts in Oregon and elsewhere have opted for this violations-only approach to circumvent the need for paying for defense counsel.

Every few years, it was said, the topic of whether to stop prosecuting criminal offenses in Salem Municipal Court arises. If Salem opted to stop enforcing criminal cases, the matters could be filed in Circuit Court. A general sentiment shared by several interviewees is that Circuit Court would not prosecute quality-of-life crimes, such as trespass, as they would be considered too low of a priority in light of the other serious crimes heard in Circuit Court. So far, the assumption that Salem citizens want to see quality of life matters enforced has influenced Salem to retain criminal court jurisdiction, and to pay the expenses associated with that, including supporting the right to counsel for those facing charges who are unable to afford counsel.

### Court Operations Efficiency and Integration of Technology

A systemic problem that arose throughout the TTA team’s interviews was a widely shared feeling that the Municipal Court, by reputation and in practice, is slow and inefficient. This problem manifests itself via unnecessarily cumbersome court procedures, the Court’s excessive reliance on paper documents, and the Court’s lack of coordination and lack of progress in leveraging electronic forms and case management systems.

### Slow and Unnecessarily Cumbersome Court Processes

Stakeholders reported that Municipal Court proceedings and processes are too slow and cumbersome, and that procedures should be more efficient. For example, one judge decried the slow procedures for

diversion cases: “The process to handle a DUII diversion case has been way too long: the paperwork is slow, the explanations to each client one by one is way long. Those things can be much more efficient.”

Court scheduling was also a weak point identified by many interviewees. A judge observed that there is opportunity for Municipal Court scheduling to be “streamlined.” One defense attorney suggested that, for cases where it is clear that the case is not going to be advanced at the next scheduled court date, there should be a new, informal system to manage needed continuances and to set new dates. That, the attorney noted, would make afternoon dockets move more smoothly, making more time for substantive matters. Such a process would allow the CAA to communicate the issue to the City Attorney and the Court and to get a date set without having to make a court appearance.

In the TTA team’s court observations, recurring problems arose regarding community service forms and verification of the completion of required community service hours. Many defendants did not submit their community service forms in a timely manner, but their CAAs were able to explain the situation to the judge and win extensions of submission deadlines for their clients.

#### Excessive Reliance on Paper Documents

A related issue is the Court’s excessive reliance on paper documents, both in the courtroom and in court administration functions, which stakeholders in a variety of positions remarked upon in their interviews. As a court staffer summarized, “We still have actual files at our court, so we have a lot of paper. It’s everywhere. We have to handwrite our judgments and our suspension forms. We write everything, and then we enter it into Full Court.” In a similar vein, multiple interviewees remarked on the oddity of the Municipal Court still relying on carbon paper to conduct business.

Stakeholders across the system reported in interviews that the Court needs to update court forms. A member of court staff revealed that many of the current court forms that have been in use for a decade, were initially meant to be temporary forms that would be replaced by updated versions, but they have not been updated. A judge detailed problems with court forms:

The Court in the past has also had to use two or three forms that in my view did exactly the same thing. . . . It’s inefficient for a judge to fill out a suspension form or a license for revocation form. There is still some of that going on at the Salem Municipal Court.

Multiple stakeholders discussed dissatisfaction with the Presiding Judge’s frequent requirement that motions to suppress and motions *in liminae* must be submitted in writing and are not permitted as oral motions. As one defense attorney described:

They [Salem Municipal Court judges] make me file a lot of motions for things that I think are silly. I think it’s a waste of the city’s money for some of these things. Like, especially COVID, they—if you need somebody to appear via telephone or something like that, in other courts I could just ask the court staff and they’d get it set up; I don’t have to waste thirty minutes of drafting time and filing time to say, “Hey, they’re ill. They can’t appear in court. May they appear by phone today?” Or a request to change a court date. In other courts, I’ve had that experience, you just email the DA and you email the court, you let them know, “This is the conflict. May we change it?” It’s just kind of a more casual process. It saves time and money. So they do have you file motions for a lot of stuff.

It was said that the Presiding Judge will require a motion to be filed in situations where the pro tem judges would not, causing confusion as to whether a given action requires a motion to be filed.

#### Uncoordinated Use and Non-Use of Electronic Case Management Systems

Going hand-in-hand with needing to address its over-reliance on paper documents, the Court needs to use electronic systems more broadly and more smartly. A system-wide problem for the Salem Municipal Court is that there is no standardization of case management systems (CMS's), which impedes information flow, jeopardizes client services, and slows down court proceedings. The Municipal Court uses the Full Court CMS, which is difficult for defense attorneys to access. CAAs are unable to access Full Court unless they do so in person at the Civic Center, which leads to many unnecessary phone calls from CAAs to Court Administration staff requesting case details from Full Court, such as whether the system shows clients as having completed community service, made payments, or going to a DUII diversion class. City Attorneys, on the other hand, have ready access to Full Court. Court Administration found that making Full Court accessible remotely for CAAs and defendants would require creation of a public portal, which would carry substantial cost and raise security access problems.

Furthermore, if a CAA's client is in jail on a Circuit Court charge, the attorney might not have access to the Circuit Court case details in that court's preferred CMS, Ecourt. CAAs' use of a CMS is not standardized even among the CAA cohort, and systems in use variously include dedicated legal software like Clio, and general-use software like Quickbooks. This lack of uniformity among defense attorneys contrasts with the JustWare CMS used by City Attorneys, which allows for Salem Police to share evidence with the prosecution easily, whereas defense attorneys, not using that system, must use a discovery portal that sometimes malfunctions or locks access to evidence after a short time.

One CAA described how, if a client was incarcerated on a Marion County Circuit Court charge, the attorney is unable to access information about the Circuit Court case on Ecourt. This hampers not only substantive preparation of the client's Municipal Court case, but might also prevent the attorney from having accurate information to relay to the judge regarding a client's failure to appear for court.

During one of the Municipal Court criminal arraignments sessions that the TTA team observed, there was an error with the Full Court system that would not allow clerks to enter payment plan information into the system, halting proceedings and requiring I.T. support. Eventually the clerk said she would enter the payment plan manually so the defendant wouldn't have to continue waiting for that in order to be done with his court proceeding.

During another court observation, the Presiding Judge discussed with an attorney an unfortunate shortcoming of the Full Court system: she was interested to see how many hours of community service Municipal Court defendants had completed in lieu of jail time, but she was unable to run a report on this metric.

The Full Court CMS is set to be replaced with a new system that will allow access by CAAs and their clients, with rollout expected within the next one to two years.

In any discussion of court efficiency, it should be noted that the court's goal should not be efficiency for the sake of efficiency, speed, and smooth administration themselves. It would be counterproductive to the goals of justice, fairness, and accountability for the Court to simply churn through cases and dispositions as quickly as possible. That said, the TTA team believes that the current personnel working

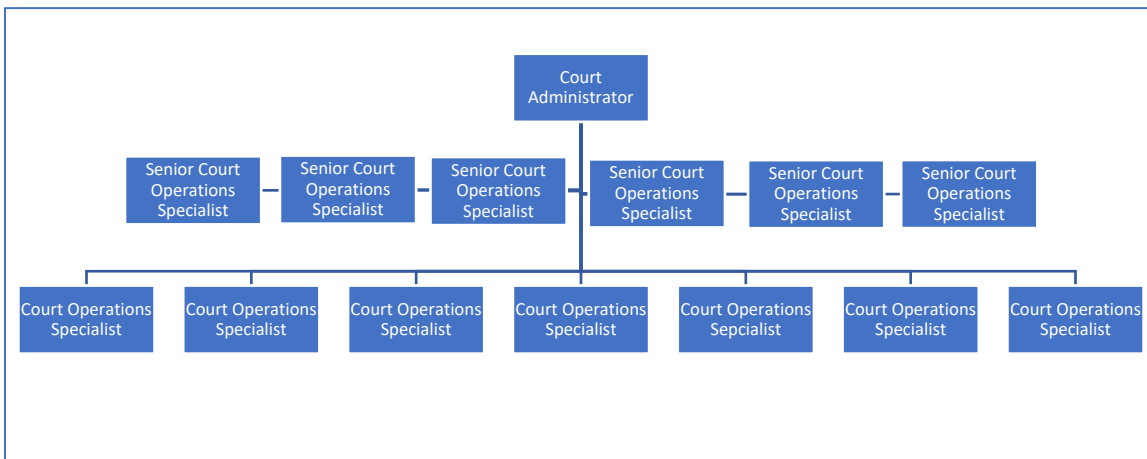
in and adjacent to the Salem Municipal Court are well aware of the necessary investments of time for purposes of due process and fair administration of the law.

