PRESCRIPTIVE PACKAGE

Guide to tablishing Defender System

ıte of Law Enforcement and Criminal Justice
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Department of Justice

Guide to Establishing a Defender System

By Nancy Albert Goldberg
Jay Lawrence Lichtman

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FOREWORD

The years ahead are likely to be ones of substantial change for the criminal justice system and its policies concerning the treatment of convicted offenders.

Hardening public attitudes toward crime and those who commit it, together with a growing realization that the system lacks coherent and workable policies, are taking us in the direction of more certain punishment for some categories of offenders and the increasing likelihood that more convicted persons will be imprisoned.

Such steps may indeed be desirable, but they pose some inherent dangers. If we permit our enthusiasm for strengthening the criminal justice system to override the requirement for improved and effective defender services, then an already existing imbalance between prosecutors and indigent defendants will be severely exacerbated—and we will have done real damage to the concept of justice in America.

To avert this possibility, we must see to it that changes in the sentencing and corrections policies of the system are accompanied by equal efforts to enhance the quality of defender services to ensure that all who come before the courts are provided with the best legal counsel possible.

There is nothing contradictory in this. The Sixth Amendment to the Constitution, and its interpretations by the Supreme Court, require that counsel be furnished to any defendant in a case carrying a penalty of imprisonment. Even beyond that, the principles of justice demand that such counsel be competent and able, with ample time and resources to devote to his client. If justice is to be done, the advocacy proceedings of the courts must be of the highest quality possible. Only if defenders are as well-trained and supported as prosecutors can this goal be attained.

Many persons who avail themselves of defender services are not hardened criminals as commonly supposed. They are ordinary citizens who stand accused of an offense for the first and last time in their lives. But, regardless of their status, defendants have rights that are as important to the fabric of society as are the rights of the victims and the rest of society. These rights must be zealously protected if our system of justice is to function properly, decently and fairly.

Some states and localities have made exemplary efforts toward this end already —and many more are preparing to follow suit. To all of these the *Guide to Establishing a Defender System* should prove invaluable. It is an important document, written by professionals, to assist both existing and embryonic defender systems. It will, I am confident, be an important tool as we continue our efforts to guarantee to all our citizens the right of counsel that is so important to our system of justice.

PETER W. RODINO, JR.
Chairman, House Committee on
the Judiciary

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We also wish to thank the secretaries who typed and retyped the manuscript, and without whom we could not have completed this project. Thanks are due to Judith Miotek, Jeanne Edwards, and Michelle Lewis whose efforts are sincerely appreciated. Catherine Ewing, Administrative Assistant at NLADA, provided editorial assistance in the final draft.

All of the persons participating in the work which led to this manual have done so at considerable personal sacrifice and out of a firm belief in the constitutional rights which this manual seeks to help implement. It is this commitment to fairness and equality in our American justice system which has nurtured and maintained the free society in which we live.

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CHAPTER I. INTRODUCTION

A. Why Have Defense Systems?

Not very many years ago, a person who was accused of a state criminal charge was not entitled to have appointed counsel for his defense. The courts reasoned that, while the Sixth Amendment to the U.S. Constitution required accused persons to be represented by counsel, that requirement only extended to federal crimes. In a small number of jurisdictions, there were organized defender systems beginning as early as 1913;[1] however, in the majority of jurisdictions, counsel was not in fact provided. Some jurisdictions did appoint counsel in very serious cases, but there was little or no compensation, as it was considered an obligation of the bar to donate its services. Compensation could not be obtained from state or local governments because there was no governmental duty to provide defense services.

However, the rule absolving state and local governments from responsibility for providing counsel to the poor in criminal matters slowly changed. The U.S. Supreme Court began to apply a "special circumstances" test in cases where the lack of counsel was likely to result in a denial of due process. This trend began in 1932 when the high court found that appointment of counsel was necessary in capital cases where the accused is ignorant, illiterate, and unable to afford an attorney.[2]

The "special circumstances" rule was abolished in 1963 by the landmark case of *Gideon v. Wainwright*[3] which for the first time established an absolute right for poor persons charged with felonies to have the assistance of counsel in state courts. Thereafter, persons accused of felonies could no longer be tried in state courts without a lawyer. The Supreme Court extended the right to counsel to persons accused of misdemeanors and petty offenses involving a possibility of incarceration in *Argersinger v. Hamlin*[4], decided in 1972. It has been estimated that the criminal caseload generated by the *Gideon* and *Argersinger* decisions approaches four million cases annually on the state trial-court level alone.[5]

The Supreme court further expanded the right to counsel in the pre-trial stages of the criminal process. As a result of *Miranda v. Arizona*[6], the accused was guaranteed counsel at custodial interrogations conducted by law enforcement officials to protect his Fifth Amendment privilege against self-incrimination.[7] The case of *U.S. v. Wade*[8] made the presence of counsel mandatory at pre-trial lineups, and *Gilbert v. California*[9] required exclusion of all testimony concerning lineups conducted in violation of that principle.[10] *Coleman v. Alabama*[11] found a right to counsel in the preliminary hearing in which a determination is made as to whether there is probable cause to believe that the suspect has committed a crime.[12]

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[1] R.H. Smith, JUSTICE AND THE POOR 117 (Memorial Ed., 1967).

[2] *Powell v. Alabama*, 287 U.S. 45 (1932).

[3] 372 U.S. 335 (1963), overruling *Betts v. Brady*, 316 U.S. 455 (1942).

[4] 407 U.S. 25 (1972).

[5] National Legal Aid and Defender Association, L. Benner and B. Lynch-Neary, THE OTHER FACE OF JUSTICE: A REPORT OF THE NATIONAL DEFENDER SURVEY 72 (1973).

[6] 304 U.S. 436 (1966).

[7] However, in recent years the Supreme Court has weakened *Miranda's* deterrent impact on police misconduct and jeopardized the right to counsel in custodial interrogations. See e.g. *United States v. Mandujano*, 19 CRL 3087 (May 19, 1976) counsel not required and *Miranda* warnings need not be provided where indigent defendant subpoenaed before grand jury); *Oregon v. Haas* 420 U.S. 714 (1975) (*Miranda* warnings not constitutional requirements, but procedural devices); *Harris v. New York*, 401 U.S. 222 (1971) (defendant's statement procured without proper *Miranda* warnings admissable to impeach trial testimony.)

[8] 388 U.S. 218 (1967).

[9] 388 U.S. 263 (1967).

[10] *But see Kirby v. Illinois*, 406 U.S. 682 (1972) (right to counsel at line-ups attaches for Sixth Amendment purposes only after the State's initiation of formal criminal charges).

[11] 399 U.S. 1 (1970).

[12] In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Supreme Court modified the *per se* rule regarding the right to counsel in preliminary hearings, so that it is now necessary to ascertain, on a case-by-case basis, whether counsel's presence is needed in view of local procedural rules.

In addition to expanding the right to counsel in pre-trial criminal proceedings, the Supreme Court in *Douglas v. California*[13] guaranteed counsel for the first appeal.[14] Further, the Court in *Gagnon v. Scarpelli*[15] recognized the right to counsel in certain parole and probation recovation proceedings.[16]

Finally, though the Supreme Court has never clearly specified the full range of proceedings which should be classified as criminal and thereby invoke the right to counsel, the Court guaranteed counsel in the adjudicatory or trial stage of a juvenile delinquency proceeding in the case of *In re Gault*.[17]

As a result of the Supreme Court's mandates, every state in the union now has a statute requiring the provision of counsel for poor persons in criminal and/or criminal-related cases. The debate which once raged among state and local officials over "whether" to provide free counsel in state courts has thus shifted to "how."

B. Defense Systems Today—The State of the Art

The methods used for providing counsel to the legally indigent vary widely from one jurisdiction to the next. While precision in defining these various approaches is difficult to achieve, descriptions are necessary for meaningful discussion. Today's approaches may be roughly divided into four general categories:

1. *Ad hoc* appointed of counsel;
2. Defender offices;
3. Assigned counsel programs; and
4. A mixture of defender offices and assigned counsel programs.

The oldest method of providing defense services is the *ad hoc,* or random, appointment of counsel by the court from among those practitioners in the locale served by the court. Appointments are generally made from a list of attorneys compiled by the court, the local bar association, or the clerk of the court. In many jurisdictions, appointments are simply made from attorneys present in the courtroom when the occasion arises. While the *ad hoc* approach is still employed in a great many U.S. jurisdictions, for reasons hereafter stated, it is the least desirable method of providing defense services.

The second method involves defender offices wherein public or quasi-public officials are appointed or elected to render defense services, and do so through an employed staff. This method is now a well-established approach, particularly in more populous areas, and continues to grow as an effective means of meeting the needs of the legally indigent criminally accused. However, few jurisdictions utilize defender offices exclusively, as defender staff attorneys cannot be employed in cases which pose a conflict of interest to the defender office.

The third category is the coordinated assigned counsel program. It differs from the *ad hoc* approach in that there is a systematic method of selecting panel members and designating case assignments in an attempt to establish a generally competent level of representation. Where such systems have been established, they vary from loosely structured controls overlaying an essentially *ad hoc* approach, to highly sophisticated, formally organized systems. Hereafter, the term "assigned counsel program" will be used to denote a coordinated system as opposed to an *ad hoc* approach. Unlike the *ad hoc* approach or the defender office, the assigned counsel program is employed in only a small number of jurisdictions in the United States.

The fourth, and least common, category is the mixed defender and assigned counsel system. While there has always been a utilization of the private bar where defender offices exist to deal with the conflict of interest cases, there is a growing interest in coordinating the services of organized defender offices and assigned counsel programs. In most instances, there has been little effort to date to either coordinate the relationship or to systematize the assigned counsel component. A true "mixed system," then, is more than use of appointed counsel to aug-

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[13] 372 U.S. 353 (1963).

[14] However, in *Ross v. Moffitt,* 417 U.S. 600 (1974), the Supreme Court rejected a due process claim to the right to counsel in an appeal following the first appeal. But, the Court did not hold that once either the state supreme court or the U.S. Supreme Court had actually granted review, an indigent defendant would not be entitled to appointment of counsel to handle the case on its merits.

[15] 411 U.S. 778 (1973).

[16] The Supreme Court also recognized the right to counsel for prisoners on a case-by-case basis to ensure access to the courts: E.g. *Procunier v. Martinez,* 416 U.S. 396, 419 (1974) (the State cannot ban law students and legal assistants from prison facilities, for without their help lawyers would be discouraged from representing prisoners); *Johnson v. Avery,* 393 U S. 483 (1969) (the State cannot prevent poorly educated prisoners from obtaining legal assistance from "jailhouse lawyers"). *But see Baxter v. Palmigiano,* 96 S.Ct. 1551 (1976).

[17] 387 U.S. 1 (1967).

ment an existing defender office staff, but a structured, organized and coordinated blend of the two, wherein there is substantial participation of the private bar.

According to recent data, there are currently 573 defender agencies in the nation providing representation at the trial level in state courts.[18] These offices serve approximately two-thirds of the nation's population. Most of the remaining jurisdictions are served by assigned counsel who are appointed randomly by the local judge. The total annual cost of these services nationally is conservatively estimated at $200 million[19] and is likely to continue to grow at a rapid pace as further implementation of Supreme Court mandates takes place.

Due to rapid changes in the requirements for the provision of counsel, many jurisdictions are presently reevaluating their defense needs. An increasing number of areas have concluded that an organized defense system would be more effective, efficient and economical than simply appointing lawyers on a random basis. Other areas which have utilized semiorganized methods, such as contracting with a number of lawyers to perform part-time services, are considering changing over to a full-time staff program. Still other areas are interested in altering their organized systems, e.g., from a local to a state system, a public to a private system, or vice versa, a court-operated to an autonomous system, and so forth. This Prescriptive Package discusses the comparative merits of various models for defense systems.

C. How This Manual Came About

The present manual is an outgrowth of the massive work done by the National Study Commission on Defense Services, a project funded by a grant from the Standards and Goals Division of the Law Enforcement Assistance Administration to the National Legal Aid and Defender Association. The National Study Commission on Defense Services (NSCDS) was mandated to reexamine the then newly promulgated defense standards of the LEAA-sponsored National Advisory Commission on Criminal Justice Standards and Goals in the course of its study.

The Commission was composed of thirty-five persons from throughout the United States drawn from various disciplines including legal defense systems, sociology, computer systems, criminal justice planning, civil legal assistance and judicial administration. In addition, the Commission utilized a full-time staff of five persons. The project, which spanned almost two years, included extensive original research into the actual practices of today's defense systems, an examination of reports from all states and territories throughout the U.S., and a thorough study of case law, legislation, and writings relating to the operations of defense systems.

The scope of the NSCDS's work extended to the determination of eligibility for defense services, the types of cases and proceedings for which counsel need be appointed at public expense, questions of recoupment, budgetary and manpower needs, caseload limitations, supporting personnel (including paraprofessionals), training needs, administrative procedures for dealing with clients and their cases, defender personnel practices such as recruitment, hiring, promotion and firing, defense system financing, selection of the heads of defender and assigned counsel operations, administration of funds, assigned counsel fees, careerism and staff salary levels, record-keeping and statistics, organizational level and location of defender systems, mixed systems, and the role of the defense attorney in pre-trial diversion and plea bargaining.

Given the length and complexity of issues dealt with in the NSCDS's report, a need was seen for one or more Prescriptive Packages dealing with portions of the Commission's work. In this way, the reader could obtain a booklet on the particular area of his interest. Moreover, such a manual would be geared for practical application.

D. Principal Resource Materials

The NSCDS made several hundred recommendations in its report, *Guidelines for Legal Defense Systems in the United States*. As an independent body which was not committed to follow the policies of any preexisting organization, the NSCDS, in addition to reconsidering the proposals of the National Advisory Commission on Criminal Justice Standards

[18] National Legal Aid for Defender Association, S. Singer, B. Lynch and K. Smith, *Final Report Of The Indigent Defense Systems Analysis Project* 33 (Unpublished, 1976).