### Court Administration Structure and Staffing

The Municipal Court should consider making changes to Court Administration. These include structural changes, succession planning for the Court Administrator, evening out distribution of work among court staff, and streamlining the process for CAAs to seek and receive information from Court Administration.

The Salem Municipal Court Administration is headed by the Court Administrator, who has a staff of fourteen, split among five FTE Senior Court Operations Specialist positions and seven FTE Court Operations Specialist positions. There is currently no deputy to the Court Administrator. Figure 1 illustrates the structure of Salem Municipal Court Administration.

**Figure 1:  
Salem Municipal Court Administration Staffing Structure**



As shown above, Salem Municipal Court Administration currently has a largely flat structure, with the Court Administrator position at a higher tier and the rest of staff all on a lower tier. There is no mid-tier position that functions as a path toward increased future responsibility. The current structure was mentioned by those working in and outside of court operations as a concern for purposes of succession planning. The current Court Administrator, Deborah Ingledew, has served in her role for seven and a half years, and apparently no one on current Court Administration staff is being prepared to take over her duties once she leaves the position.

As a result of the current structure, some court staff reported being overburdened with work, noting that the distribution of work within Court Administration is unequal. For example, the court staffer responsible for supervising fulfillment of probation conditions reported such a high workload that people on probation sometimes finish the term of their probation without having completed the conditions of probation that the Court was meant to monitor and enforce. The staffer noted, “I’ve trained people to do show causes and probation endings, but they don’t like them because it’s tedious, so they choose not to do them.” The staffer said that a computer program that can automatically generate a list of probation cases to check would help a lot, as manually assembling lists takes hours, leaving less time for the staffer’s other duties, which include training staff and clerking in the courtroom.



It was reported that attorneys do not know who in Court Administration handles various questions. Often they will talk to the clerk who was working when their case was heard. Questions are frequently directed to people who are not best suited to respond, and this makes Court Administration's operations less efficient. This occurs despite a dedicated Court Administration email address specifically for CAAs' questions, which is staffed by Senior Court Operations Specialists. It was said that the court staffer who handles criminal case record entry is part of violations staff and does not otherwise work on criminal cases. A court staffer suggested that there be a single point of contact for CAA questions: "the person handling the billing should be the person handling the schedule should be the person participating in the hiring process, all of those things."

### Municipal Court Physical Infrastructure

The Salem Municipal Court is housed at the Salem Civic Center (City Hall). CAAs noted in interviews that the Municipal Court's physical plant currently does not provide private space to talk confidentially with clients. One CAA described that because of the lack of meeting space, "it's actually rare for defense attorneys to meet with their clients for Salem Municipal . . . it would be helpful to have a private room where you can meet before court or something like that." One court staffer noted that attorneys will frequently have to meet with clients in a public hallway outside the courtroom. One CAA noted that talking to clients in the hallway is not a viable option, so attorneys will either speak with clients while seated in pews at the back of the courtroom, or they will often have to turn their back to the judge and whisper to their client as a best attempt to communicate confidentially, although the need for COVID-related health and safety measures have made this more difficult. Occasionally, this attorney noted, a client will stay after arraignments to talk with them outside of the building.

The TTA team's court observations confirmed that conversations meant to be confidential between attorneys and clients take place without privacy, in the courtroom. To discuss a case with a client prior to a hearing, a CAA would often sit with the client in the public gallery in the rear half of the courtroom; or if an attorney-client conversation needed to take place during a hearing, the attorney and client would simply talk or whisper standing close by each other in the middle of the courtroom, without any measures to keep that discussion private, like playing white noise over the courtroom's speaker system.

Defense attorneys need to be able to communicate privately with their clients, and vice versa, in order to ensure that the attorney has accurate information about the case, to protect the client from inadvertently revealing private details to an adversary such as a prosecutor or law enforcement official, and allow for trust to develop between the attorney and their client.

The backup courtroom is the Salem City Council chambers. The Municipal Court uses this space infrequently, with scheduled use only on Wednesday mornings for jury trials (the first and third Wednesdays of the month), and motion hearings and settlement conferences (the second, fourth, and fifth Wednesdays), and stakeholders did not comment on the available confidential meeting space in or near that room.

Plans are currently in place for the Municipal Court to move into a new space within one to two years. This move will provide the Court with two full, dedicated midsize courtrooms. It is critical that these new courtrooms provide private meeting rooms where attorneys can meet confidentially with their clients.

In addition to space restrictions, the Salem Municipal Court currently lacks basic physical security measures to ensure the safety of judges, court staff, attorneys, accused individuals, and others at the

Municipal Court. Although the Municipal Court only handles misdemeanors, violations, and traffic offenses, which are generally less serious charges, many people who are charged in the Municipal Court also have pending matters in the Circuit Court, which handles felonies and violent crime. One court staffer said that the Municipal Court does have a security officer at the door who asks people entering if they have a weapon, but the officer does not have the authority to use a metal detector wand to actually check for weapons. The court staffer noted that the Court had purchased a metal detector wand but never followed up to take steps for using it. Interviewees noted that the Court had purchased a metal detector wand some years ago but that it had never been used. The court staffer emphasized the precariousness of security at the Municipal Court: “We’re lucky that we haven’t had any issues.” Basic security measures, such as a metal detector, are needed to keep people at the Municipal Court safe.

### Cross-Stakeholder Coordination

Interviewees reported that, prior to fall 2019, the Presiding Judge and the Court Administrator convened quarterly cross-stakeholder meetings with City Attorneys and court-appointed attorneys to discuss Municipal Court procedural and logistical matters. In advance of each meeting, all City Attorneys and court-appointed attorneys would be asked to contribute items to the meeting agenda. The agenda would be circulated one to two weeks prior to the meeting date. Police would be invited if the agenda included an issue involving violations, where police appear in court without the benefit of a City Attorney. Occasionally social service providers would be invited, if an issue pertinent to their work was on the agenda. One prosecutor noted that the motivating question for these discussions was, “How can we get this done better?”

This kind of transparency and communication among criminal legal system professionals is strongly encouraged. Many interviewees felt, however, that the meetings were not worthwhile, and that was why they were ceased. As one defense attorney said, “I don’t know how productive those meetings were. I think it made the Presiding Judge feel better about how things were going.”

Restarting these cross-stakeholder meetings would be a beneficial way to enhance collaboration and improvements to the Municipal Court system. With a new Presiding Judge taking office in January 2023, transparency and communication among Municipal Court stakeholders will be essential to mitigating the culture of cynicism and mistrust that has hampered the Court in recent years.

## Chapter 5: Applying National Indigent Defense System Standards and Best Practices to Salem

With details of the Salem Municipal Court and its indigent defense delivery system laid out, this chapter now proceeds with analysis of the system in the context of national standards and best practices.