[19] This figure was derived by the staff of the National Study Commission from a calculation of the known budgets of existing programs and a rough projection of the costs of remaining defender offices and assigned counsel plans. The figure includes the cost of defense services in the federal courts.

and Goals, reexamined the standards and recommendations of several other primary national policy-making bodies. These are included in the following list of essential reading for anyone who is interested in defense services. The principal recommendations contained in the chapters which follow draw support from the findings of at least one, and, in some cases, all, of the following documents:

National Study Commission on Defense Services,
GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (Final Draft, 1976)
Available from: National Legal Aid and Defender Association, 2100 M Street, N.W., Suite 601, Washington, D.C. 20037

National Advisory Commission on Criminal Justice Standards and Goals, COURTS, Chapter 13 (1973)
Available from: National Criminal Justice Reference Service, Law Enforcement Assistance Administration, U.S. Department of Justice, Washington, D.C. 20531

American Bar Association Project on Standards for Criminal Justice, PROVIDING DEFENSE SERVICES (Approved Draft, 1968)
Available from: American Bar Association, 1155 East 60th Street, Chicago, Illinois 60637

National Legal Aid and Defender Association, Defender Committee, PROPOSED STANDARDS FOR DEFENDER SERVICES (Approved Draft, 1976)
Available from: National Legal Aid and Defender Association, 2100 M Street, N.W., Suite 601, Washington, D.C. 20037

President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: THE COURTS (1967) and THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967)
Available from: United States Government Printing Office

National Conference of Commissioners on Uniform State Laws, UNIFORM LAW COMMISSIONERS' MODEL PUBLIC DEFENDER ACT (1970), *as amended,* (1973–74), National Conference of Commissioners on Uniform State Laws, 645 North Michigan Avenue, Chicago, Illinois 60610

E. The Objectives of This Prescriptive Package

Throughout the United States, methods of providing counsel for persons who are accused of crime but are unable to afford legal representation are undergoing reexamination and change. Jurisdictions are constantly seeking answers to questions relating to the design and establishment of legal defense systems.

Many competing coniderations impact upon the design of a defense system. While the overall goal must always be the provision of high quality representation, jurisdictions often have additional goals such as efficiency in court dispositions, economy of operations, reform of criminal laws and procedures, involvement of the private bar, and involvement of various factions and groups, e.g., the courts themselves, state and local executives and legislatures, the community at large, and the client community, all of whom have an interest in the way that defense systems function. These considerations enter into the chapters which follow.

This manual is intended to provide a format for persons and organizations seeking to upgrade existing defense systems or to establish organized systems in areas previously lacking them. Its discussion is limited in scope to questions relating to the design and overall structure of defender and assigned counsel programs. Other issues addressed by the NSCDS, such as the specific design of a defender system budget, have been reserved for possible inclusion in subsequent manuals which may serve as sequels to the present volume. However, the model statute which is contained in Appendix B of this manual addresses a wider range of issues than could be included in the present text.

F. Organization and Contents

This manual deals with several basic issues which are critical to the establishment and stability of effective systems for the defense of poor persons accused of crime. Every major study has shown that influences which impede counsel's role as an independent, zealous advocate for his client are pernicious to legal defense systems. All of the topics discussed herein relate to the means of establishing a strong, independent defender system.

Chapter II concerns the most pressing problem facing defense services today—funding. The amount

spent annually for legal assistance to the criminally accused represents only a minute portion of this nation's public service costs. Criminal justice has long been the stepchild in the nation's priorities. Yet, the need for increased funding has grown to crisis proportions as the result of statutory and judicial mandates, growing crime rates, and the complexity of modern-day criminal laws and procedures. Today, fully 65% of this nation's felony defendants and 47% of all alleged misdemeanants are unable to afford the cost of representation.[20] Thus, Chapter II concerns sources of financing for defender and assigned counsel programs and the means of administering program funds to maximize effectiveness.

The jurisdictional level at which defense systems are organized, whether city, county, multicounty or state, is also a major factor in the stability of operations. Chapter III describes today's systems and proposed two possible structures for the organization of defender systems. This chapter incorporates considerations of the relationships between state and local offices in a centrally administered state defender system and also discusses trial-appellate relationships. It concludes with a discussion of the practical question of defense program location.

Chapter IV deals primarily with the question of selecting the individual who will be principally responsible for fostering effective services, the defender director. It also pursues the related question of the extent and source(s) of supervision over the defender director and the establishment of a state defender commission.

In a number of jurisdictions, defense services are provided by means of contract with one or more private agencies. Thus, Chapter IV concludes with a discussion of the considerations necessary to selecting the agency itself as well as the head of that agency. Consideration is also given to the contents of such a contract.

The final chapter turns the reader's attention to the participation of the private bar in areas utilizing organized systems for providing defense services. The random, or *ad hoc,* approach to providing counsel is examined and the concept of "mixed systems" utilizing both defenders and assigned counsel lawyers selected from the private bar is discussed. The mixed system is compared and contrasted with the wholly defender system and alternative models of mixed systems are suggested.

Appendix A provides a handy directory of programs exemplifying the recommendations contained in this report. Persons wishing to obtain further information on the practical aspects of a particular feature are referred to the agencies listed therein.

Appendix B contains a model statute for consideration by jurisdictions changing over to a state system. The statute is based upon the recommendations of the National Study Commission on Defense Services in its extensive report.

Appendix C provides a bibliography of materials which were utilized in preparing this manual. The reader may find this a useful tool for independent study.

[20] National Legal Aid and Defender Association, *supra,* note 5.

CHAPTER II. FUNDING

A. Introduction

Inadequate funding is the most serious problem facing legal defense services today. The National Defender Survey reported that in 1972 83% of the defenders responding indicated that they were inadequately funded in one or more areas in which they were required to provide representation.[1] Similarly, 55% of the judges in jurisdictions served by assigned counsel reported that their county was not financially capable of implementing defense services to eligible persons as mandated by the United States Supreme Court's decision in *Argersinger v. Hamlin*.

Whether through lack of commitment or because of supervening priorities, defense services today remain in a state of financial anaemia which seriously threatens constitutional safeguards of due process and equal protection of the laws. Although the number of defender systems in this country has steadily increased in recent years, many have had to close their doors due to the withdrawal of funding.

In a recent speech, former American Bar Association President James Fellers observed:

> Defense services today are woefully underfunded across the country. Public defender offices are inadequately staffed . . . probably without exception. While a number of localities are doing a reasonably effective job despite the handicaps they face, it is reported that in some places, no course at all is provided to those who are rightfully entitled to it . . . In short, I consider that the state of public systems for providing legal assistance to the indigent criminal defendants is appalling.[2]

Indeed, it has been estimated that approximately $200 million is spent annually on legal defense services to the poor compared to a projected need of $1 billion.[3]

The source of funding for defense services, whether state, federal, regional, county, municipal, or private, will often greatly affect the adequacy of funding. Thus, the source of funding is of major concern in the structuring of defender systems and assigned counsel programs. Moreover, the procedures used to administer funds influence the independence of the defense agency and its ability to receive sufficient revenues. This chapter examines the sources and administration of defense system funds and proposes means of establishing stable and adequately funded systems to meet the nation's burgeoning legal defense needs.

B. Funding Sources

Given the *ad hoc* fashion in which defender services have emerged, funds have been welcomed from any and all quarters to meet the mounting need. However, as defender systems continue to grow and develop, attention will increasingly focus upon sources which will enhance the stability and effectiveness of the services. Given the current realities of limited funding, defense systems will undoubtedly welcome supplementary staff in the form of work-study students, volunteers and the like; however, the primary source of funding for a defense system is a critical question.

1. *Placing the burden on the bar.* Is it feasible to forego government financing of defense services by requiring lawyers to donate their time? Prior to the *Gideon* decision, it was the practice in many jurisdictions to require attorneys to defend indigents without compensation under the theory that it was a responsibility to be borne by the practicing bar. However, following *Gideon* and its progeny which have expanded manyfold the types and stages of proceedings for which representation by counsel

[1] National Legal Aid and Defender Association, L. Benner and B. Lynch-Neary, THE OTHER FACE OF JUSTICE: A REPORT OF THE NATIONAL DEFENDER SURVEY (1973). All references to the National Defender Survey throughout this chapter are found on pages 31, 43 or 79 unless otherwise indicated.

[2] Address to the 1975 Annual Convention, Kentucky Bar Association, May 23, 1975.

[3] LaFrance, *Criminal Defense Systems for the Poor*, 50 NOTRE DAME L. 41, 101 (1974).

is constitutionally mandated, the number of lawyer-hours, secretarial and investigative resources involved has become enormous.

Two major factors are at issue in approaching the question of requiring lawyers to donate their services. First, when a lawyer is obligated to perform defense services for little or no compensation, are clients thereby deprived of their Sixth Amendment rights to the effective assistance of counsel? Second, what is the essential fairness of imposing the burden upon the legal profession?

Although lawyers attempt to meet their professional responsibility by representing every client zealously, it is perhaps too much to expect that the lack of compensation will have no effect upon attorney performance. Even where compensation exists, but is less than adequate, studies have found that this creates the temptation to convince clients to plead guilty in cases which should have proceeded to trial.[4]

A survey conducted by the Virginia State Bar Association indicated that 62.2 percent of defense attorneys responding believed that lawyers should be compensated at higher rates for their services in order to create an incentive for lawyers to represent indigent defendants to the fullest.[5]

Much of the literature stresses that the obligation to provide counsel rests with the state and therefor requires state support. As one study put it:

> All the taxpayers should contribute to this basic cost of government—law enforcement. There is no sound reason why a small segment of the community, simply because of special training, a sense of pride in their profession, and a feeling of moral obligation, should carry this governmental function.[6]

The attorneys who provide *pro bono* services pursuant to a court's direction may themselves be deprived of constitutional guarantees. Thus, in the case of *Bradshaw v. Ball,* the Kentucky high court held that,

> . . . the constitutional right of the indigent defendant to counsel can be satisfied only by requiring the state to furnish the indigent a competent attorney whose services does not unconstitutionally deprive him of his property without just compensation.[7]

Under the Kentucky court's reasoning, the failure to compensate the attorney constitutes a "taking" of the attorney's property by the State without just compensation in violation of Fifth and Fourteenth Amendment guarantees of due process and equal protection of the laws.

Other state courts have held that counsel must be compensated in light of the heavier burden now placed upon attorneys to render services in an increasing number of proceedings at a higher level of competency.[8] Taking account of the "almost geometric proportions of the caseload imposed upon private attorneys" as a result of *Gideon* and its progeny, and of the great degree of complexity introduced into criminal law practice by contemporary jurisprudence, the West Virginia Supreme Court of Appeals recently reversed a long history of requiring attorneys to provide services for little or no compensation. Although unwilling to take the position that the failure to compensate attorneys for indigent defense representation was *per se* unconstitutional, the West Virginia court observed,

> [W]here the caseload of appointments is so large as to occupy a substantial amount of the attorney's time and thus substantially impairs his ability to engage in the remunerative practice of law, or where the attorney's costs and out-of-pocket expenses attributable to representing indigent persons charged with crime reduce the attorney's net income from private practice to a substantial and deleterious degree, the requirements must be considered confiscatory and unconstitutional.[9]

The former practice of requiring attorneys to render gratuitous services has not only been reversed

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[4] *See, e.g.,* Burleigh County Bar Association, City of Bismarck, and the North Dakota Combined Law Enforcement Council, *Providing Counsel For The Indigent Accused: A Regional Survey* 25 (1970). *See generally,* Alschuler, *The Defense Attorney's Role In Plea Bargaining,* 84 YALE L. J. 1179 (1975).

[5] Virginia State Bar Criminal Law Section, *Study of the Defense of Indigents in Virginia and the Feasibility of a Public Defender System* 21 (1971).

[6] South Dakota District II Planning and Advisory Commission on Criminal Justice, *The Defense Of Indigents In District II* 26 (1973), *quoting* L. Silverstein, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS (1965).

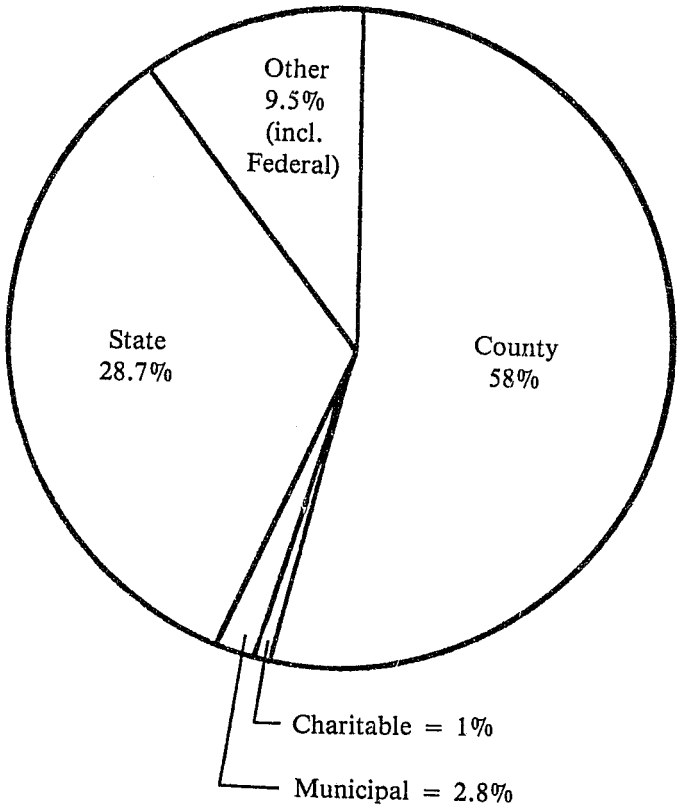
[7] 487 S.W.2d 294, 298 (1972).

[8] *See State v. Green,* 470 S.W.2d 571 (Mo. 1971); *Honore v. Washington State Board of Prison Terms and Paroles,* 466 P.2d 485 (Wash. 1970); *State v. Second Judicial District Court,* 453 P.2d 421 (Nev. 1969); *State v. Rush,* 217 A.2d 441 (N.J. 1966).

[9] *State v. Oakley,* 227 S.E.2d 314,319 (W. Va. 1976).

Diagram A.

FUNDING SOURCES FOR EXISTING DEFENDER SYSTEMS*



*Figures are derived from the National Defender Survey 30-31 (1973).

in court decisions. Almost every state presently has legislation prescribing the payment of fees for lawyers who represent persons who are accused of crime but are unable to afford the cost of representation.

In sum, the protection of societal rights should be a societal obligation. Just as police, prosecutors and judges are not expected to fulfill societal responsibilities without just compensation, neither should attorneys. On the other hand, although mandatory *pro bono* services are undesirable, purely voluntary work for the poor should be encouraged, particularly in those areas, such as prison legal assistance, which have not been constitutionally mandated. Where a private attorney takes an interest in a particular case, important reforms in the criminal process may result. However, such intermittant contributions cannot be expected to supplant governmental obligations to provide counsel where legally required.

2. *Charitable contributions.* In the small number of jurisdictions which provided counsel to the poor in criminal cases before the advent of *Gideon*, a large portion of the funding was provided by local charities such as the Community Chest. At that time, it was not yet considered a constitutionally mandated governmental obligation to provide counsel in state and local courts, since the Sixth Amendment had been narrowly construed to apply to federal courts only.

Following *Gideon,* a further contribution of private charitable funds was made on a national scale by the Ford Foundation. The Ford Foundation awarded in excess of $6 million for the development, through the National Legal Aid and Defender Association's National Defender Project, of an appropriate response to the Supreme Court's mandate to provide counsel in felony matters. The Project established some 78 programs for indigent defense with some assistance from local matching contributions. That project was responsible for initiating the majority of defender and assigned counsel programs in existence during the early years after *Gideon.*

However, the National Defender Survey reported that, by the time of the *Argersinger* decision in 1972, only 1% of all funds received by defender agencies and less than .5% of funds for assigned counsel were derived from private sources. According to the most recent study conducted by the National Legal Aid and Defender Asociation's Indigent Defense Systems Analysis Project in 1976, defender offices in areas having over one million in population received most of the 1% of private charitable funds. That study theorized that this was because the necessary resources to develop and process grant applications were available only in the larger defender agencies.

Private contributions are, at best, an uncertain source of funds for legal defense systems. Moreover, the grant application process may be costly and time-consuming. In addition, reliance upon charitable contributions for support of legal defense programs may adversely affect the funding of civil legal assistance programs which have not been deemed a governmental obligation and thus often rely upon local united funds or bar association contributions.[10]

While private contributions cannot be relied upon for maintenance, they may be a useful supplement for one-time expenditures such as a basic library or office equipment. Thus, provision should be made so that defender agencies are authorized to apply for and accept such funds. Accordingly, the statutes of several states specifically authorize the defender director to seek private contributions for the defender system. The recently enacted Connecticut statute is illustrative. Under that statute,

> The chief public defender shall . . . with the approval of the commission, apply for and accept on behalf of the division of public defender services, any funds which may be offered or which may become available from . . . private gifts, donations or bequests . . . and . . . expend such funds to effectuate the purposes of this chapter.[11]

Such a provision can also enable a defender office to augment its services with new components, such as prison legal assistance, to develop a training program which may be lacking, or to upgrade existing services. Supplemental funds from private sources can, in addition, make it feasible to test innovative approaches to provision of services such as 24-hour availability of representation and switching from representation by different lawyers at various stages of a case to a system of continuous representation by a single lawyer in each case.

3. *Municipal funding.* Municipal funding amounts to only 2.8% of the total funds received by defender agencies and less than 8% of the funds pro-

[10] The newly-formed National Legal Services Corporation, established by federal statute, 42 U.S.C. § 2996 *et. seq.* (Supp. 1976), provides only a portion of this nation's funding for civil legal assistance.

[11] Conn. Gen. Stat. Ann. § 51-291(j) (Supp. 1977).

vided for assigned counsel as reported by the National Defender Survey.

The small percentage of city funding is probably attributable to several factors. The major determinant is usually the fact that local ordinance violations constitute only a portion of the locality's criminal business, and most criminal matters are heard in county courts. Moreover, today's cities are faced with an endless supply of pressing socio-economic problems which severely drain municipal budgets.

On the other hand, the major portion of crime is committed in metropolitan areas and the percentage of municipal funds for defender services is slightly higher in such areas. However, in general, funding for defender services is not considered to be a municipal responsibility, and there has been no discussion in current literature regarding the use of city funds to fill this nation's defender funding needs.

4. *State vs. county funding.* County governments are the most pervasive source of legal defense funding today. The National Defender Survey reported that almost 58% of all funds received by defender agencies are provided by counties. Urban defenders receive more than 74% of their total funds, rural defenders, 60%, and metropolitan defenders, 39% from county coffers. Moreover, over half of the urban and rural defenders responding to the Survey indicated that they were funded solely by county governments and, although most defender agencies in metropolitan areas receive funding from multiple sources, almost 16% of all metropolitan defender offices receive only county funds. In addition, the great majority of jurisdictions served by assigned counsel are entirely funded by their counties.

State governments, by comparison, contribute only 28.7% of all funds received by defender agencies. More specifically, state funds amount to 39.6% of the total funds received by metropolitan defenders, 29% by rural defenders, and 17.4% by urban defenders. Of the assigned counsel jurisdictions responding to the National Defender Survey, 29% indicated that state governments provide funding in felony matters and 16% indicated that they receive state funds for misdeameanor representation.

From a review of existing state legislation, it is apparent that the extent of state funding varies. For example, California, which employs county-based defenders for representation of eligible persons at the trial level, limits state contributions to 10% of total expenditures.[12] However, an increasing number of states, now totaling eighteen, provide all or most of the funding for defense services from state coffers. Of these, thirteen fund defender systems having some centralized administration. These are the states of Alaska, Colorado, Connecticut, Delaware, Hawaii, Kentucky, Maryland, Massachusetts, New Mexico, New Jersey, Ohio, Rhode Island and Vermont. Florida and Missouri provide state funding for locally-administered defender offices.[13] The remaining three states, Kansas, North Carolina and Virginia, provide state funds for assigned counsel plans operating in most areas of these states and for several local defender offices.[14] State funding for defender services on the appellate level has been implemented in the states of California, Illinois, Minnesota, Oregon, Wisconsin and Michigan and state funds are provided for post-conviction representation in Indiana. A number of other states currently have bills pending for state funding of both trial and appellate defender services.

Currently there is a certain amount of debate as to whether state or county funding for defender systems is preferable. Support for funding of defense services by the state rather than the county is found in the recommendations of national policy-making bodies. In recommending a system of state financing, the National Advisory Commission on Criminal Justice Standards and Goals noted that,

> [C]ounties with a low tax base often have a higher incidence of crime. Often an especially high percent of defendants in these counties are financially unable to provide counsel. Hence, where the need may be greatest, the financial ability tends to be the least.

While state governments have many sources of revenue, counties depend for support primarily upon property taxes. As a result, the amount of resources available to support defender services varies depending upon the finances of the individual county. For example, a Georgia study revealed that twenty-five counties in a given year spent no money for defense

[12] Cal. Pen. Code § 987.6 (West. 1970), *as amended,* (Supp. 1977). In practice, state subvention in California has ranged from 3% to 5%.

[13] A discussion of centrally-administered and locally-administered state defender systems as well as state appellate and post-conviction defender systems appears in Chapter III of the manual.

[14] Kan. Stat. Ann. § 22-4512 (1974); N.C. Gen. Stat. § 7A-465 (Cum. Supp. 1975); Va. Code § 19.2-163 (1975), *as amended,* (Supp. 1976).

services, whereas the variance of expenditures among seventy-three other counties which expended some funds amounted to as much as a tenfold differential in monies spent. The study concluded that such a variance was not attributable to a difference in population size or criminal caseload, but was primarily due to a variance in the quality of services provided.[15]

In a case involving school financing, California found a denial of equal protection to persons residing in counties having a lower tax base.[16] This argument applies with even greater force in a matter involving a constitutionally protected right. Whether or not the inadequacies of local funding can be said to rise to the level of a constitutional deprivation, it is clear that states are better able to provide funding. For some small counties, the prosecution and defense of a major homicide case has actually resulted in bankruptcy for the governmental unit. In addition, the lack of funds may result in coerced waivers of counsel or avoidance of jail sentences in misdemeanor cases where counsel cannot be afforded.

Moreover, as the National Advisory Commission on Criminal Justice Standards and Goals pointed out, it is often politically impossible to provide adequate funding for defense services at the local level. Most studies concur that many counties are neglecting their fiscal responsibility in the area of defense services. It was primarily for this reason that the Advisory Commission on Intergovernmental Relations as early as 1971 urged direct state financing of defense services, stating:

> A critical element in the provision of indigent defense counsel is the assurance of financial support . . . Local governments are . . . less willing to provide funds because of their greater susceptibility to citizens' insensitivity to the rights of the accused, as expressed in reluctance to support officials who would provide adequate funding for protecting those rights.

Local officials, most of whom are elected to office, are heavily influenced by public pressures to limit the total amount of taxes levied and to adopt priorities in funding allocations which do not include legal defense services.

The unpredictability of local funding can seriously jeopardize the defense attorney's efforts to adequately represent clients. In one locality, the judge registered disapproval of the defender's filing of several motions to suppress evidence and to petition for a writ of habeas corpus. The judge suggested that the defender "hold off . . . until after the (county) board decide(d) on its budget for the next year" before pursuing the motions. The court was concerned that the local funds allocated to the prosecutorial and judicial agencies would be insufficient to handle cases where the defender adopted a full motion practice. The defender attempted to resist judicial pressure for, as he explained, the failure to pursue the motions would waive his client's rights to raise various issues.

Not only is the state a more capable vehicle for funding defense services than county governments, the state also bears the primary responsibility to execute its own criminal laws. When an individual is charged with violating one of these laws, it is the responsibility of the enacting authority to provide the defense services required.

In sum, the quality of defense services provided ought not to be a matter of geographical accident. The state is better able to fund these services both because of the availability of resources and removal from local politics. The state is also capable of allocating such resources so as to ensure uniformity among the counties, thus avoiding great disparities in the available services. Finally, since the majority of criminal statutes are enacted by state legislatures, the state bears responsibility for the burdens which ensue.

5. *Federal funds.*

a. *Funding to date.* Maintenance funding for defense services is currently provided through federal appropriations pursuant to the Criminal Justice Act of 1964, as amended in 1970.[17] However, these funds are restricted to the defense of crimes proscribed by federal statute only. Thus, the great bulk of criminal matters, those arising in state and local courts, are excluded from funding under the Criminal Justice Act.

The closest corollary to the program established by the Criminal Justice Act for legal services at the state level is the federal Legal Services Corporation. However, this too is restricted, and may only be used to provide legal assistance in civil matters.

In the absence of any federal funding program earmarked for the funding of defense services, federal assistance to the states for this purpose has been

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[15] Georgia Governor's Commission on Criminal Justice Standards and Goals, *Courts Study Team Recommendation Memo No. Ct. 7-B, Concerning Issue No. 7: Statewide Indigent Defense* (September 27, 1974).

[16] *Serrano v. Priest*, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971). *But see San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

[17] 18 U.S.C. § 3006A.

very modest. The majority of such assistance within recent years has been provided by the Law Enforcement Assistance Administration (LEAA). Funds have been disseminated for state and local defense services through revenue-sharing monies administered in each state by State Planning Agencies (SPA's) located within the executive branch of the state government. In addition, LEAA has provided funding for national scope projects in the area of defender services through its administrative offices in Washington, D.C.

In the early days of the LEAA program, it was unclear from the legislation whether or not it was at all applicable to the funding of defender agencies. The emphasis of the legislation was on funding of programs for "law enforcement." Language which would have encompassed defender services was deleted prior to final passage of the 1968 Act which created the agency.[18]

The scope of the LEAA legislation, known as Title I of the Omnibus Crime Control and Safe Streets Act, has been gradually broadened since that time. The most far-reaching amendments were enacted in 1973 and 1976. In 1973, the Act was extended to include the objective of improving the administration of criminal justice, although it had previously included only the stated objective of strengthening law enforcement. Moreover, the words "defender services" were explicitly added to the definition section of the Act.[19]

Most recently, the 1976 LEAA legislation has further expanded the opportunities for obtaining defender funding by adding to the list of spending priorities the improvement of defender services and reduction of criminal case backlog. In addition, the amendments prohibit disbursement of federal funds to any state which fails to consider the needs of all criminal justice agencies in the state.[20]

Due to the spending priorities established in the LEAA legislation, substantial funding of defense services from that source has been slow to come. Thus, in a study of the first three years of operation of the LEAA program, it was reported that LEAA awarded only $5.6 million of $550 million in block grants to defense programs, or about 1% of the total available block grant funds.[21] During the next four years of operation, from 1972-1975, a recent report has revealed that the amount of block grant funds allocated to defense services increased only to approximately 2% of LEAA's total block grant expenditures.[22]

Despite the relatively small amount of LEAA monies allocated to defense services to date, the LEAA initiative has had a significant impact upon the development of innovative approaches to the delivery of such services and has led to a number of advances in the methods employed by such services.

LEAA funds have been provided for the development of standards and guidelines for defender services through grants to the National Advisory Commission on Criminal Justice Standards and Goals and the National Study Commission on Defense Services. Areas which have been almost exclusively developed with the aid of LEAA monies include defender training, regional, multi-county defender services in rural areas, neighborhood defender services in urban areas, statewide appellate defender services, technical assistance to jurisdictions to help in the establishment of organized defense services, and evaluation of existing services.

The Model Cities Program of the Department of Housing and Urban Development has also, although to a lesser extent, provided funds for defense services within recent years.[23] A prominent example of a defender office which received substantial assistance from that program was the Seattle defender office. However, funding from HUD was subsequently phased out despite the warning issued by an evaluation study that, "the greatest threat to the failure of defender services in Seattle is the gradual phase out of money from the Seattle Model City Program."[24]

Not only do federal funds currently constitute a small percentage of all funds expended for defense services;[25] they are also extremely transitory. The statutory scheme which provides the basis for fund-

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[18] H.R. Rep. No. 5073, 90th Cong., 2nd Sess. (1968).

[19] 87 Stat. 197 *et. seq.*, 42 U.S.C. § 3701 *et. seq.* (1973).

[20] 20 CrL 3002 (Sept. 20, 1976).

[21] National Legal Aid and Defender Association, B. Lynch and N. Goldberg, THE DOLLARS AND SENSE OF JUSTICE: A STUDY OF THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION AS IT RELATES TO THE DEFENSE FUNCTION OF THE CRIMINAL JUSTICE SYSTEM (1973).

[22] American University Criminal Courts Technical Assistance Project, *Analysis of LEAA Block Grant Financial Assistance to State Courts 1972-1975* (Unpublished, 1976).

[23] No statistics are available concerning the dollar amount of HUD funding for defense programs.

[24] National Legal Aid and Defender Association, R.A. Green, C.P. Jones, J. Shullenberger, and J. Williams, *A Report on the Seattle Public Defender Office* 19 (1971).

[25] The percentage breakdown of funds is depicted in Diagram A, *infra*, p. 8.

ing by LEAA requires that programs be funded for only a limited period of time.[26] The theme of the federal funding program is "innovation," and it provides only seed money for localities to experiment with new approaches to criminal justice. Thereafter, the localities must either pick up the program with their own funds or the program lapses. Thus, a number of defender agencies which have received federal funding for two or three years have been phased out of existence due to the inability of the jurisdiction served to provide the necessary resources.

b. *Future federal funding alternatives.* As was discussed above, the states should bear the responsibility to fund defender services as a concomitant of their enactment of criminal laws. However, although it is now some fourteen years after *Gideon* and five years after *Argersinger,* most states have not yet met their responsibilities to provide effective representation to persons accused of crime in state courts. Fully ⅔ of this nation's counties have not yet established organized systems for providing defense services; yet the need for organized systems to meet constitutional mandates was urged by both the President's Commission on Law Enforcement and Administration of Justice and the American Bar Association a decade ago. Moreover, while exact figures are not available, large numbers of persons in felony and misdemeanor cases are going to trial without a lawyer due to coerced waivers, overly stringent eligibility practices, and widespread unavailability of counsel.