Perhaps the most accessible indigent defense system guidance is the ABA's Ten Principles of a Public Defense Delivery System.<sup>86</sup> That publication pulled together key considerations from standards promulgated by the ABA, NLADA, and other sources. Since its release, that resource has set the guideposts for many well-regarded assessments of indigent defense services, and served as an aid when jurisdictions seek to improve their systems, regardless of the service delivery model used. The resource is currently undergoing an update, with an expected release in 2022. The next section examines Salem's indigent defense system in context of what areas are addressed in the original Ten Principles as well as important areas that will be included in the forthcoming edition, including client-centered practice, race equity, and use of data.

### Adherence to ABA Ten Principles

The Ten Principles contain guidance to help jurisdictions operate a public defense delivery system that incorporates best practices. In applying the Ten Principles to Salem's current indigent defense system, it is possible to identify areas for which there is room for improvement. The following analysis points to the strength and weaknesses of the current system when the Ten Principles are applied, and includes guidance for further evaluation and implementation of improvements.

The black-letter text of the Ten Principles is reproduced in Table 12.

Discussion of principles that are particularly relevant to assessing Salem's municipal public defense system follows.

#### Principle 1: Defender Independence

Insufficient defender independence is one of the most pressing concerns in the Salem Municipal Court's delivery of indigent defense services. The Presiding Judge is singularly empowered to hire, discipline, and fire court-appointed attorneys, and can deny requests for payment. Current and former court-appointed attorneys alike noted in interviews that appeasing—or at least not provoking—the Presiding Judge was a substantial obstacle in providing independent representation at the Municipal Court.

The Presiding Judge herself acknowledges that defender independence is an ongoing concern. Indeed, it was due to independence concerns that she shifted from the previous practice of the Presiding Judge alone recruiting attorneys to the panel simply by asking them to serve, and moved to a more transparent approach using a public call for applications, and an application review process led by the Court Administrator and two pro tem judges.

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<sup>86</sup> ABA TEN PRINCIPLES, *supra* note 1.

**Table 12:**  
**ABA Ten Principles of a Public Defense Delivery System**  
**(Black-Letter Text)<sup>87</sup>**

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.
2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
3. Clients are screened for eligibility and defense counsel is assigned and notified of appointment as soon as feasible after arrest, detention or request of counsel.
4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
5. Defense counsel's workload is controlled to permit the rendering of quality representation.
6. Defense counsel's ability, training, and experience match the complexity of the case.
7. The same attorney continuously represents the client until completion of the case.
8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
9. Defense counsel is provided with and required to attend continuing legal education.
10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

One of the most salient challenges to the CAA system today is the absence of any single point of oversight and support for indigent defense system needs and concerns. There is no person responsible for bringing issues of policy, procedure, or practice to the attention of the City or the Court. As a result, the defense function has no voice, or advocate. One result of that lack of voice has been a burdening on CAAs to withstand inappropriate behavior from the Presiding Judge, which has contributed to a difficulty retaining panel attorneys willing to work in the court.

#### Principle 2: Mixed Practitioner Delivery System

The criminal caseload at the Salem Municipal Court is likely not sufficiently high to warrant the establishment of a separate institutional public defender office. However, when using an indigent defense delivery system which relies on private court-appointed attorneys, no matter the size of the panel or the jurisdiction's caseload, the Ten Principles commentary cautions: "The appointment process should never be *ad hoc*," meaning that a judge personally appoints the lawyer assigned to each case, "but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction."<sup>88</sup> The same goes for use of an all-contract attorney system. Without this independence, a key reason for private bar involvement in a jurisdiction's indigent defense system, which is to keep the local Bar aware of systemic issues they can speak out about to the court and local funder, is likely lost.

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<sup>87</sup> *Id.* at 1.

<sup>88</sup> *Id.* at 2.

### Principle 3: Eligibility and Early Appointment of Counsel

Salem's practice of appointing attorneys at initial appearance satisfies national recommendations about early entry of counsel, however the high rate of turnover among attorneys has led to problems in ensuring that an Attorney of the Day (AOD) will always be available to meet with clients at their first appearance in court. The AOD system requires each attorney on the panel to be present and provide representation to all persons making their first appearance in court for one to five days per month. As more attorneys leave the panel, however, several first appearance sessions per month occur without an AOD staffing the session. Clients do not get to speak to their appointed counsel on the day of their initial court proceeding, and are instead instructed to contact the assigned attorney before their next court date. This heightens the potential that an accused individual never speaks with their attorney, fails to appear for their next court date, has their attorney withdraw from the case, and they get picked up on a warrant and assigned new counsel, possibly starting the cycle all over again.

### Principle 4: Time and Space to Meet with Clients

There is room for improvement in providing attorneys with sufficient space to meet with clients. The Salem Municipal Court, which meets in City Hall, does not have a private space where attorneys can meet confidentially with their clients. One court staffer noted that attorneys will frequently have to meet with clients in the public hallway outside the courtroom. One court-appointed attorney noted that because there is no space to meet with clients privately, they will often have to turn their back to the judge and whisper to their client as a best attempt to communicate confidentially. Occasionally, this attorney noted, a client will stay after arraignments to talk with them outside of the building.

For out-of-court meetings, Salem does not have standards or requirements for CAAs to have an office where they can meet with clients. A prosecutor noted that one CAA in the past would meet with clients at the library because she did not have an office in Salem.

Attorneys expressed in interviews that they felt they had sufficient time to meet with their clients. A key factor to consider in any discussion of available time is whether the attorneys have reasonable and manageable workloads.

### Principle 5: Workloads

Salem imposes no caseload standards on CAA attorneys, but rather allows panel members to regulate their own workload by accepting fewer AOD shifts. However, the high rate of turnover among court-appointed attorneys has increased pressure for the remaining panel members to staff AOD slots and, concurrently, the workload for attorneys has increased. High caseloads lead to concern that attorneys are not adequately addressing all client concerns.

One member of court staff noted that Court Administration does not track court-appointed attorneys' open caseloads for Municipal Court cases, let alone any other pending workload (e.g., court-appointed cases from the Circuit Court or private practice retained cases). This means that the Court cannot reasonably ascertain whether an attorney on the panel is overburdened. With the high rate of turnover among court-appointed attorneys, court staff reported that not knowing current open caseloads sets the Court up for having to reassign an unknown and often undesirably large number of cases if an attorney leaves the panel.

### Principle 6: Ability and Training

While Municipal Courts hear what are comparatively less complex cases than most in Circuit Court, clients deserve to be represented by attorneys who are sufficiently experienced and have been trained in the nuances of Municipal Court practice. The Municipal Court has no minimum experience requirements to join the CAA panel and provides no training or mentorship for court-appointed attorneys. The Court is equipped with no formal systems to track or evaluate attorney performance, to provide support, or to raise or maintain quality of representation. Many CAAs are also part of MCAD and receive training and mentorship through that consortium, but the training is likely to be focused on the felonies and more serious charges encountered at Circuit Court and not be tailored to Municipal Court practice. Some CAAs share office space and engage in informal consultations and mentoring that way, but it is not a sufficient replacement for a formalized training program.

### Principle 7: Vertical Representation

Best practices for public defender attorneys suggest that the same attorney should represent the client from beginning to end of case. There are many reasons, but chief among them is the importance of bolstering the attorney-client relationship, and increasing the level of trust between client and attorney. Another key reason is the certainty that all necessary work is being undertaken in a timely fashion. The court-appointed attorneys at the Salem Municipal Court generally practice continuous, or vertical, representation of clients, although panel attorneys do occasionally cover for one another if a conflict arises.