Until such time as the states meet their responsibilities to provide effective defense systems for eligible persons in criminal matters, federal funds will still be needed for this nation's ailing and unformed defender programs. The need for federal funding in this area was first recognized in 1966 by the conferees at the Conference on Legal Manpower Needs of Criminal Law held at Airlie House in Virginia.[27] Although the majority of criminal laws are enacted by the states, the conferees argued that, as a result of the U.S. Supreme Court's decision in *Gideon v. Wainwright,* the federal government was also responsible for the need to provide counsel. Moreover, they stressed that *Gideon* had created an immediate critical shortage of qualified criminal defense counsel.

The argument that the federal government should bear some responsibility for the provision of defense services mandated by the highest federal court is even more persuasive today. As indicated in Chapter I, since the 1963 *Gideon* decision mandating state courts to provide free counsel to indigents in felony trials, the high court has extended the right to counsel to the earliest stages of a prosecution, including interrogation immediately following arrest, and to other proceedings uch as appeals, juvenile delinquency matters and misdemeanors involving a likelihood of incarceration. This expansion of federally-mandated legal defense services has imposed an ever-increasing burden on the states.

Following the *Argersinger* decision in 1972, there were renewed calls for federal assistance. Former American Bar Association President Robert Meserve, in a speech to the Los Angeles County Bar Association, called for stepped-up federal financial aid to the states and local governments on the grounds that, "a significant part of the increased cost of providing counsel can be attributed to the implementation of federal constitutional rights." This was followed in 1973 by a resolution of the ABA House of Delegates urging federal, as well as state and local governments, "to take immediate steps to insure the provision of sufficient funds for the assistance of counsel to persons accused of crimes who are unable to afford legal representation in state and local courts."

The question remains, by what means should federal funds be provided for defender programs. The major existing source of federal funds for state and local defender programs, LEAA, has done an excellent job of providing training, research and short-term funding for newly-established defender programs. However, two or three year funding for defender programs cannot provide a long term answer for this nation's defense needs.

At least three alternatives for a federal response present themselves. The first is an amendment to the LEAA program which would enable LEAA to continue to fund programs which have been evaluated as effective. This would enable such programs to hire career-oriented staff in anticipation that the program will have a degree of stability.

A second alternative would be to leave LEAA in place with its present structure and ability to conduct research and fund innovative, short-term projects,

[26] The usual LEAA funding span is three or fewer years. Some states do, however, allow for a gradual assumption of costs. Ohio, through its Criminal Justice Supervisory Committee, permits funding for a fourth year at 2/3 of the federal allocation received for the third year, and funding for a fifth year at 1/3 of the federal allocation received for the third year.

[27] *Report of the Conference on Legal Manpower Needs of Criminal Law,* 41 F.R.D. 389 (1966).

but to establish a separate federal program for long-term matching grants to states which is designed specifically for the funding of legal defense services. The provision of long-term matching grants for defenders was proposed by the Task Force on Defender System Structure of the National Study Commission on Defense Services. The Airlie House Conference recommended that any program of federal matching grants be "conditioned upon the setting up of an appropriate state-wide plan for providing counsel and auxiliary services." Such a program of federal matching grants may have the advantage in that it provides an incentive for states to expand their defender services while leaving the primary responsibility to the states.

A third alternative which is presently undergoing study by some groups is the development of a Corporation for Defense Services. Such a Corporation may be considered a parallel to the recently established federal Legal Services Corporation which provides federal funds for legal assistance to the poor in civil cases. The proponents of such an agency argue that the establishment of a corporation for criminal defense work on behalf of the poor may be a higher priority than a civil program since the former is constitutionally mandated.

The major difference between the second and third alternatives would be the ability of a national corporation or commission to provide 100% funding where needed in addition to matching grants and to set up defense programs where none exist. The provision of 100% funding where needed would address the problem faced by many jurisdictions that matching funds are either unavailable or politically unfeasible. Such a corporation could augment existing programs and/or wholly fund new programs organized by bar associations, states, localities or community groups. This would allow flexibility so that the Corporation could encourage state and local groups to take the initiative in establishing defender programs while enabling the Corporation to initiate programs in areas where local groups have failed to do so.

The National Advisory Commission recommended that, "Services of a full-time public defender organization, and a coordinated assigned counsel system involving substantial participation by the private bar should be available in each jurisdiction." Federal funding would assist in the realization of that goal. The foregoing are some of the variations which may be considered as a federal response to the widespread unavailability of competent representation for poor persons accused of crime. In the years ahead, steps will undoubtedly be taken to upgrade this nation's flagging defense systems through some form of federal assistance.

C. Administration of Funds in State and Multi-County Defender Systems and Assigned Counsel Programs

The way in which a defender or assigned counsel's funds are channeled to the program has a subtle influence upon the program's independence. If the funds must be approved by or made a part of the budget of some outside agency, that agency is likely to exert some influence upon the program's policies. Such influence may take the form of the program's agreeing not to exercise vigorous advocacy, handle a politically embarrassing case, file time-consuming motions, or being convinced to handle an excessive number of cases in return for a promise by the outside agency to assist in increasing the defense system's staff size, to approve certain expenditures or the reallocation of line item costs. Or, the influence may take a subtler form with no explicit agreements but with similar results. Although factors such as these may not be as visible indicators of the lack of independence as the method of selecting the defender director or the actual source of funds, the administrative structure by which funds are to be approved and disbursed is a critical factor in achieving the goal of ensuring an adversary system.

The structure of the defender's budget or the assigned counsel's fee schedule is also an important factor in ensuring an effective defense system. Whether or not the defender's budget is comprehensive may affect both the ability of the defender office to function adequately and independently and the client's view of his lawyer as an independent advocate. The assigned counsel fee structure may serve to encourage or to deter comprehensive services.

1. *Administration of funds in state defender systems.* In some states, such as Alaska, Connecticut and Maryland,[28] the defender organization's budget must be submitted to the appropriating authority as part of the budget of the executive branch of state government. Thus, it must go through an initial

[28] Alaska Stat. § 18.85.010 (1974) and information provided by a member of the National Study Commission on Defense Services; Md. Ann. Code art. 27A, § 3(e) (Supp. 1976); Conn. Gen. Stat. Ann. § 51-291(m) (Supp. 1977).

screening and, possibly, reduction by the governor's office, since it is in the posture of competing directly with other programs within the executive branch.

The judicial branch has authority over the defender's budget in some states. These states include Colorado, Kansas and the District of Columbia.[29] However, in Kansas a district defender's budget must be jointly approved by the district court and a special board which sets assigned counsel fees as well.

On the other hand, some states help to ensure defender independence by making the defender agency's budget a distinct entity. The Illinois State Appellate Defender Agency presents requests for appropriations directly to the state legislature. In Oregon, the Public Defender Committee "approve[s] the original estimate sheet in connection with the budget for the defender's office" and an account known as the Public Defender's Account is established in the general fund of the state treasury.[30]

The delegation of fiscal authority to executive or judicial departments over the defense system's budget request has serious repercussions. Quite obviously, the actual diminution or alteration of defense funds may prevent the provision of necessary services and result in the ineffective representation of clients. Even more significantly, the sheer power of a competing agency to diminish the defender system's budget poses a serious threat to the independence of the defense system.

This is especially problematic in jurisdictions where the fiscal authority is delegated to the judiciary. Even where the judiciary is scrupulous about not interfering with the defender's budget requests, judicial involvement operates consciously or subconsciously to decrease a defender's willingness to irritate judges if necessary to pursue a client's case. In a recent study of one large public defender office, the allegation was raised that the state supreme court's administration of the state defender system had a "chilling effect" upon the operation of the office. One example cited was the reluctance on the part of the office to attack decisions of the state supreme court through federal court action.[31] Perhaps an even more common response to judicial control of the defender's budget are influences over the defender agency's office procedures, such as the assignment of individual lawyers to staff particular courtrooms rather than serve clients on a one-to-one basis.

The system whereby the defender director presents the agency's budget directly to the appropriating authority seems to provide the agency with the greatest amount of independence. Should the appropriating authority question the basis for the budget projections, the agency which drafted the budget would be available to supply further information. Where the defender agency has a board or "defender commission," [32] that board should review and advise the defender director on the budget before its submission and provide support for the budget request.

2. *Administration of funds in multi-county defender systems.* In those states which have yet to establish a system of state funding or where county-funded programs are firmly established, multi-county systems may be the most appropriate means of providing an organized, full-time defender system, particularly in the rural areas of those states.[33]

In a multi-county system, the funding will be provided by all of the participating counties. Coordination and allocation of expenditures may present special problems in such a system.

Some states have offered a certain amount of guidance in their respective statutes. The Illinois statute allows the counties involved to provide by joint resolution for the payment of the public defender's salary. New York also permits the counties to contract with regard to the sharing of expenses, but adds that expenses incidental to individual cases are to be paid by the county for which the services were rendered.[34]

Other states apportion expenses on a pro rata basis in accordance with the population of each of

[29] Colo. Rev. Stat. §§ 21-1-101(1), 21-1-102(1) (1973); Kan. Stat. Ann. § 22-4517 (1974), *as amended,* (Cum. Supp. 1976); D.C. Code § 2-2227(a) (1973), *as amended,* (Supp. III 1976).

[30] Ill. Rev. Stat. tit. 38, § 208-6 (1973) and information provided to the National Study Commission on Defense Services by the Illinois State Appellate Defender (see Appendix A); Ore. Rev. Stat. §§ 151.280(4), 151.290 (1973).

[31] Note, *The Right to Effective Counsel: A Case Study of the Denver Public Defender,* 50 DEN. L. J. 9 (1973). In addition, the Colorado State Defender has stated that while no actual judicial interference has occurred during his tenure, judicial participation in the defender system is not the best model.

[32] See Chapter IV, *infra,* regarding defender commissions and advisory boards.

[33] The structure of multi-county systems is discussed at length in Chapter III of this manual.

[34] Ill. Rev. Stat. tit. 34 § 5605 (1973); N.Y. County Law §§ 716, 719 (McKinney 1972), *as amended,* (Supp. 1976).

the participating counties. For example, in Minnesota, the amount which each county in a district public defender system pays is that proportion of the total budget which the population of the county bears to the total population of the district as set forth in the last federal census. Funds for the district office are handled by officials in a designated county, and a revolving fund is established in the designated disbursing county into which an initial deposit and a proportionate share of the expenses of the office are paid by each county. However, the Wyoming statute uses the population formula only for expenses which were not clearly performed "on behalf of" any given city, town or county.[35]

The allocation of costs on a pro rata basis according to population figures is a relatively simple procedure. However, county population may not always be an accurate reflection of the defense costs incurred by a county. The amount and type of indigent criminal caseload, which is probably the most precise measurement of costs, is not necessarily consistent with population figures. Some rural counties may have more urban centers, and consequently higher caseloads involving more serious crimes, yet still have a smaller total county population than other counties in the region.

A second method of allocating costs is to simply divide the costs equally. This method is particularly appropriate in regional systems where all counties have similar criminal caseload levels. It, of course, presents no problems in calculating the costs owed by each county and may be an efficient and equitable method of cost allocation in appropriate multi-county systems.

A third alternative would be to attempt to project the proportionate share of the caseload that is likely to be incurred by each jurisdiction. This may present some difficulty if based upon the previous year's figures, since they may have been skewed due to unrealistic criteria for client eligibility or avoidance of imposing jail sentences in misdemeanor cases because of the unavailability of counsel.

In the event that the third alternative is adopted, it is important to decide in advance what the amount of the payment will be for each county and not to alter the payments based upon the actual costs incurred. Although an unexpected fluctuation in crime which increases the costs for one county may be "unfair" to the other counties in a given year, another county can take advantage of the "cushion" afforded by multi-county funding in a subsequent year. While a given method of allocating costs may not be precise, it may nevertheless serve the function of protecting each of the counties from the economic disaster which could result from a prolonged felony trial or a sudden influx of cases.

Such an occurrence contributed to the demise of a multi-county defender system in North Dakota. Several of the less populous counties in the ten-county region rejected a plan allocating a fixed cost per county based upon the county's average criminal activity over a five-year period. Instead, each county was billed for services actually rendered on a case by case basis. One county, which had three prior years of negligible defense expenditures, suddenly incurred a bill of over $2,500 for a murder case. The same county would have been assessed only $600 per year for defense services under a projected caseload allocation plan.

Whether the allocation of costs is by caseload, population or equal sharing does not appear to be significant as long as the amounts are fixed in advance so that the defender's budget is secure. Such an arrangement can benefit each of the participating counties financially and will spread costs over a wider region to make both full-time lawyers and supporting services available. Thus, the quality of services can be greatly improved at a minimal cost to each jurisdiction.

3. *Structure of defender system budgets.* Although the specifics of a defender system's budget are not addressed in this manual,[36] some facets of defender budgets are so basic to the organization of defense systems that they are included here.

a. *Rejection of case-by-case reimbursement approach.* The great majority of defender offices in the country receive an annual budget. This pattern was verified by the staff of the National Study Commission and by NLADA's Indigent Defense Systems Analysis Project. A small percentage of jurisdictions, however, continue to fund defender offices by reimbursing the attorneys following the handling of a case much like in an *ad hoc* assigned counsel approach.

Although the payment of defense services as they

[35] Minn. Stat. Ann. § 611.27 (Supp. 1977); Wyo. Stat. §§ 7-9.9(c), 7-9.13 (Cum. Supp. 7975).

[36] For a fuller discussion of defender system budgets, see National Study Commission on Defense Services, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Chapters 15 and 16 (NLADA ed. 1976).

occur rather than the provision of a budgetary allocation avoids the problem of requiring an outside agency to approve the budget, the reimbursement approach is beset with other serious deficiencies. Proper administration of the defender system requires that the defender director know at the outset of the funding period the precise amount of resources available in order to allocate them most productively. Because of its uncertainty, a case-by-case reimbursement approach prevents future planning for hiring and training of personnel, reserving office space and equipment, and so forth. Defender programs in Ohio and Detroit, Michigan operating with a reimbursement procedure have experienced severe budgetary difficulties. It has also been suggested that the use of case-by-case payment systems tends to place more emphasis on rapid turnover of cases than on quality representation.

The problem of projecting a year in advance what the system's expenditures will be in the coming year can be overcome by guaranteeing the defender system a sum sufficient appropriation. In cases where the defender agency's caseload exceeds expectations, some jurisdictions permit the agency to return to the appropriating authority with a request for additional funds out of the treasury's contingency fund.