There are some exceptions to strict verticality of defense representation. For one, if a client fails to appear for a court date multiple times, it is common for the attorney to withdraw from the case as a bench warrant is issued for the client. If the client is arrested on the warrant, they will typically be assigned a lawyer according to the Attorney of the Day system instead of their previous attorney resuming representation. Additionally, an attorney's representation ends at disposition, unless the judge specially requests that the attorney stay attached to the case, which means that the attorney typically is not available to provide post-disposition guidance to their client.

### Principle 8: Resource Parity and Equal Partnership

Parity between defenders and prosecutors in pay and resources is essential to sustainably deliver quality representation to people who cannot afford counsel. Salem's court-appointed attorneys lag behind the city's prosecuting attorneys in pay, in resources, and in having a voice in system concerns.

The Salem City Attorney's Office prosecution unit consists of two city attorneys, two legal assistants, and one other legal assistant shared with a General Counsel. Attorney staff are part of a collective bargaining process, which affords them a voice to consistently advocate for adequate pay, benefits and resources. Among other things, Assistant City Attorneys enjoy salaries with annual pay increases. The City pays for their annual bar dues, for attendance at CLE training programs, and for the cost of legal representation in the event of a Bar complaint. They receive paid time off for holidays, vacation, and sick time, plus coverage for health care, life, and long-term disability insurance.

In comparison, court-appointed attorneys are paid \$65 per hour. There is no official support staff available for CAAs, but seemingly no discouragement for involvement of support staff. One CAA who relies regularly on a legal assistant bills the city for any time that co-worker spends performing work the attorney would otherwise do, such as making client phone calls, drafting letters to clients, performing

client conflict checks at arraignment, and making discovery requests to the City. Use of investigators and experts is chilled somewhat by having to request approval for non-routine funds from the Presiding Judge. While court-appointed attorneys are in no way forbidden from handling retained cases which pay market rates, the panel has diminished to the point where court-appointed work is demanding for the remaining four who took cases during NLADA's interviews.

Unlike Assistant City Attorneys, CAAs don't have full access to the court's case Full Court case management system because they are not City employees. CAAs can only access Full Court via a single computer terminal when they are at the court, whereas City Attorneys have unrestricted access to case information on that system. CAAs have to either use the terminal at the Municipal Court or call court staff to get information on, for example, whether their client is listed as having fulfilled terms of probation, made payments, completed DUII diversion, got picked up on a new charge, etc. Defense counsel saw no justification for making it more difficult for them to access this information than the City Attorney. The planned introduction of a new, more accessible CMS by the Municipal Court appears likely to mitigate some but not all of these issues.

Finally, CAAs do not have a designated advocate to argue for pay parity and resource adequacy. In practice, this role has been filled by the Court Administrator. Although the increase in pay from \$50 per hour to \$65 per hour is a positive step, and one for which the Court Administrator and others in City government should be commended, court-appointed attorneys need an advocate who is more squarely aligned with their interests to be engaging in negotiations with the City.

#### Principle 9: Continuing Legal Education

In contradiction with the ABA Ten Principles, Salem court-appointed attorneys are neither provided with nor required to attend CLE or training relating to their Municipal Court practice. Any training must be sought out by CAAs on their own, and completed on their own time. In contrast, the City must pay for Assistant City Attorneys to attend at least 45 hours of CLE that is related to their work every three years.

#### Principle 10: Supervision and Review of Defense Counsel

As mentioned, there is currently no independent supervision of Salem's court-appointed attorneys, or mechanism to monitor quality of performance. For professional and ethical reasons, it is not appropriate for court administration, a judge, or the city council to supervise court-appointed attorneys or to evaluate their performance. No judge or city agency is in a position to receive confidential information from the client which, often times, will steer the course of a defense plan. Without access to this information, and because of attorneys' professional ethical obligations and how they must be carried out, judges and other city entities are not equipped with information necessary to comprehensively assess quality.

When a jurisdiction's caseload is sufficient to warrant creation of a public defender office, supervisory and oversight responsibilities are carried out by public defender management. To afford a similar level of oversight and support for panel attorneys, Salem can consider utilizing a consortium model, such as that used by the Oregon Office of Public Defense Services. Individual consortium members receive mentoring, training and professional collegiality through the consortium structure, with no involvement by the judiciary. The other model favored by jurisdictions providing services through a panel attorney model is a managed assigned counsel system, such as those used in San Mateo County, California, and Lubbock County, Texas.

## Looking Ahead to the Revised Ten Principles

Finally, worth mentioning are several important elements that the updated Ten Principles will address that were not covered in the original publication, including:

- the need for sufficient and ongoing analytics capacity to assess system performance;
- access to resources for delivering holistic legal services, such as use of social workers;
- attentiveness to systemic issues of racial equity; and
- a call for statewide funding and oversight of indigent defense services.

Salem can look to the original and the updated Ten Principles as well as the other NLADA and ABA standards mentioned as it makes future decisions about its indigent defense system.

## Holistic Defense and Client-Centered Representation

Clients represented by Salem CAAs receive traditional representation services that include legal analysis, investigation, and advancement of a zealous defense against the charges. As national practice norms change, more and more defender systems follow client-centered principles and apply a holistic, team practice model.

Holistic defense amounts to advocating for a client’s interconnecting needs in civil, immigration, housing, employment, and other contexts, and not simply representing a client in their criminal case. As conceived by the Bronx Defenders, the “four pillars” of holistic defense are: “seamless access to services that meet legal and social support needs,” “dynamic, interdisciplinary communication,” “advocates with an interdisciplinary skillset,” and “a robust understanding of, and connection to, the community served.”<sup>89</sup> The model recognizes that for many low-income individuals, simply addressing the “four corners” of a criminal case without considering underlying factors, such as mental illness, substance dependence, or housing insecurity, does not substantially reduce the likelihood of repeat criminal legal system involvement.

At the core of client-centered representation is the belief that a client should have primary decision-making authority in determining the direction of their case, and the attorney is supposed to provide neutral and objective legal advice to help achieve the ends that the client seeks.<sup>90</sup> Client-centered representation can be thought of as aiming to accomplish four broad goals: “(1) recognizing the importance of non-legal aspects of the client’s case, (2) limiting the role of lawyers’ professional expertise, (3) giving primacy to client decision-making, and (4) understanding the client’s perspective and values.”<sup>91</sup> In practice, client-centered representation humanizes the client, respects their goals and perspectives about their case, and prioritizes their decisions about how to best resolve their situation. Successful outcomes are defined by the client and not the attorney. Success includes the client experiencing their attorney providing guidance and counsel about all aspects of the case but not making final decisions that are not aligned with what the client wants.

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<sup>89</sup> *Holistic Defense, Defined*, BRONX DEFENDERS, <https://www.bronxdefenders.org/holistic-defense>.

<sup>90</sup> Julie D. Lawton, *Who Is My Client? Client-Centered Lawyering with Multiple Clients*, 22 CLINICAL L. REV. 145, 147 (2015), [https://www.law.nyu.edu/sites/default/files/upload\\_documents/Julie%20Lawton%20-%20Client-Centered%20Lawyering%20with%20Multiple%20Clients.pdf](https://www.law.nyu.edu/sites/default/files/upload_documents/Julie%20Lawton%20-%20Client-Centered%20Lawyering%20with%20Multiple%20Clients.pdf).

<sup>91</sup> Jonah A. Siegel, Jeanette M. Hussemann & Dawn Van Hoek, *Client-Centered Lawyering and the Redefining of Professional Roles Among Appellate Public Defenders*, 14 OHIO ST. J. CRIM. L. 579, 584 (2017), [https://kb.osu.edu/bitstream/handle/1811/80794/OSJCL\\_V14N2\\_579.pdf](https://kb.osu.edu/bitstream/handle/1811/80794/OSJCL_V14N2_579.pdf).