In the case of a state system, the state treasurer would be authorized to allocate to the defender system the additional funds necessary to properly perform its function upon approval of the appropriating authority. This type of provision should be incorporated into a state's defender legislation.

b. *Lump sum appropriation.* The appropriating authority is entitled to, and should insist upon, a carefully spelled out budget projection. Defender budgets should include not only figures, but also a budget narrative explaining the various costs and the reason for their increase or decrease. A number of defender agencies in the country do supply a written narrative accompanying their budget requests. For example, the New York City Legal Aid Society's Criminal Division, with its sophisticated management personnel, submits a budget of approximately two hundred pages in length which provides a cost-benefit analysis of the various items.

On the other hand, once the budget is approved, the defender director, who has been selected for administrative ability as well as legal skills, needs the flexibility to allocate these monies in accordance with current needs. In the State of Alaska, funds may not be transferred by the defender director between line items, e.g., from witness fees to personnel, without the approval of the State's Department of Administration. The requirement of prior approval detracts from the operational flexibility necessary for proper management.

The trend away from line item control has already begun to take place in several states' court systems.[37] One other example of a modified approach to freeing budgets from line item control is that of the Omnibus Crime Control Act which permits grantees of the Law Enforcement Assistance Administration to transfer between major categories (each containing a number of line items) up to a given percentage of the entire budget without prior approval.[38]

Thus, while the defender agency should be required to justify its expenditures in advance, the defender director needs the freedom to allocate funds during the fiscal year in accordance with the changing demands of the defense operation. The budget should be provided by the funding source in the form of an annual or biennial lump sum appropriation to allow needed flexibility.

c. *In-kind contributions.* The way in which office space, equipment, forensic services and other costs are provided to the defender agency influences both the actual independence of the agency's operations and the appearance of independence from the client's perspective. The Indigent Defense Systems Analysis study reported that a large proportion of defender agencies receive rent and expert consultant services in kind from their state or local governments. Defender agencies located in public buildings such as courthouses usually do not receive appropriations for rent and utilities since these items are already accounted for in a public budget for governmental agencies which are housed there. A number of defender offices are required to use state facilities for evaluation of evidence.

Where the defense agency is located directly in the courthouse, the client is apt to identify his attorney with the State which prosecutes and tries him. Moreover, a courthouse location makes it difficult for the defender office to maintain confi-

[37] Information supplied by Ms. Carolyn Burstein, LEAA project monitor, March 1977.

[38] U.S. Department of Justice, FINANCIAL GUIDELINES TO OMNIBUS CRIME CONTROL ACT OF 1970, *as amended,* (1976).

dentiality with respect to various aspects of the case such as the identities of persons interviewed.[39]

Use of state facilities for the evaluation of evidence has two drawbacks. First, where the state facility evaluates evidence for the prosecution as well as the defense, test results cannot be kept confidential. Secondly, experts frequently differ. Where the defense is able to obtain an outside expert, the evidence may appear in a different light, particularly where the state's experts are more accustomed to seeking clues which inculpate rather than exonerate the defendant. For example, in a recent case handled by the Criminal Defense Consortium of Cook County, Illinois, an independent pathologist was able to demonstrate that the deceased, who had taken part in several gang fights on the date of his injuries, could not have died as a result of the wounds inflicted by the defendant. Since the State had failed to introduce conclusive evidence on this issue, the defendant was acquitted of the charge of murder.

In order to minimize costs, some jurisdictions require the defender agency to seek prior court approval of the use of expert witnesses. This has distinct disadvantages. It delays the use of experts to evaluate evidence so that delays in case preparation result and, in some cases, prevents the defense from evaluating perishable evidence. In order to avoid this result, the defender agency budget could include a reasonable amount for expert services, and any unusually high expert costs can receive specific approval, either in advance or by subsequent ratification.

Unlike other components of the criminal justice system, the defense lawyer owes his primary allegiance to the defendant. Moreover, as the American Bar Association has pointed out, once a lawyer has undertaken the representation of an accused, his duties and obligations are the same whether he is privately retained, appointed by the court, or serving in a defender system.[40] Thus, it is important that the defender avoid both the appearance and reality of collaboration with the police, prosecution or even the courts. The professional integrity of a defender office is weakened when it is unable to provide its own office space, equipment, consultants or even, in some cases, its own staff. In one jurisdiction, a National Legal Aid and Defender Association evaluation team found that a coordinated assigned counsel program administrator was forced to share secretarial staff with the sheriff's office. Although that may have been an extreme case, it emphasizes the danger of requiring the defense to share with other components of the criminal justice system.

In sum, in-kind contributions detract from the ability of the defender agency to operate as an independent advocate. The defender's budget should include not only core staff such as attorneys, clerical assistance, investigators and social workers, but also equipment, rent, travel funds, and a reasonable amount for outside experts.

4. *Assigned counsel component budget and attorney fee schedule.*

a. *Open-ended budget.* In localities where local coordinated assigned counsel programs function independently of the defender system, they, too, must operate on an annual or biennial budget. The assigned counsel administrator would compensate the appointed attorneys and also disburse funds for other anticipated expenditures out of this budget.

The assigned counsel program's budget should be open-ended, much like the "sum sufficient" appropriation recommended for the defender system. This is particularly important for assigned counsel programs, as a flat sum may lead to unjust discrimination in the payment of assigned counsel fees when the number of cases has exceeded projected limits. Under a finite budget, if the number of cases unexpectedly increases, attorneys serving at the end of a fiscal year would either go uncompensated or would receive only partial payment.

While a defender office with a fixed staff may utilize projections to estimate staffing needs, it is not unusual for emergency appropriations to be needed in a given fiscal year to augment the service. Where such appropriations are not available, quality suffers. *A fortiori,* in an assigned counsel program there is little or no staff to call upon; thus, the funding must be adequate to utilize participants from the private bar in an even-handed manner throughout the fiscal period.

This can only be accomplished by an open-ended budget whereby the total amount may be augmented in the event of an increase in the number of cases. Fiscal controls can still be employed by developing a formula based upon caseload and the nature and extent of services reasonably rendered. This approach

[39] A fuller discussion of the location of defender offices is provided in Chapter III.

[40] American Bar Association Project on Standards for Criminal Justice, STANDARDS RELATING TO THE DEFENSE FUNCTION, Standard 3.9 (Approved Draft, 1971).

allows for projecting funding needs based upon prior experience, yet is flexible enough to meet actual needs.

An example of the basic unfairness and resultant disadvantage to indigent clients in jurisdictions operating with limited budgets is provided by the Kansas statute. It states: "Should it appear to the board of supervisors that the balance in such fund together with anticipated revenues will be insufficient in any fiscal year to pay in full claims filed and reasonably anticipated to be filed in such year, the board is authorized to adopt a formula for prorating the payment of pending and anticipated claims so as to ensure an equitable allocation of the available balance among those persons having or filing valid claims against the fund." [41]

Other jurisdictions are more flexible. For example, the San Mateo County, California coordinated assigned counsel program operates under flexible budgetary limits and is eligible to receive additional funds to handle increased caseload levels. In Nevada, assigned counsel fees for post-conviction representation or appeals are paid out of the public defender's budget. However, after the funds appropriated for that purpose are exhausted, additional funds are allocated from the "reserve for statutory contingency fund." [42] Similarly, in Alabama a back-up fund is appropriated annually from general state revenues in the event that funds are exhausted.[43]

b. *Relationship of assigned counsel fees to prevailing prviate bar rates.* Fees received by assigned counsel in many jurisdictions are substantially lower than the earnings of retained counsel. One study estimated that the compensation received by assigned counsel amounted to only 40% of that received by retained counsel[44]

A report issued by the Alaska Judicial Council described the hardships and injustices imposed upon attorneys operating in a legal system with marked disparity between fees received by assigned and retained counsel. The report provided a description of the Alaska system as it existed in the early 1960's:

> [T]wo solo practitioners spent almost one month away from their regular work on unusually difficult cases. The office expenses of each were $1,000 per month. One of these attorneys was paid $350 for his services, the other, $250. The latter attorney found it necessary to make a bank loan to meet his office expenses for that month.[45]

Recognizing the difficulties caused by discrepancies in fees, several state statutes have addressed the interrelationship between assigned and retained counsel compensation. In Wisconsin, California, Wyoming and Maine, the rate of compensation for assigned counsel as fixed by the trial court is based either exclusively or partially on the customary fees charged by retained counsel for similar services. In Alaska, assigned counsel are now awarded compensation in accordance with a schedule of fees promulgated by the state supreme court. This schedule is based upon the standard minimum bar fees for the area in which the attorney regularly practices law.[46]

Assigned counsel must be adequately compensated for services rendered. Their fees should be consistent with the prevailing rates for retained counsel, except that a downward adjustment might be made in the fees of inexperienced lawyers who spend additional time on a case while gaining competence in the criminal defense field.

A system which fails to do so discourages the more capable attorneys from entering into criminal practice. In 1967, the President's Commission on Law Enforcement and Administration of Justice strongly urged this result:

> Assigned counsel should be paid a fee comparable to that which an average lawyer would receive from a paying client for performing similar services. Most presently proposed standards for compensation of assigned counsel call for a fee which is less than could be commanded in private practice. It has been argued that these standards are sufficient, because it is part of a lawyer's obligation as a member of the bar to contribute his services to the defense of the poor. But these standards unavoidably impose a

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[41] Kan. Stat. Ann. § 22-4507 (1974), *as amended*, (Cum. Supp. 1976).

[42] Nev. Rev. Stat. § 7.260(3) (1973).

[43] Ala. Code Recompiled tit. 15, § 318(11) (1958), *as amended*, (Supp. 1973).

[44] Oaks, *The Criminal Justice Act in the Federal District Courts: A Summary and Postscript*, 7 AMER. CRIM. L. Q. 210, 219 (1969).

[45] Alaska Judicial Council, *The Alaska Public Defender Agency in Perspective: An Analysis of the Law, Finances and Administration 1969-1974*, pp. 10-11 (1974).

[46] Wis. Stat. Ann. § 967.06(2) (West. 1971); Cal. Pen. Code § 987.3(a) (West. 1970), *as amended*, (Supp. 1975); Wyo. Stat. § 7-9.10(d), (Cum. Supp. 1975); Maine R. Crim. P., Rule 44(c); Alaska Stat. § 18.85.130(a) (1974).

stigma of inferiority on the defense of the accused. If the status of the Defense Bar is to be upgraded and if able lawyers are to be attracted into criminal practice, it is undesirable to perpetuate a system in which representation for the poor seems to be obtained at a discount.

The means of calculating prevailing bar rates, however, are complicated by the U.S. Supreme Court's recent decision in *Goldfarb v. Virginia State Bar.*[47] While in the past it was possible to determine prevailing rates by examining the bar association's minimum fee schedules, the *Goldfarb* decision held that minimum fee schedules are unconstitutional because they violate federal antitrust laws which prohibit price-fixing.

The practical result of that decision as it impacts upon the drafting of assigned counsel fee schedules is that a sample of criminal defense lawyers must be polled to determine the average rates charged. In this way, an independent assessment of prevailing bar rates can be made without reference to bar association schedules.

c. *Inclusion of funds for support services.* In the course of providing representation to eligible persons, assigned counsel, like defenders, require the services of investigators, expert witnesses and other support services. For example, the inclusion of social work assistance in a defense program may make the critical difference in a criminal defendant's chances for rehabilitation.

In an independent coordinated assigned counsel system, funds must be included for support services in the program's budget. If an attorney is unable to receive prior assurance of the State's commitment to pay for such services, he is thrust onto the horns of a dilemma. On the one hand, if the attorney pays for the services out of his own pocket, he risks the court's subsequent refusal to reimburse the expenses. On the other hand, if the attorney prepares the defense without these necessary services, he fails to provide the defendant with adequate representation and thereby risks becoming the target of subsequent ineffective assistance or malpractice claims.

Acknowledging this problem, some courts have proclaimed a constitutional right to expert services at state expense in some cases. The test that has been adopted by courts in deciding this issue has been accurately summed up in *United States v. Chavis*:

> . . . whether the defendant is financially unable to obtain the required service himself, and whether the service is necessary to the preparation and presentation of an adequate defense.[48]

In this light, in *People v. Watson,*[49] the Illinois Supreme Court held that a defendant had a right to the appointment of a document examiner at state expense where he was charged with delivery of a forged traveler's check. Similarly, the New Jersey Supreme Court in *State v. Lippincott* [50] recognized a constitutional right to the appointment of an expert on the effects of alcohol in the prosecution for driving while intoxicated. An Alabama Circuit Court in *State v. Weeks* [51] also held that a defendant had a right to the appointment of a ballistics expert where the State's case would depend on a bullet analysis.

In jurisdictions where there are no budgetary allocations for support services, attorneys tend to prepare cases without the use of such services, rather than seek approval through court procedures. Funds should be made available to assigned counsel in a budgetary allocation for the services of investigators, expert witnesses and other necessary services. The National Study Commission on Defense Services, the National Advisory Commission on Criminal Justice Standards and Goals, the American Bar Association, and the National Legal Aid and Defender Association have all recognized the necessity of adequate support services. Such services are not only vital to the presentation of the defense's case, but they are often required to disprove the prosecution's case. Moreover, since the State already has the police to conduct investigations and supply expert testimony, assigned counsel would be forced to operate under a distinct disadvantage without the availability of necessary support services. This is an inequity which no system of justice should tolerate.

d. *Fee structure.* The primary considerations in the development of a fee structure are its effect upon the quality of representation afforded to clients and upon the equitable treatment of attorneys. Fee schedules should be designed to compensate attorneys for effort, skill and time actually, properly and necessarily expended in assigned cases. They should have sufficient flexibility to encourage diligent representation, but should also operate with defined standards

[47] 421 U.S. 773 (1975).

[48] 479 F.2d 1137 (D.C. Cir. 1973).

[49] 221 N.E. 2d 645 (1966).

[50] 307 A.2d 657 (1973).

[51] Order of the Circuit Court for the Fifth Judicial District, Alabama (1972).

to ensure an equitable distribution of fees and prevent the receipt of unearned benefits.

In a number of jurisdictions, the approach to awarding fees is highly discretionary. Statutes in these states specify only that the trial judge should award "reasonable compensation" without elaborating the basis for such a determination. As a result, one attorney performing the same or similar services as another is not assured of receiving the same or similar fee. This inconsistency in fee determination prompted the National Center for State Courts to recommend that assigned counsel systems establish uniform standards and guidelines for fee assessment.[52] Moreover, a discretionary fee schedule is subject to criticism from another perspective. As the Burleigh County, North Dakota Bar Association pointed out, lack of systematic procedures "can give rise to allegations of patronage or favoritism especially where a large fee may be involved for a difficult case."

A second type of procedure operative in a number of states is characterized by both a minimum and maximum rate, or one of the two, which varies depending upon the nature of the case, e.g., felony-misdemeanor, capital-non-capital, guilty plea-trial-appeal or combinations thereof. The use of minimum and maximum rates offers more guidance in the assessment of fee awards than the "reasonable compensation" approach.

However, minimum and maximum rates, by themselves, do not provide sufficient guidance for the fee determiner. The fee structure must take account of hourly in-court and out-of-court time so that a flat amount may not be awarded without a showing of time spent. In addition, provision should be made for excess compensation in meritorious cases.

The federal Criminal Justice Act employs an hourly rate of up to $30 for in-court and $20 for out-of-court time plus expenses with maxima of $1,000 for felonies, $400 for misdemeanor cases, $1,000 for appeals and $250 for post-trial motions or probation revocation proceedings. Payments in excess of these amounts are available for "extended or complex representation" upon the certification of the court.[53]

[52] National Center for State Courts, N. Elkind, M. Colton and F. Bremson, IMPLEMENTATION OF ARGERSINGER V. HAMLIN: A PRESCRIPTIVE PROGRAM PACKAGE 38-39 (1974).

[53] 18 U.S.C. § 3006A(d) (1964), *as amended* (1970). For an interpretation of the federal statute, *see United States v. Thompson*, 361 F. Supp. 879 (D.D.C. 1973).

A calculation of fees based upon hourly rates offers a reasonably precise estimate of the effort and time expended by the attorney in a given case. It eliminates most of the unwarranted discretion in the fee assessment process, thereby ensuring the equitable treatment of attorneys and the prevention of undeserved awards. Moreover, an hourly assessment helps to encourage attorneys to perform diligently and consequently, may avoid the proliferation of guilty pleas which impede the defendant's constitutional right to a trial.

However, the number of hours expended on a case cannot, alone, be determinative of the amount of the fee award. Such a straight line approach would tend to penalize the efficient and highly skilled attorneys and overcompensate the less efficient and less experienced lawyers Other criteria relevant to fee assessment should be considered in conjunction with the total number of hours spent on a case. The California statute offers a useful recitation of such factors:

(a) Customary fee in the community for similar services rendered by privately retained counsel to a nonindigent client.
(b) The time and labor required to be spent by the attorney.
(c) The difficulty of the defense.
(d) The novelty or uncertainty of the law upon which the decision depended.
(e) The degree of professional ability, skill and expertise called for and exercised in the performance of the services.
(f) The professional character, qualification and standing of the attorney.[54]

Both the federal Criminal Justice Act and most of the states which use hourly rates in calculating fees distinguish between in-court and out-of-court time. These jurisdictions invariably award higher fees for in-court time because the attorney generally has no control over the specific times and duration of court appearances and because in-court practice is usually more demanding.

The development of stated maxima for various types of cases provides a check on the charge levied upon the public treasury by assigned counsel. The maximum amounts reflect the norm generally applicable to the type of case in question. Such categories as felony, misdemeanor, appeal, post-conviction, and

[54] Cal. Pen. Code § 987.3 (West. 1970), *as amended*, (Supp. 1977).

probation revocation, as found in the federal Criminal Justice Act, might be adopted.

The categories of case type can also be further refined. The "weighted fee" proposal of the Criminal Courts Bar Association of Bronx County, New York offers the following breakdown for misdemeanor and felony cases:

For Misdemeanor Charges:

$100 Disposition without hearing;
$150 Disposition with preliminary hearing;
$200 Disposition with other hearing on motion;
$300 Disposition by trial to conclusion;
$ 50 No disposition (e.g., attorney relieved, defendant absconded, etc.)

For Felony Charges:

$200 Disposition in Criminal Court;
$300 Disposition in Supreme Court [i.e., trial court]
plus $100/hearing day
plus $100/trial day
$100 No disposition (e.g., attorney relieved, defendant absconded, etc.)[55]

It is crucial that the fee structure allow for compensation in excess of the stated maximum ceilings in appropriate cases. Some cases, which are of unusual complexity, require attorneys to spend additional hours to provide an effective defense. The quality of representation provided to eligible clients should never suffer because of an unavailability of funds. The amount of such fees should be open-ended, limited only by a proper computation of total hours necessarily expended.

Again, in order to protect the public treasury, the attorney's additional hours should be approved by the assigned counsel administrator. However, procedures for approval should not be overly cumbersome so as to discourage the provision of full and effective representation to clients. Consideration might be given to a recommendation of a joint committee of the D.C. Circuit Judicial Conference and the D.C. Bar which urged that, in order to streamline the payment of excess compensation, counsel be paid the set fee for the particular charge while awaiting a final determination on the entire claim. The committee also recommended that excess compensation be paid at the rate of $40 per hour and that claims for excess compensation should be treated like any other vouchers in that they should not be subject to approval by the trial judge.[56]

While, in some jurisdictions, fee schedules are established by statute, a more flexible approach is to establish guidelines, as in the California statute, leaving the actual hourly amounts to be established by the state defender director or the local assigned counsel program so that they can be adjusted to meet changes in the prevailing bar rates. Such an approach, administered independently of the courts, and allowing for upward or downward adjustment depending upon the circumstances of the case and the experience of the attorney, is the recommended approach.

D. Conclusion

Defender systems are moving toward funding by state governments. As a means of initial implementation, some states have established pilot statewide programs with LEAA funds. However, in the long run, this will require the passage of legislation at the state level. In the interim, areas lacking adequately funded county-wide defender systems will be best served by turning to defender programs funded on a multi-county basis. Moreover, until such time as state governments have assumed the responsibility for full and adequate funding, federal funds will be needed to establish organized defense systems in jurisdictions presently lacking them and to augment impoverished systems.

Whether the system's funds in fact emanate from state, county or federal sources or a combination of these, it is important that the defender agency or, where established separately, the coordinated assigned counsel program, be permitted to seek and administer its own funds independent of any governmental agency. The system's budget should help to make the agency self-sufficient by including necessary funds for non-legal staff such as investigators, and for consulting experts, rent, travel and the like. Whether the budget is for the defender system or for a separate assigned counsel program, there should be a means of obtaining a budgetary supplement in the case of unexpected contingencies.

[55] A "weighted fee" proposal was recommended in, Institute of Judicial Administration, *Project on Court Improvement Assigned Counsel Study* (1976).

[56] Joint Committee of the Judicial Conference of the D.C. Circuit and the D.C. Bar (Unified), *Report on Criminal Defense Services in the District of Columbia,* pp. viii, ix (1975).

As the criminal law field becomes increasingly demanding both in terms of the need for additional personnel and increased skills, we must encourage private bar participation. This can only be done if assigned counsel are to be compensated fairly and adequately. The sheer complexity of the laws and procedures necessary to provide a competent defense imposes substantial barriers to entering the field. Thus, all jurisdictions need to establish a system of hourly rates with maximum fees for given types of cases which approximates prevailing private bar rates in the community. In addition, provision should be made for excess compensation where merited.

The question of the source of funds is closely related to the issue of the jurisdictional level at which these services are organized. Does it follow from the fact that the services are funded at the state level that they will also be organized and administered at the state level? This question is the focus of the following chapter.

CHAPTER III. ORGANIZATIONAL STRUCTURE

A. Introduction

The jurisdictional level at which a legal defense system is organized, i.e., local, regional or state, may have a significant impact upon the services provided. The level of organization affects such questions as availability of services, level of funding, uniformity of quality, and system independence.

Present day defender systems employ a variety of organizational structures. The principal variations include the following: a) a wholly local program funded and organized at the city or county level; b) a multi-county, or regional system, created and funded by the participating counties; c) a state-financed system with local selection and control of the local offices; and d) a centrally-administered state-financed system.

The great majority of today's organized defense systems, whether public or private, defender or assigned counsel, are funded and organized at the local level. This is particularly true of those systems which have been in existence for the longest periods of time. There are very few multi-county systems in existence, although enabling legislation exists in approximately sixteen states, not including those states which have organized defender services at the state level. Authorization for multi-district defender offices also exists in the Criminal Justice Act, which determines the structure of federal defender offices.

The trend among the newer defense systems is toward state level organization either in whole or in part. This is surprising to some observers inasmuch as the criminal justice counterpart of defenders, the prosecution function, has resisted the move toward centralization. According to one report, there are several reasons why defender services are more likely to be centralized. First, defenders did not develop, like prosecutors, as locally-elected officials with constitutional status. Moreover, defender systems themselves, except in a small number of jurisdictions, most notably in California and New York State, have developed primarily within the past decade. The recent explosion in mandatory entitlement to assistance of counsel has placed a troublesome and rapidly accelerating cost burden on local units of government (as opposed to the traditional and more moderately increasing prosecution burden) that was not anticipated. This, coupled with severe financial pressures facing all local governmental services, has made state administration and financing seem to many an attractive alternative for meeting government's indigent defense needs. Finally, the very newness of indigent defense as a criminal justice component has probably generated a flexibility and receptivity to change that comes much harder to independent, electorate-responsible prosecution offices which have been in existence for many years.[1]

Some states have adopted wholly state systems for trials and appeals with state level financing and state level defender appointment and administration. Other states have provided all or a portion of funding at the state level, but have required central administration for only a limited number of functions. Still other states have left the trial function to local discretion, but have established a state level system for appeals or post-conviction matters.

The strengths and weaknesses of each of these systems are examined in this chapter. In discussing the different systems, the term "statewide defender system" has been avoided, inasmuch as that term has been widely used and misused to describe a variety of systems. These systems range from centrally administered state defender systems serving all jurisdictions within a state, to states which provide only a portion of the funds for defender offices, lack centralized administration and even employ randomly appointed counsel in less populated areas.

The discussion which follows applies equally to public and private models. Presently, the private model is employed only in locally-administered programs.[2] However, there is nothing to bar the estab-

[1] Skoler, *Government Structuring of Criminal Justice Services: Organizing the Non-System* 19, 20 (Report, Visiting Fellowship, National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, 1977).

[2] However, the present Illinois State Appellate Defender Agency began as a project of a private, non-profit corporation, funded by LEAA.

lishment of a private defender system at the state level; in fact, just as the new national corporation for civil legal services is modeled after the private sector, some states have considered establishing a state defender corporation along similar lines.[3] Thus, while this manual does not opt for either the public or private model as a preferred system, the reader should keep both models in mind during the discussion.

B. Pros and Cons of Existing Organizational Structures for Defender and Assigned Counsel Systems

1. *Locally-based defender offices or assigned counsel programs.* It should be recognized that whether a system is organized at the state or local level may say nothing about the size or complexity of a given system. For example, the county-based defender system in Los Angeles employs several hundred lawyers, has numerous branch offices and a large number of separate divisions. In contrast, the entire state defender system in Rhode Island is served by a single office. Given the variations in population size and geography among counties, the same considerations may not apply to different areas with equal validity.

On the other hand, all counties share certain characteristics. They are all served by trial courts whose decisions are appealable to state level courts and are governed by local officials who operate with local funds. Regardless of the size of the county, there exists another layer of government at the state level as well as another treasury.

The fact that defense systems have traditionally been established at the local level is probably a result of the fact that criminal cases originate in local courts. It is also understandable that defender systems in major cities having crowded court dockets have been established prior to defender systems in more rural areas, since the need for an organized system in areas having higher crime rates and population densities was seen earlier in those localities. Thus, locally-based defender systems have evolved, in large part, as a response to immediate needs of communities rather than as a result of planning and judgments that a local system is more effective.

Notwithstanding the somewhat fortuitous origins of most defense systems which involve local appointment and administration, there are substantive arguments which can be made in favor of locally-based systems. Locally administered systems can most readily be designed to respond to local conditions. Communities may differ from one another in the quantity and types of eligible cases, the characteristics of the local bar, geographical and demographic factors, and with respect to other peculiarities. Thus, different approaches to the handling of cases and to dealing with the community may be called for in various localities.

Secondly, while selection of the defender director at the state level is designed to eliminate local political bias and to ensure merit appointment, if bias or poor choice in the selection of a state defender director nevertheless occurs, the result would be to undermine the performance of quality services throughout a state.

Moreover, local programs argue strongly in favor of local autonomy in program administration. They cite the difficulty of administering a program from a distance as the primary reason why programs should be administered by a local defender or administrator.

On the other hand, while these arguments are persuasive, in practice, a number of deficiencies have been observed in locally-based programs. Studies have found that, in states which lack a centrally organized and administered system, the problems include wide disparities in the quality of services throughout the state, lack of service coordination, absence of standards, erosion of independence, political and judicial influence in the selection process, uneven allocation of financial and personnel resources, and a perpetuation of the part-time defender system in many localities.

The disparities in the quality of services throughout a state stem from various causes. In some states, the lack of a state agency has resulted in the absence of any organized defense system in many localities.

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[3] In its *Report on the Alaska Defender Agency,* NLADA consultants recommended the private model for long range consideration. Similarly, the Alaska Judicial Council in its 1974 report, *The Alaska Public Defender Agency in Perspective,* noted that, "The concept of a 'public' defender agency by its nature creates a dilemma between accountability to the public and a primary legal and official responsibility to the best interests of the client. This Janus-like role for the Public Defender is made more difficult when the public or representatives of other components of the criminal justice process fail to comprehend the function of defense counsel in an adversary process." A private, nonprofit corporation for the provision of both civil and criminal legal assistance was proposed for the State of Wisconsin in a *Report to Governor Patrick J. Lucey* by a Citizens' Study Committee on Judicial Organization in 1973.

Disparities in the amount of funding earmarked for defense services on the local level have also contributed to disparities in the structure and operation of defense systems, the number of attorneys provided and the amount of caseload handled by each attorney, and the extent of support services available. The findings of a study conducted by the National Center for State Courts on California's county-controlled defender systems are typical:

> County control of public defender systems in California has resulted in wider variations in the size, structure and operations of these systems. During the course of this study, the research team found some of the most effective and innovative defense services in California counties. On the other hand, county control also resulted in wide discrepancies in the quality of defense service provided. The level of funding and the variations in services differ considerably from county to county.[4]

The problems associated with local disparities become even more pronounced where, as a survey of the Illinois trial level defender offices found, the development of defense services is "greatly outpaced" by the prosecutorial and judicial agencies in a particular jurisdiction.[5] Moreover, the unequal distribution of financial and legal resources on a statewide basis and the disparity in the record keeping practices of local jurisdictions obstructs the effort to plan for the future provision of defense services throughout a state. In sum, such wide variation in the services offered by each locality in a locally-organized defense system has led one study to conclude that in such systems "justice [often] becomes a matter of geographic accident." [6]

There is also an absence of uniform policies in a state having locally based defense systems. Studies of both the New York and Georgia systems revealed significant differences among counties in the eligibility criteria used to determine which defendants would be entitled to defender services. This means that an accused arrested in one county could be denied defender services while his counterpart in the same financial predicament in another county would be provided with services. Moreover, certain basic policy questions relating particularly to case processing and other internal functions of the defender office are also left to the discretion of each local jurisdiction, thereby creating discrepancies in the quality of services offered clients. Defender staff attorneys and assigned counsel also receive unequal treatment in policies governing their employment. Uniform guidelines concerning the salary paid to defenders and fees paid to panel attorneys, the recruitment and hiring of personnel and the resolution of grievances are not possible in locally-organized systems. Finally, the lack of uniform defender policies throughout the state prevents the creation of an official voice to speak in the legislature regarding bills that affect defenders and their clients.