Ideally, these two approaches complement one another to provide representation that seeks to empower clients and set them up for success within and outside of their criminal case.

The effectiveness of this manner of representation depends on access to practitioner training, people with interdisciplinary skill-sets, particularly social workers, and community-based resources. Arguably, municipal court practice, which frequently sees individuals with mental health and substance abuse issues who can experience high levels of housing instability, is in need of holistic practice and referral services even more than Circuit Court. The lack of available services for people facing charges at the Municipal Court makes provision of holistic services highly difficult.

One court-appointed attorney, when asked if they had ever collaborated with a social worker to provide services to the attorney's clients, said they had never used a social worker and that they didn't know what they would use a social worker for; the attorney separately noted that clients often have mental health issues and substance use disorders. A social worker would be valuable in assisting clients who face problems with mental health and substance use disorders. The fact that this attorney did not connect need for a social worker with the mental health and substance use disorder needs of their clients underscores the lack of consideration of and capacity for holistic defense services at the Salem Municipal Court.

The Salem Municipal Court's plans to relaunch the Community Court program, which have been indefinitely on hold since COVID-19 pandemic closed down in-person court operations in spring 2020, would be a strong step in the right direction toward holistic services for people accused of crimes at the Salem Municipal Court. It was suggested that the Presiding Judge-Elect might not relaunch the program after she assumes office in January 2023, in favor of pursuing other ways of connecting defendants to social services.

### Race Equity

Without race and ethnicity data available from Salem Municipal Court systems, the TTA Team has little information on which to base a detailed recommendation regarding race equity. Court staff report that it is difficult to track race and ethnicity data with the Municipal Court's current Full Court CMS. As the Court advances in its use of case management systems and electronic data systems more generally, it is important that these systems be chosen, designed, or adapted, and used, to provide reports on cases sortable by race and ethnicity data. This information will be key to understanding the intersection of race equity efforts and needs with policing practices, access to social services, cultural responsiveness of defense representation, and other key indicators of race equity in Salem's criminal legal system.

The TTA Team's court observations revealed that the Court takes measures to ensure that a Spanish interpreter is present at court proceedings—sometimes including proceedings where a Spanish interpreter is not needed—and that interpreters of other languages are available by phone as needed.

### Use of Data

As described in Chapters 3 and 4,<sup>92</sup> the Salem Municipal Court is in need of technology upgrades and standardization to improve access to and use of data. With various incompatible case management systems used across the Municipal Court system – which in turn differ from that used at the Marion

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<sup>92</sup> See “Indigent Defense Analytics,” *supra* in Chapter 3; and “Systemwide Race Equity Data” and “Uncoordinated Use and Non-Use of Electronic Case Management Systems,” *supra* in Chapter 4.

County Circuit Court, where many Municipal Court defendants face charges parallel to their Municipal Court charges – the system is starting from a low level in terms of being able to meaningfully use and leverage data. Standardizing the case management systems used by all professionals working in the Court would be helpful to building a more robust data network that would allow for easier transmission of case information and smarter use of case data.

## Chapter 6: Findings and Recommendations

The TTA Team’s evaluation concludes with findings from the team’s review and recommendations to guide the City of Salem in its efforts to improve the City’s municipal indigent defense and justice systems.

The people of Salem are served by a corps of public servants working in and adjacent to the Salem Municipal Court who are dedicated to preserving the fair trial rights of the Sixth Amendment to the U.S. Constitution, and who work every day toward the goal of justice. The system that these individuals work in needs substantial changes in some key areas in order to achieve these goals and make progress sustainable into the long-term future. The Salem Municipal Court is to be applauded for seeking assistance through the BJA Sixth Amendment Initiative to identify and address areas for improvement in the provision of indigent defense services.

### Findings

1. **Because the City of Salem has decided to prosecute criminal offenses through its Municipal Court, it is required under the Sixth Amendment to the U.S. Constitution to provide effective assistance of defense counsel to people who are accused of crimes in the Court.** This obligation is incumbent upon any court when processing criminal offenses that carry a potential sentence of incarceration. Strictly speaking, the City does not have to have jurisdiction over criminal matters, which would be prosecuted at the Marion or Polk County Circuit Court in the absence of criminal case jurisdiction at the Municipal Court; in that case, the Municipal Court would not be required to provide defense counsel.
2. **The Salem Municipal Court provides indigent defense services via a court-appointed attorney rotation. The Presiding Judge is, by statute, responsible for hiring and firing the Court’s indigent defense attorneys, for approving their billings, and for disciplining the attorneys.** The Presiding Judge has taken steps to distance herself from the hiring process, but insists on meticulously reviewing all attorney billings.
3. **The current structure of indigent defense delivery service at the Salem Municipal Court undermines defender independence, a core component of promoting fairness and effectiveness in the criminal legal system and upholding rights under the Sixth Amendment to the U.S. Constitution.** Under municipal code, the Presiding Judge is responsible for selecting attorneys to serve in the CAA rotation, removing attorneys from the rotation if needed, approving CAA billings, and handing down discipline to CAAs. It is worth noting that the Presiding Judge has taken efforts to adopt practices to separate herself from direct oversight of CAAs, including by delegating the substance of duties to pro tem judges and court administration; but nevertheless, the court still wields undue influence over the defense function.
4. **The Salem Municipal Court’s current indigent defense delivery system does not have enough court-appointed defense attorneys to provide representation for the volume of criminal cases that the Court processes. The court-appointed attorney pool has had a high rate of turnover due to four primary factors: interpersonal and professional dynamics between court-appointed attorneys and the Presiding Judge; attorneys’ inability to effectively seek redress for grievances flowing from those dynamics; inadequate pay for court-appointed attorneys; and a lack of resources to provide effective indigent defense representation.** As of the writing

of this report, the CAA rotation is down to just three, although at least three more attorneys are expected to return to the rotation in mid-January 2023. Further analysis based on average misdemeanor case filings and a workload standard tailored to Salem Municipal Court defense practice is needed to determine the total number of full-time equivalent (FTE) court-appointed attorneys and support staff that are needed to fulfill the Court's indigent defense representation needs. For many attorneys, the pay is not enough to be subjected to what many feel are inappropriate comments and orders by the judge. For others, the time required for Municipal Court assignments means that the pay rate is not enough to maintain a reasonable workload at the Municipal Court while covering overhead expenses, even when splitting time between Municipal Court cases and better-paying Circuit Court cases. For some attorneys, both of these problems combine to drive them out of the Municipal Court CAA rotation.

5. **Insufficient attorney staffing for the CAA pool causes excessive workloads for CAAs, leading them to become less available or willing to take on additional Municipal Court cases, further exacerbating the attorney shortage. Overly burdensome workloads are sometimes worsened by CAAs being appointed to violation-only cases where there is no constitutional or statutory right to counsel.** As a result of not having enough attorneys for the CAA pool, case assignments on the Municipal Court's Attorney of the Day rotation often end up being much more burdensome than attorneys expect.
6. **The Presiding Judge of the Salem Municipal Court is an elected position, which is rare among Oregon municipalities.** Elections for the office of Presiding Judge regularly occur every four years. Including Salem, there are only four municipalities in the state with an elected judge. Judges in other municipalities are appointed by city officials, such as the city council.
7. **Current statutes and rules governing the Municipal Court and the elected Presiding Judge provide insufficient buffers between court-appointed defense attorneys and the Presiding Judge. There are virtually no checks on the authority of the Presiding Judge, as an elected official, or effective oversight mechanisms to promote accountability for the Presiding Judge, short of a no-confidence recall process or being voted out at the next regular election.** The elected municipal court judge model that Salem uses offers limited avenues of recourse for investigating dissatisfaction with the elected judge. Municipal court judges do not fall under the jurisdiction of the state Commission on Judicial Fitness and Disability. The Oregon State Bar has no disciplinary authority over Oregon attorneys serving as judges. In municipalities where judges are appointed by city officials, there is a path for registering, investigating, and addressing concerns over judicial behavior, but this recourse is not available in Salem. The only real mechanism of immediate recourse for dissatisfaction with Salem's Presiding Judge would be a no-confidence recall process, something that is very unlikely to be pursued given the lack of public awareness about the inner workings of the Municipal Court.
8. **The Salem Municipal Court suffers from irregularities in the administration of justice, particularly with respect to sentencing, probation, and diversion, which undercuts CAAs' ability to provide effective defense and reportedly results in harsher outcomes for accused individuals than if their case had been cited to the Circuit Court.** Many of these irregularities stem from decisions by the Presiding Judge and pro tem judges that result in Salem Municipal Court defendants sometimes receiving harsher punishment than if they had been charged at the Circuit Court.

9. **The rate of pay for Salem Municipal Court CAAs is insufficient, which has driven turnover in the CAA pool and low interest from attorneys in participating in the program. The current compensation level is not sufficient either to achieve parity with City Attorneys' compensation, or to prove competitive in attracting and retaining attorneys who can seek higher pay taking indigent defense cases at the Marion County Circuit Court, engaging in private practice outside of indigent defense, or pursuing a prosecutorial position. The disparity between pay rates at the Municipal Court and these other competing opportunities for attorneys is likely to continue to undercut attorneys' willingness to participate in the Municipal Court CAA pool and deprive the Court and accused individuals of talented attorneys.** The Municipal Court increased court-appointed attorneys' hourly pay rate from \$50 per hour to \$65 per hour in summer 2021, a move that merely tracked with cost-of-living adjustments provided to other City staff in the time since the \$50-per-hour rate was instituted.
10. **CAAs at the Salem Municipal Court are frequently less experienced attorneys, and the Court provides no mentorship or structured training or learning systems to help these attorneys develop their skills. Similarly, the Court does not provide CAAs with access to continuing legal education (CLE).** The extent of CAAs' training is limited to an orientation by Court By contrast, criminal defense attorneys practicing at the Marion County Circuit Court through the Marion County Association of Defenders (MCAD) consortium receive access to peer mentorship and training.
11. **The Salem Municipal Court Administration structure does not lend itself to preparing a natural successor to the current Court Administrator, a critical role in the functioning of the Court. The role current includes responsibility for court-appointed attorney panel administration. The hierarchy of Court Administration for the Municipal Court is fairly flat, and there is no deputy to the Court Administrator.** The Court Administrator is the lone management figure, with two levels of line staff—Senior Court Operations Specialists and Court Operations Specialists—serving underneath. As such, the current structure potentially jeopardizes a smooth transition once the current Court Administrator leaves her position.
12. **The Court relies heavily on paper forms, written motions, hard-copy records, and manual data collection. This reliance hampers the Court's efficiency and slows down processes for professionals working in the Court as well as for people who are subject to Municipal Court charges.** Requirements for motions to be submitted in writing, instead of allowing oral motions in court, is inconsistent and has varied by the judge assigned to the case.
13. **Many Municipal Court forms are outdated, and many are redundant, which undermines the efficiency and efficacy of the Court and of court-appointed attorneys.** Stakeholder interviews revealed that many of the current court forms that have been in use for a decade, were initially meant to be temporary forms that would be replaced by updated versions, but they have not been updated.
14. **The Salem Municipal Court has no ability to easily review data about the CAA program, such as total number of cases appointed, average cost per case, average hours spent on a case, or individual activities performed.** There is no electronic data tracking system for CAA appointments, client demographics, attorney activity, case outcomes, or case costs from which basic analytics can be easily produced. Lack of basic data limits ability to determine resource needs and assess overall performance.

15. **The Salem Municipal Court does not have an electronic billing and payment system for work of court-appointed attorneys.** All invoices are submitted as hard copies, and payment is made via check, not as direct deposit.
16. **The use of non-integrated case management systems across the Salem Municipal Court stakeholder network unnecessarily impedes the flow and sharing of case information, leads to confusion among attorneys, and wastes time.** There is no standardization of case management systems among professionals who work in the Salem Municipal Court system, which impedes information flow, jeopardizes client services, and slows down court proceedings. The Municipal Court uses the Full Court CMS, which City Attorneys have access to but CAAs do not, apart from visiting a computer terminal at the Civic Center. CAAs are also unable to access clients' Circuit Court case data. Furthermore, whereas City Attorneys have access to the same CMS that Salem Police use for sharing evidence, CAAs have to download evidence from a sometimes unreliable online portal that is run by the City Attorney's Office.
17. **The Salem Municipal Court resolves a worryingly low proportion of cases by trial, with the overwhelming majority of cases being resolved by plea.** The national average of misdemeanor and felony cases that proceed to trial is approximately 5%. In FY 2019, prior to COVID-related court closures starting in spring 2020, the Salem Municipal Court resolved just 8 of 1,579 misdemeanor charges, or 0.51%, by trial. That same year, 1,516 charges, or 96.0%, were resolved by plea. Anecdotally, stakeholders sensed a reticence by the Presiding Judge to hold trials.
18. **Disruptions to holding in-court proceedings caused by the COVID-19 pandemic halted the holding of criminal trials in the Salem Municipal Court from late March 2020 until July 2022, creating a substantial backlog of cases upon the resumption of trials.** The temporary cessation of jury trials in the period extending more than two years risked violation of defendants' Sixth Amendment rights. During that time, other proceedings were held in a hybrid fashion with some participants in court, and others dialing in by telephone. When a client and attorney are in different locales where they cannot see and confidentially confer with one another, during court proceedings, that strains the likelihood of ensuring meaningful representation.
19. **The Salem Municipal Court does not provide sufficient connections to social services for defendants. This disconnect hampers the ability of court-appointed counsel to provide holistic defense services and address underlying drivers of criminal legal system involvement that foster recidivism, strain Municipal Court and police resources, and drive up system costs.**
20. **The Municipal Court embarked upon a Community Court program that was halted by pandemic-related court closures in 2020, and has yet to resume that program.** That program created a diversion track for certain defendants focused on connecting them with social services, such as housing, mental health treatment, substance use disorder treatment, and employment.
21. **The Salem Municipal Court does not have adequate space for defense attorneys to meet confidentially with their clients.** Attorneys report having to improvise meeting spaces that are not confidential and not suitable for sensitive discussions, such as the back of the courtroom or a space outdoors on the Civic Center grounds. This deficiency of physical infrastructure inhibits private discussion of case matters and undermines the attorney-client relationship.

22. **Quarterly cross-stakeholder meetings with the Presiding Judge, City Attorneys, court-appointed defense counsel, and occasionally police and/or social service providers ceased in fall 2019. Some stakeholders were frustrated that they did not find the meetings productive.**

## Recommendations

With Salem's indigent defense attorney recruiting, selection, and discipline administered by the Court, a primary motivator behind the Court's request for an assessment of the system was to receive help in recommending a new governance structure that would ensure greater independence from the judiciary. The following recommendations track the findings above. Certain of these, such as shifting indigent defense oversight responsibilities to an independent indigent defense entity, will need to be presented to the City Manager and City Council for potential changes to City ordinances and practices. Others can be taken up by the Court Administrator and Presiding Judge with no legislative change needed.