A locally organized system further lacks a central administrative structure needed for the coordination of defense services on a statewide basis. The National Defender Survey reported that many counties, because of limited attorney staff, are unable to handle the requisite number of cases.[7] In locally-administered systems, there is no way to allocate attorneys to those counties which are in the most need of their services during peak periods. Furthermore, some counties are without necessary support services, resulting in the presentation of poorly-prepared cases. A study of one county in Indiana revealed that public defenders were operating without the services of investigators, and because of a lack of appropriations, expert witnesses either testified without charge, were paid in part by small contributions from the defendant's family or were paid in full from the public defender's own pocket.[8] On the other hand, where a system serves more than one county, support services can be shared, so that their cost is more readily absorbed.

The provision of training and technical assistance to defenders cannot be acomplished effectively without coordinating efforts among all offices in the state. Many local offices employ so few attorneys and operate under such minimal budgets that they are

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[4] National Center for State Courts, N. Elkind, M. Colton and F. Bremson, DESCRIPTION OF DEFENSE SERVICES IN NINE STATES 3 (1974).

[5] Illinois Defender Project, P. Hughes, Survey Coordinator, *Criminal Defense Of Indigents In Illinois: Report To The Illinois Law Enforcement Commission* p.iv (1974).

[6] American University Criminal Courts Technical Assistance Project, A. Bowman, F. Cohn, A. Parlapiano, R. A. Green, and S. Stiller, *An Evaluation Of Indigent Criminal Defense Services In Louisiana And A Proposal For A Statewide Defender Service* (1972).

[7] National Legal Aid and Defender Association, L. Benner and B. Lynch-Neary, THE OTHER FACE OF JUSTICE: REPORT OF THE NATIONAL DEFENDER SURVEY 28-29 (1973) (hereafter referred to as THE OTHER FACE OF JUSTICE).

[8] Kittei, *Defense of the Poor: A Study in Public Parsimony and Private Property,* 45 IND. L. J. 90, 92-93 (1969).

unable to offer comprehensive entry-level training to inexperienced attorneys joining the staff. As a result, neophyte attorneys are sent to represent clients before receiving basic instruction in criminal law, criminal procedure and trial tactics. Moreover, local offices frequently lack the means of keeping their more experienced attorneys abreast of recent developments in the criminal defense field.

Locally organized systems are also frequently deficient in appellate services. This topic is addressed in detail later in this chapter wherein the relationship of the trial and appellate functions is explored.

Where the selection of the director or administrator is made by an independent board or commission, an additional factor must be considered. If that board is removed from the local scene, then independence is more readily ensured. Locally-selected defenders are more apt to owe their appointments, and hence, allegiance, to local judges or governmental officials. The further the appointing board is removed from the locality, the greater is the assurance that its appointee will have the independence necessary to pursue his clients' cases zealously. Defense attorneys must have independence not only from the judges before whom they must present their cases but also from the members of the local community who may develop opposition to the defense of a notorious case.

One of the most serious deficiencies of the locally organized defense system is the continued use of part-time defenders having little or no support services. This problem is best seen in the context of the following discussion of regionalization of defense services. While part-time defender services are not strictly a rural phenomenon, they are most frequently a result of low caseloads in low crime, sparsely populated areas.

2. *The multi-county system.* From a nationwide perspective, rural areas have the greatest need for organized defender services. The vast majority of rural defense systems are locally organized and are served by part-time defenders or by randomly appointed assigned counsel. The National Defender Survey reported that only about one-fifth of the rural defender agencies were staffed by full-time staff attorneys compared to three-fourths of the metropolitan defender systems and about one-half of the urban defender systems. Out of a total of 128 defender offices reporting, only four rural offices had full-time investigative staffs, and only five had part-time investigators. While the overall majority of chief defenders viewed their job as a career, very few rural defenders did so. Only slightly more than half of the rural defenders had attended continuing education programs in criminal law and procedure compared to over three-fourths of the metropolitan and urban defenders. In many of the rural counties employing an *ad hoc* assigned counsel approach, the judges themselves recognized their county's inability to comply with the demands of *Argersinger* and favored the implementation of a multi-county defender system.[9]

A multi-county defender system attempts to establish a full-service organized defender system in predominantly rural areas which lack substantial caseloads. Under this design, neighboring counties (or other localities) pool their legal and financial resources to form a shared regional defender office which provides defense services to all eligible defendants in the participating counties. A multi-county system can exist as part of a centrally-administered state system or be exclusively the product of the local units of government which form its constituency.

As previously noted, regionalization has received authorization in federal and state statutes. In addition to statutes creating centrally-administered systems, which are reviewed in a subsequent section, there are a substantial number of state statutes which permit counties to join together to establish defender programs. The most direct support is exemplified by the California and New York statutes which allow the board of supervisors of *any* county to join with one or more counties to create and maintain a public defender office.[10] Other statutes authorize regionalization under certain circumstances. The Federal Criminal Justice Act requires that two districts or parts of districts seeking regionalization be adjacent and have an aggregate of two hundred persons who annually receive the appointment of counsel.[11] Furthermore, some states allow counties in the same judicial district to regionalize upon either the joint resolution of their county boards, as in Illinois,[12] the appointment of the district public defender by

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[9] THE OTHER FACE OF JUSTICE, pp. 19-20.

[10] Cal. Gov. Code § 27700 (West. 1968), *as amended,* (Supp. 1977); N.Y. County Law § 716 (McKinney 1972). *See* Ida. Code § 19-859(b) (Cum. Supp. 1976); Nev. Rev. Stat. § 260.020 (1975); Wyo. Stat. § 7-9.9(c) (Cum. Supp. 1975).

[11] 18 U.S.C. § 3006A(h)(1) (1964), *as amended,* (1970); *see also* Iowa Code Ann. § 336A.1 (1977).

[12] Ill. Rev. Stat. tit. 34, § 5601.2 (1973).

the state judicial council, as in Minnesota,[13] or the initiative of the district court, as in Kansas.[14] The Missouri statute provides that the public defender in a circuit containing more than one county designate the county in which the principal office will be maintained.[15] Some statutes also elaborate upon the ways in which the expenses of the regional office should be distributed among the participating counties—a topic already discussed in Chapter II.

a. *Full-time service.* The major advantage of regionalization over defense programs which currently serve most rural areas is its elimination of part-time defenders. A defender agency which provides service to several counties would have a sufficient caseload to support the development of a full-time defender service.

Although part-time defenders are generally earnest and well motivated, there is an inherent systemic conflict between their defender work and their private practice. Since the defender typically receives an annual stipend for public defender work, legally indigent clients are disadvantaged in competing with fee paying clients for the attorney's time. The experience of Hennepin County, Minnesota is illustrative. The State Public Defender in conjunction with the University of Minnesota Law School hired two highly experienced criminal defense lawyers to staff the county misdemeanor courts on a part-time basis. It soon became apparent, however, that the utilization of part-time defenders was a mistake. On too many occasions the attorneys were inaccessible to defender clients because they were occupied elsewhere by non-defender business. Moreover, it was difficult to find a practical way of dividing the attorneys' time between defender responsibilities and the demands of private practice. The attorneys tried to furnish services to defender clients exclusively in the mornings, but frequently judges carried cases over from the morning session to the afternoon, thus forcing the part-time defenders to remain a full day in court. Furthermore, the attorneys operated with the incentive to plead as many defender clients guilty as possible and to narrowly construe eligibility standards in order to allow sufficient time to attend to their private law practices. The Minnesota program ultimately replaced the two part-time defenders with one full-time attorney.[16]

In jurisdictions where the part-time defender's private practice consists primarily of civil cases, the conflict is even more problematic. The defender's loyalties are divided in cases where the defense of unpopular non-fee clients may cause a loss of private revenues due to notoriety and public opinion. When the attorney's responsibilities to the office of the public defender are weighed against the needs of his private practice, the former may be compromised or even neglected, notwithstanding the best intentions of the lawyers. Since salaries paid to part-time defenders are customarily low, and defender "burn-out" is widespread, the attorney becomes increasingly dependent on and dedicated to his private law practice. This pattern has by now become predictable, as are its effects on the quality of representation. The inherent conflicts of interest confronting the part-time defender lead to the erosion of defender independence, adversely affect zealous advocacy on behalf of clients, and damage attorney-client relationships.

In some, albeit exceptional instances, the conflict between defender responsibilities and the needs of a private criminal practice has led to serious abuses. An evaluation of Indiana's trial level defenders revealed that part-time defenders offered accused persons seeking the services of the defender office bargains designed to solicit clients for their private law practice. Upon the payment of money, the defender would promise to "shift the indigent to his private clientele" and thereby provide more extensive and effective defense services. Although the evaluation team could not determine the frequency or extent of this practice, it did conclude that "it is sufficiently widespread to be a matter of urgent concern."[17] Such practices have led some states to prohibit criminal law practitioners by statute from handling indigent cases. However, that very safeguard engenders problems of its own. Civil practitioners, in particular, do not handle sufficient defender caseload to develop an expertise in criminal defense.

Part-time defenders are plagued by other handi-

[13] Minn. Stat. Ann. §611.26 (Supp. 1977).

[14] Kan. Stat. Ann. § 22-4517 (1974), *as amended*, (Cum. Supp. 1976).

[15] Mo. Ann. Stat. §§ 600.010(1), 600.040(2) (Supp. 1977). Other states with similar enabling legislation include Georgia, Indiana, Kentucky, Louisiana, Nebraska, Pennsylvania and South Carolina.

[16] Sedgwick, S. and Oliphant, R. *Judicial Reflections on Law Students in Court and the Argersinger v. Hamlin Decision 5-6* (Unpublished 1973).

[17] National Legal Aid and Defender Association, A. LaFrance, L. Frost and P. Hughes, *The Structure And Funding For Criminal Defense Of Indigents In Indiana* (1974) (American University Criminal Courts Technical Assistance Project).

caps as well. They frequently lack the benefit of support staff and facilities necessary to provide effective representation. A survey of part-time Illinois trial level defender offices reported that defenders were forced to donate funds from their defender salaries or remunerations from their private practices to pay for the necessary support services.[18] Moreover, part-time defenders may be unable to provide early representation to their clients or to devote a sufficient amount of time to each case. A study of defense services in Indiana described a system staffed by four part-time defenders. The defenders were usually unavailable to advise clients during the early stages of the case, and their total time in court ranged from 10 to 20 minutes on a guilty plea and 30 minutes for a trial.[19]

When part-time staff attorneys work out of private offices and maintain their own files, the problems of the defender office are compounded. The daily operation of the office lacks needed efficiency, especially in record-keeping and case scheduling. Client representation also suffers where part-time defenders are not benefitted by training or supervision. In addition, a part-time staff contributes to the fragmentation of the defender office. A report on Pennsylvania's part-time defender offices concluded that they were "disjointed and often chaotic, enjoying none of the continuity of operation found where one or more full-time attorneys are devoting all of their time to a defender office."[20] Full-time defender attorneys, because of the absence of competing demands on their time and greater access to support services, are often able to be more responsive to their client's needs and more aggressive in their client's interests.

In recent years, a trend toward the creation of full-time defender offices has emerged. Many statutes now mandate that defenders work full-time. In the federal system, "neither the Federal Public Defender nor any attorney so appointed by him may engage in the private practice of law."[21] Similarly, both defender directors and staff attorneys are required by statute to serve full-time in Alaska, Colorado, Connecticut (some exceptions possible), the District of Columbia, Illinois (appellate defenders only), Kansas, Missouri (except that assistant public defenders may engage in private civil practice in circuits of less than 500,000 population), Nebraska (as long as salary of assistant public defender is comparable to that of local prosecutor), New Mexico, Oregon (if defenders receive over $10,000 for appellate work or over $13,000 for county trial work), Wisconsin (appellate defenders only), and the Virgin Islands.[22] Other states require only the defender director to be full-time[23] and several jurisdictions have prohibited defenders from engaging in the private practice of criminal law.[24] The use of full-time defenders has received strong approval in the recommendations of the National Study Commission on Defense Services, the National Advisory Commission, the American Bar Association and the National Legal Aid and Defender Association. Many defenders in the field who have had experience with both full-time and part-time systems share the opinion of a public defender from one Pennsylvania county who, after experiencing both systems, concluded, "Believe me, the full-time approach works much better."

Regionalization not only eliminates part-time defenders from rural defense systems by sufficiently increasing the total caseload to justify the existence of a full-time staff, but also provides representation in certain rural areas where the supply of competent private practitioners is insufficient to handle the existing caseload. The Chief Judge of the Supreme Court of South Dakota indicated that as many as 152 towns in the state were without a single attorney.[25] Similarly, an evaluation of defense systems in Illinois found that in some rural areas, no attorneys were available for appointment in misdemeanor cases.[26] In other states, the few available attorneys are burdened with overwhelming caseloads. A study of rural defense systems in Louisiana noted that in one

[18] Illinois Defender Project, *supra* note 5, p. iii.

[19] Kittel, *supra* note 8, pp. 94-95.

[20] F. Wright, *Defender Representation In Counties Of The Second Through Eighth Class: A Public Defender Project Report* 94 (1973).

[21] 18 U.S.C. § 3006A(h)(2)(A) (1964), *as amended,* (1970).

[22] Alaska Stat. § 18.85.070 (1974); Colo. Rev. Stat. § 21-1-102(b) (1973); Conn. Gen. Stat. Ann. § 51-293(d) (Supp. 1977); D.C. Code § 2-2225(b) (1973); Ill. Rev. Stat. tit. 38, § 208-9(e) (1973); Kan. Stat. Ann. § 22-4517 (1974), *as amended* (Cum. Supp. 1976), Mo. Stat. Ann. §§ 600.020(1), 600.035(8) (Supp. 1977); Neb. Rev. Stat. § 29-1804 (1975); N.M. Stat. § 41-22A-11(D) (Supp. 1975); Oreg. Rev. Stat. §§ 151.030, 151.220(5) (1973); Wis. Stat. Ann. § 257.23(1), (2m) (Supp. 1976); Virgin Is. Code Ann. tit. 5, § 3526 (Supp. 1976).