1. **The City of Salem must restructure oversight of the Municipal Court indigent defense function to shift responsibility and influence away from the Presiding Judge and the Court, and toward an independent entity that does not present a conflict of interest for zealously promoting the interests of CAAs and their clients. This change is essential to establish independence of the indigent defense function at the Court. This necessary change will likely require increasing the budget allocated to indigent defense services.** There are many ways that this shift could happen with minimal added infrastructure and bureaucracy. One method would be for the city to contract with the MCAD consortium to provide defense counsel at the Municipal Court, while also amending municipal code to shift responsibilities for hiring, firing, disciplining, and paying attorneys to the consortium. Shifting defense to MCAD would allow the city to leverage an existing entity in MCAD and essentially adding a specialty docket to the consortium's repertoire. This approach would also allow Municipal Court attorneys to take advantage of MCAD's mentorship programs and develop their skills more effectively. Another possibility for restructuring oversight of CAAs would be to create a new, independent commission that would be responsible for setting policies for the hiring, firing, disciplining, and payment of CAAs. The Commission would be involved in budgeting for indigent defense needs, and for selection of a dedicated administrator to carry out court-appointed attorney pool operations on a day-to-day basis. And one more possibility would be for Salem to establish an institutional municipal public defender's office, although the practicality of such a move would need to account for, among other factors, whether the size of the Municipal Court's criminal docket justifies such an institution. The structure in Aurora, Colorado may provide guidance: the institutional public defense provider there is overseen by an independent, nonpartisan commission whose members are selected by the City Council and which is responsible for selecting the municipal Chief Defender (who runs day-to-day municipal defense operations) as well as all attorneys at the Aurora Public Defender's Office.
2. **The hourly compensation rate for court-appointed attorneys should be increased, taking into account not just comparable rates in other courts, but also parity with City Attorneys, as well as actual attorney overhead costs.** The Court Administrator and others in City government are to be commended for recently increasing the pay rate for CAAs from \$50 to \$65, but additional steps are needed in order to attract and retain talented CAAs. The City should undertake a parity analysis of pay and resources for CAAs and City Attorneys to inform this process. Parity and equity should be the guiding principles of setting CAA compensation, not merely setting pay

at the lowest level where attorneys will still join the rotation. Producing accurate cost-per-case and time-per-case data will also be useful in this process.

3. **Salem officials should give serious consideration to whether it is a priority to retain criminal court jurisdiction, particularly in light of the additional investment of resources required to fully provide access to counsel for people charged with jailable misdemeanors.** Consideration would entail projecting the savings in the use of City Attorney staff, Court-Appointed Attorneys, Court Clerks, and other services if no longer processing those cases. It would also involve thinking about whether the funds saved could be used in ways that reduce the occurrence of quality-of-life offenses, many of which are driven by individuals who are experiencing homelessness and facing unaddressed mental health or substance use issues.
4. **Salem leadership should consider whether an appointed Presiding Judge model would better serve the city than the elected judge model.** A shift to an appointment process would offer some form of accountability for judicial behavior apart from a vote every four years by an electorate that may not be well informed about—or care about—the operation of the Court.
5. **The Salem Municipal Court should consider the desirability and feasibility of becoming a court of record.** That determination should be made in substantive consultation with Court Administration, CAAs, MCAD, the defense bar more broadly, City Attorneys, Court information technology staff, and people who have been accused of crimes.
6. **The Salem Municipal Court should take measures to ensure that court-appointed attorneys are able to receive training specific to misdemeanors and Municipal Court work, and that CAAs are provided access to CLE courses without having to pay for those out-of-pocket.**
7. **The Salem Municipal Court Administration should consider an internal reorganization to provide a deputy to assist the Court Administrator, provide more levels to staff hierarchy, and address other inefficiencies within Court Administration.** Effective Court Administration is essential to efficacy of the indigent defense function, particularly considering the Court’s current role in CAA billings and oversight. The structure and hierarchy of Salem Municipal Court Administration staff need more clarity and long-term planning. A deputy to the Court Administrator may help handle the office’s workflow more efficiently and provide a clearer path forward for planning future leadership of the office once the current Court Administrator leaves her post.
8. **Salem Municipal Court should upgrade to an electronic invoice processing system that will simplify CAA invoice submission, review and payment.** Beyond an accounting function, a data tracking system should include basic data standardization from which analytics can be produced.
9. **Salem Municipal Court should use an electronic data tracking system for CAA appointments that will allow for easy production of reports on system performance.** This system should be capable of collecting and aggregating information on factors including case appointments by case type, client demographics, attorney activity, case outputs, and case costs. Such an analytics system will support determination of resource needs and can inform programmatic needs, such as trainings, mentoring or case allocation. Data on client race and ethnicity should be part of the metrics tracked to gauge race equity performance.
10. **Salem Municipal Court and City leaders should continue working to resolve the backlog of criminal jury trials.** Similarly, for proceedings other than trials, other temporary workarounds of permitting some parties to appear by telephone while others appear in person should cease, except in exceptional situations. If continued physical distancing stopgaps are needed due to



public health concerns, the Municipal Court should explore using video court appearances, such as over Zoom, where clients can meet privately with their lawyers in breakout rooms when appropriate. If that path is pursued, the Court should make a private computer terminal available for defendants and witnesses, in the event they do not have access to the internet. And regularized scheduling of trials is important to allow accused individuals to assert their right to trial and not be effectively forced into accepting a plea deal due to delay in getting a trial date.

11. **Outside of the pandemic-related court closure context, the Salem Municipal Court should consider strategies to bring more cases to trial.** One such strategy may be to seat multiple trials for a given date, so that if the first case set for trial cannot proceed because of a last-minute problem (e.g., witness unavailability), another case can be tried that day. Intentional collaboration among judges, court staff, City Attorneys, and CAAs will be useful to achieve a more reasonable trial rate.
12. **Court-appointed attorneys should have greater access to social workers to help identify social service needs that intersect with advocacy in their clients' criminal cases. The Municipal Court should explore strategies to increase access to social workers and encourage attorneys to use them.**
13. **The Salem Municipal Court should work to relaunch the Community Court program. Alternatively, the Municipal Court should seek ways to proactively connect defendants to social services like housing, mental health treatment, substance use disorder treatment, and employment.**
14. **The City of Salem and the Salem Municipal Court should work together to identify a space that can be used as a confidential meeting area for defense attorneys and their clients to use that is near the Salem Municipal Court courtroom(s).** Adequate attorney-client meeting space should be provided both in the short term, for the courtrooms that the Municipal Court currently uses for proceedings, as well as in the long term, following the move to new courtroom spaces expected in approximately 2023 or 2024.
15. **Professionals working in the Salem Municipal Court system—including but not necessarily limited to judges, court staff, City Attorneys, CAAs, and City officials—should hold regular cross-collaborative meetings to discuss and resolve issues in the Court.** As a new Presiding Judge takes office in 2023, transparency and communication will be essential to changing the culture of cynicism and mistrust that has hampered the Court in recent years. A rejuvenated resumption of the current Presiding Judge's quarterly stakeholder meetings would be welcome.

# Appendix A: Salem Municipal Court Schedule (Effective July 2016)



Courtroom 1 and Courtroom 2 Combined Scheduled Effective July 1, 2016

	Monday		Tuesday		Wednesday		Thursday		Friday					
	Courtroom 1	Courtroom 2	Courtroom 1	Courtroom 2	Courtroom 1	Courtroom 2	Courtroom 1	Courtroom 2	Courtroom 1	Courtroom 2				
8:00	Violation Arraignments	No Second Courtroom	Violation Arraignments	No Second Courtroom	Violation Arraignments	Jury Trials 1 <sup>st</sup> /3 <sup>rd</sup> Wednesdays (*) Motion Hearings And Settlement Conferences 2 <sup>nd</sup> /4 <sup>th</sup>	Violation Arraignments	(*) Under Development Community Court and/or Early Disposition Program	Violation Arraignments	No Second Courtroom				
8:30														
9:00														
9:30	Criminal Matters		Criminal Matters		Criminal Matters		Criminal Matters		Criminal Matters		Criminal Matters	Criminal Matters	Criminal Matters	Violation Trials
10:00														
10:30														
11:00	Criminal Matters	Criminal Matters	Criminal Matters	Criminal Matters	Criminal Matters	Criminal Matters	Criminal Matters	Criminal Matters	Criminal Matters	Criminal Matters				
11:30														
Noon	Lunch Hour													
1:00	Criminal Matters	No Second Courtroom	Criminal Matters	Violation Trials	Criminal Matters	No Second Courtroom	Criminal Matters	No Second Courtroom	Violation Trials	No Second Courtroom				
1:30														
2:00	Criminal Matters		Criminal Matters		Criminal Matters		Criminal Matters		Criminal Matters		Criminal Matters	Criminal Matters	Criminal Matters	Criminal Matters
2:30														
3:00	Criminal Matters		Criminal Matters		Criminal Matters		Criminal Matters		Criminal Matters		Criminal Matters	Criminal Matters	Criminal Matters	Criminal Matters
3:30														
4:00														
4:30														

Legend

Courtroom 1 – Main Courtroom		Courtroom 2 – Council Chambers	
	Violation Arraignments, Violation Trials		Violation Trials
10:00-12:00	DUII Diversion Show Proofs, DUII Diversion Entries, Status Hearings, Unscheduled to Clear Warrants	(*)	Jury Trials 1 <sup>st</sup> and 3 <sup>rd</sup> Wednesdays Motion Hearings and Settlement Conferences 2 <sup>nd</sup> , 4 <sup>th</sup> , 5 <sup>th</sup> Thursdays
1:00-2:30	Recogs, Telephone Conferences, Arraignments	(*)	No Second Courtroom - Under Development: Community Court and/or Early Disposition Program
2:30-5:00	Plea Hearings		No Second Courtroom

## Appendix B: Salem Municipal Court Waiver of Counsel Form

**IN THE MUNICIPAL COURT OF THE CITY OF SALEM,  
MARION COUNTY, OREGON**

City of Salem/State of Oregon	)	WAIVER OF COUNSEL
	)	
vs.	)	
	)	
	)	CASE NUMBER:
_____ Defendant	)	_____

**I am the defendant in this court case, and my initials below indicate that I have read, understand, and affirm all of the following:**

1. I understand that I have a CONSTITUTIONAL RIGHT to an ATTORNEY in this case. The court will appoint an attorney for me if I qualify. \_\_\_\_\_ (initials)
2. I am \_\_\_\_\_ years of age. I have completed \_\_\_\_\_ years of school. \_\_\_\_\_ (initials)
3. I understand that my choice to go forward in this case without an attorney puts me at a SERIOUS DISADVANTAGE because:
  - I lack legal training and experience and may not realize any DEFENSES available to me;
  - The rules and procedures of a trial will apply to me even though I am not a lawyer;
  - The City will be represented by an attorney and will have an advantage over me.  
\_\_\_\_\_ (initials)
4. I understand that by waiving my right to an attorney I am giving up the following BENEFITS:
  - An attorney can review the facts of my case to determine what defenses I have and identify problems with the City’s case against me;
  - An attorney can help me in my case. For example, an attorney can help me enter a plea to the charge(s), negotiate a plea agreement, and apply to get me released before trial;
  - An attorney knows how to gather evidence, file pretrial motions, call witnesses, and cross-examine the City’s witnesses;
  - An attorney understands the rules of evidence and knows how to question witnesses and present evidence that is necessary for my defense;
  - An attorney knows when and how to object to the use of improper evidence;

- An attorney can help me decide if I should have a jury trial or have the judge decide my case;
- An attorney can help evaluate and challenge potential jurors;
- An attorney knows how to make legal arguments to the court and present opening and closing statements to the jury;
- An attorney can tell me what sentence may be imposed if I am found guilty;
- An attorney can help present evidence and make arguments about sentencing issues;
- An attorney knows how to get information from the prosecutor that is important to my case, such as police reports and statements from witnesses.

\_\_\_\_\_(initials)

5. I understand that the judge, the city attorney, court staff, and my interpreter cannot give me legal advice or help me defend myself at trial. \_\_\_\_\_ (initials)
6. I am not under the influence of alcohol or drugs. I am not suffering from any injury, illness, or disability, or taking medications that could affect my ability to make decisions. \_\_\_\_\_ (initials)
7. No one has made any threats or promises to make me waive my right to an attorney. \_\_\_\_\_ (initials)
8. I acknowledge that I have been advised of, and that I understand the nature of the charges against me and the full extent of the punishment that may be imposed if I am convicted on those charges. \_\_\_\_\_ (initials)

I fully understand the disadvantages of representing myself, and I am aware of the benefits an attorney would provide as described above. **However, I voluntarily WAIVE my right to an attorney in this case and request that the court allow me to represent myself.** \_\_\_\_\_ (initials)

I declare that:

- I can read, speak, and understand English.
- This form was read to me by (print name): \_\_\_\_\_

\_\_\_\_\_ Date \_\_\_\_\_ Reader's Signature

- This form was sight translated to me by (print name): \_\_\_\_\_

\_\_\_\_\_ Date \_\_\_\_\_ Translator's Signature

Language: \_\_\_\_\_

---

Defendant's Signature                      Print Name                      Date

---

Address                      City                      State    Zip                      Telephone

**FINDINGS**

The court makes the following findings regarding the defendant's waiver of counsel and request to proceed pro se (without an attorney):

- Defendant understands the information contained in this document.
- The court has reviewed the elements of the crime(s) and possible maximum penalties with defendant.
- Defendant has knowingly, voluntarily, and intelligently waived the right to counsel.
- Defendant was advised of the right to obtain discovery.
- Defendant understands the risks of self-representation in this matter.
- Other:

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**ORDER**

DEFENDANT'S WAIVER OF RIGHT TO COUNSEL IS HEREBY ACCEPTED.

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Date                      Municipal Court Judge

Appendix C: Salem Municipal Court Affidavit and Order for Compensation Form



P.O. # \_\_\_\_\_

REL. \_\_\_\_\_

**IN THE MUNICIPAL COURT OF THE CITY OF SALEM  
COUNTY OF MARION, STATE OF OREGON**

THE CITY OF SALEM,

vs.

\_\_\_\_\_  
DEFENDANT

Docket No. \_\_\_\_\_

Offense: \_\_\_\_\_

Date of Offense: \_\_\_\_\_

**AFFIDAVIT AND ORDER FOR COMPENSATION**

The undersigned attorney, having been appointed on \_\_\_\_\_ by this court to represent the above defendant, under the provisions of ORS 135.055 applies for compensation and represents to the court as follows:

Attorney has expended \_\_\_\_\_ hours during the period \_\_\_\_\_ (date) to \_\_\_\_\_ (date) for which appointed; That amount of time expended was necessary for the proper and reasonable representation of the defendant; That the attorney has a time record substantiating in detail such statement and will provide a copy of such record to the court upon request.

Attorney further requests compensation for the following out-of-pocket expenses as allowed in ORS 135.055 (4):

I certify that the foregoing request and statement is true to the best of my knowledge and belief.

\_\_\_\_\_  
DATE

\_\_\_\_\_  
ATTORNEY

\_\_\_\_\_  
ADDRESS

Compensation ORDERED in the amount of \$ \_\_\_\_\_

\_\_\_\_\_  
DATE

\_\_\_\_\_  
MUNICIPAL JUDGE

RETURN BOTH COPIES TO SALEM MUNICIPAL COURT