[23] E.g., Arizona, Nevada, New Jersey, North Carolina, Vermont.

[24] E.g., Idaho, South Carolina, Wyoming.

[25] THE OTHER FACE OF JUSTICE, p. 40.

[26] Illinois Defender Project, *Report On Activities* 18 (1973).

district, for example, the total number of attorneys available for court appointment was eleven while the estimated number of cases per year requiring assigned counsel was 1,000, two hundred of which were felonies.[27]

The Louisiana study also found that none of the lawyers who were available for appointment had any interest in representing criminal defendants. This led the study to conclude that:

> It became apparent that the need for a public defender in rural areas is even greater than that in the cities, because of the enormous burden that an appointed counsel system, even if adequately funded, imposes on a few private attorneys who have no interest in devoting a substantial amount of their professional efforts to criminal cases.

A similar justification for a defender system in rural areas was cited in a grant application submitted by the Tuscarawas Valley Legal Services Association of New Philadelphia, Ohio. The application explained that the lack of interest in criminal appointments on the part of private attorneys was the result of two main factors. First, lawyers were already overworked in their private practices and the prospect of assuming additional cases which paid minimal, and in some areas, no fees, was viewed with distaste. Moreover, and perhaps more significantly, ". . . the vast majority of the lawyers of all three counties would feel not sufficiently abreast of current criminal law developments to adequately defend a person accused of a felony."

In a regionalized system, full-time defenders provide services to every locality in the region. The full-time staff, because of the substantial caseload handled by each attorney, develops the necessary criminal law expertise to adequately represent eligible defendants. A regional defender system covering seven rural counties in Illinois showed a marked improvement over the quality of represenation previously provided by assigned counsel. An evaluation of the Illinois Defender Project revealed that the Circuit Defender's Office achieved many more case dismissals as a result of the development of a substantial motion practice, the completion of more extensive investigations and the provision of early representation. Moreover, the defender's office secured more lenient sentences and substantially lower bonds from the local judiciary, discouraged harassment arrests by the police, and won the support of a racially-tense client community.[28]

b. *Efficiency and economy of regional operation.* A multi-county defender system can absorb unexpected increases in caseload and expenditures incurred by an individual county. If a county experiences an unusual amount of total cases or several prolonged felony trials in one year, there would be sufficient manpower and support services in the regional defender agency to provide the necessary representation. Without regionalization, however, this same county would encounter severe problems in meeting its constitutional obligation under the Sixth Amendment. Especially where the county utilized an assigned counsel plan which was financed with county funds, as is usually the case, sudden additional expenditures in attorneys' fees could result in an economic disaster. Judges in South Dakota and Wisconsin, when faced with this predicament, decided that the only alternative was simply not to incarcerate misdemeanor defendants, in order to relieve the county of its obligation to provide counsel in such cases. A county employing a part-time defender system would be forced to burden attorneys already experiencing difficulty in handling current caseloads adequately with increased demands. In a regionalized defender system, however, counties not experiencing unexpected increases in a given year "cover" for a county or counties which are overburdened. In this way, counties would enter into a cooperative joint agreement as a hedge against widely varying and unpredictable events.

There is also some evidence, although not conclusive, that a regionalized defender system is generally more economical for participating counties than the existing locally-based systems. North Dakota instituted a regional defender system on an experimental basis, providing services to ten counties over a two-year period. A statistical analysis of the project revealed that eight of the counties in the defender region recorded an average per capita cost which was less than that expended in a "control" county employing an assigned counsel plan; the average per capita cost for the ten county area was half that of the plan operating in the control county; and the average cost per offense in the control county was "significantly higher" than the expenditures in the defender region. Based on this data, the study concluded that the regional defender system seemed

[27] American University Technical Assistance Project, *supra* note 6.

[28] Illinois Defender Project, *supra*, note 26, pp. 18-20.

"much more economical to operate than the assigned counsel program."[29]

Similarly, the Kansas Bar Association sponsored the Public Defender Pilot Project which provided full-time defenders in three judicial districts, two of which served multi-county areas. An analysis of the project's first three years of operation concluded that its total cost was less than the pre-existing assigned counsel plan servicing the same counties. The study explained that the defender's specialization in criminal defense enabled the regional defender system to be more economical, despite the additional purchases of library books, supplies, and furniture and such expenses as rent and travel.[30]

Travel costs in multi-county systems merit further comment. With regionalization, of course, there are increased travel demands upon defenders who must reach clients and courts in various counties. Although critics of regionalization argue that the increased travel expenses make the system less economical than locally-based systems, both the Kansas and North Dakota studies found to the contrary. Similarly, a report from the Wisconsin Council on Criminal Justice stated that the state's multi-county Indian Legal Services Program demonstrated that defenders traveling in rural areas could provide representation at a minimal cost per case. One way of decreasing the amount of travel expenditures is to limit the size of the region, if possible, so that the distance from the defender office to the outlying areas is minimized. For example, in the North Dakota experiment, the distance by highway from the defender office to all the county seats was no greater than 77 miles and on the average was approximately 50 miles. Not surprisingly, the regional defender's itemized budget listed only $1,000 for in-state transportation mileage out of a total budget of $30,000 for the first year and again listed $1,000 out of a total budget of $48,000 for the second year of operation.

c. *Potential problems confronting regionalization.* Regionalization is commonly confronted with several potential problems. Counties may oppose the institution of a multi-county defender system because it poses a threat to local control. This problem was encountered by the South Dakota Planning and Advisory Commission which evaluated the feasibility of establishing a regional defender office in a six-county district which was primarily rural. Some officials in the rural counties opposed regionalization because, they argued, "justice will not be served by bringing in an outside criminal law expert." Nevertheless, the Commission recommended that a regional defender office be created in the area. It expressed the belief that the substantial advantages of such a system would become apparent and the initial mistrust expressed by some counties would dissolve as the defender office became more acquainted with the various communities in the region.[31]

There are also other problems related to the operation of a regional defender system. A North Dakota study[32] warned that if arrests were made concurrently at opposite ends of the region, the defender office would not be able to effectively handle either case. However, a regional defender system could account for such difficulties by employing a sufficient staff of full-time attorneys and reducing the size of the region to manageable levels, thereby enabling all defendants to receive early representation. The North Dakota study also noted that because the court terms in the various counties generally coincided, considerable "dead time" and expense would result from extensive traveling. This problem can be avoided with, as the National Center for State Courts study explained, "full cooperation of all the participating courts to develop a calendaring method to minimize attorney appearance conflicts." Such a proposal was implemented with encouraging results in the Illinois defender system. Furthermore, the "dead time" problem can also be remedied by requiring the defenders to "circuit ride" in tandem with the judge, a system used in a tri-county region of northeastern Vermont.

The multicounty defender system is an innovative concept designed to improve the quality of representation provided in predominantly rural areas. Despite widespread statutory authorization, the most recent data indicates that only 17% of all defender systems analyzed, or a total of 63 defender agencies, are regional systems, many of which are part of a larger

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[29] Note, *Meeting the Challenge of Argersinger: The Public Defender System in North Dakota,* 1973 N. DAK L. REV. 699, 720.

[30] Goodell, *A Review of the K.B.A. Public Defender Pilot Project,* J. KAN. BAR ASSN. 171 (1974).

[31] South Dakota District II Planning and Advisory Commission on Criminal Justice, *The Defense Of Indigents In District II* (1973).

[32] Burleigh County Bar Association, City of Bismarck and the North Dakota Combined Law Enforcement Council, *Providing Counsel For The Indigent Accused: A Regional Survey* (1970).

statewide defender network.[33] Regionalization seems to present so many advantages over locally-based defense systems that it should be implemented more extensively in the future. A regional defender system can be created without awaiting the enactment of enabling legislation, as was done in North Dakota. A fuller discussion of the implementation of a multi-county defender system appears subsequently in this chapter.

3. *State-created system with autonomous local programs.* Defender programs which are created on the state level and are financed, either totally or partially, with state funds, are often characterized by some measure of central control or coordination, even where they are locally-administered. Some state-created systems ensure that all eligible defendants throughout the state are provided with defense services. The Florida statute, for example, requires that a public defender be established in each of the state's twenty judicial circuits, guaranteeing all of Florida's sixty-seven counties the services of a defender office having a full-time director. This is a significant improvement over locally-based systems where counties can individually decide to forego the establishment of a defender office and leave defense responsibilities to *ad hoc* assigned counsel appointments. Moreover, although defenders are elected locally and there is no central office in charge of defender services for the state of Florida, appellate services are provided by several regional appellate offices serving the state.[34]

State funding may provide leverage for a state to regulate the quality of defense services provided on the local level. The newly-enacted Ohio statute requires the State Public Defender to supervise the maintenance, by public defenders and appointed counsel systems, of standards established by the Ohio Public Defender Commission. The Commission is authorized to develop standards pertaining to some of the following areas: the determination of indigency; contracting by the public defender with law schools, legal aid societies and non-profit organizations; the qualifications and size of the supporting staff of a public defender office; the determination of minimum caseload; and procedures for assessment and collection of fees. Each county board of commissioners retains the power to establish and administer a defense system of its own choosing. However, if the system fails to comply with the standards promulgated by the state commission, the county is given ninety days to remedy the deficiency. After such period, the county loses its right to reimbursement from the state for 50% of the total cost of providing defense services.[35]

The Kentucky statute employs a similar technique to encourage locally-based defense systems to provide effective defense services. Counties containing ten or more circuit judges are required to establish and maintain a district public defender office. The fiscal court in all other counties has the power to choose among various defense alternatives, including a public defender office, a non-profit organization or a coordinated assigned counsel system to supply the necessary services. The State Public Defender approves, denies or suggests modifications to all defense plans which are submitted by the counties. If the plan is approved on the state level, counties may be entitled to a specified amount of state funds based on the number of circuit judges per judicial district. However, if the county plan is denied for failure to comply with state standards, or if the county neglects to choose any of the alternative defense plans, the state can implement either a district public defender office or an assigned counsel plan in the defaulting county. Consequently, under the Kentucky statute, counties which fail to develop effective defense systems can lose the right to acquire state funds as well as the power to determine the type of defense system which is implemented in their area.[36]

A state defender office can perform other defense functions to further the services provided by the autonomous local programs. As in Ohio, the state office can itself provide representation, or may assist the local offices in certain cases, upon the request of the local system. Moreover, the Kentucky State Defender can supply local counsel with technical assistance, conduct research into methods of improving the operation of defense systems, and develop defense regulations and standards. In addition to creating a state defender office, the state can delegate the power to appoint local defenders to a state agency. In Missouri, the Public Defender Commission selects the circuit public defender for various

[33] National Legal Aid and Defender Association, S. Singer, B. Lynch, and K. Smith, *Report Of The Indigent Defense Systems Analysis Project* (Unpublished, 1976).

[34] Fla. Stat. Ann. §§ 27.50, 27.51 (West. 1974), *as amended,* (Supp. 1977); Fla. Const., Art. 5, § 18 (Supp. 1977).

[35] Ohio Rev. Code § 120.01 *et. seq.* (Supp. 1975).

[36] Ky. Rev. Stat. §§ 31.030, 31.050, 31.060, 31.160 (Supp. 1974).

circuits.[37] This process enables the state to ensure that each local system, while locally administered, is managed by a defender whose credentials satisfy state standards of competency.

Some states have established a centrally-administered state system for appeals and post-conviction proceedings which coexists with locally-based systems handling all other proceedings. California's statute, which is the most recent enactment of this kind, authorizes the State Public Defender to represent eligible defendants in appeals, petitions for hearing or rehearing to any appellate court, petitions for certiorari to the United States Supreme Court, and proceedings of any nature after the defendant has received the death sentence. In Indiana, the state defender provides representation to "any person in any penal institution of this state . . . in any matter in which such person may assert he is unlawfully or illegally imprisoned after his time for appeal shall have expired." The Wisconsin state appellate defender is also required to offer post-conviction relief to persons confined to the central state hospital or other institutions for the purpose of civil commitment. Minnesota's statute also authorizes the state defender to supervise the training of all district public defenders throughout the state. Other states such as Illinois, Oregon and Michigan have provided by statute or court rule for centralized state appellate or post-conviction services, although defenders are locally organized at the trial level.[38]

However, states having county option plans and autonomous local programs suffer from many of the same deficiencies in defense services as do wholly local programs. In particular, the quality of services may be uneven, and organized programs may be altogether lacking in some areas. For example, in Missouri, as a result of statutory enactments, jurisdictions under 75,000 persons are served by *ad hoc* assigned counsel appointments. In Kentucky, through the exercise of local option, the majority of counties are currently served by assigned counsel.

Other problems associated with local option plans were revealed in an evaluation of the Kentucky system. The commitment of state funds to support defense services has been inadequate since, contrary to expectations, very few of the local circuits have actually matched state contributions and instead have relied upon the state to fund the entire local defense program. The unwillingness, or in some cases, the inability, of local communities to provide necessary resources combined with the increased caseload demands resulting from the *Argersinger* decision, created a financial crisis in the state defender office. In addition, the state defender experienced serious practical difficulties in evaluating local defense proposals and planning for the provision of defense services throughout the state. There simply was no data on criminal court caseload or the number of court appointments nor any records available in many jurisdictions from which data could be readily compiled.[39]

Autonomous programs may also be more costly in the event that services such as record-keeping, preparation of budgets, development of office procedures, digesting of current cases, etc. are replicated in the various offices. While the new Ohio legislation has attempted to give a state defender responsibility for the development of standards, it is difficult to envisage the enforcement of standards in a basically unintegrated system where the state defender has no line authority over the offices in the system. While the state office has the right to cut off a county's partial state reimbursement, this expedient is likely to be employed sparingly, if at all. On the other hand, Ohio's move toward attempting to establish and enforce state standards demonstrates an awareness of the need for some type of statewide coordination even where localities have autonomous systems.

4. *Centrally-administered state system.* An increasing number of states have implemented a system whereby a central state defender office is responsible for the provision of services on the trial as well as the appellate level throughout the state. Connecticut is the most recent state to adopt such a system. Other states include Alaska, Colorado, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New

[37] Mo. Stat. Ann. § 600.015 (Supp. 1977).

[38] Cal. Gov. Code § 15421 (Supp. 1977); Ind. Stat. Ann. § 33-1-7-2 Stat. Ann. § 611.25 (Supp. 1977); Ill. Rev. Stat. tit. 38, § 208 (1973); Oreg. Rev. Stat. § 151.250 (1973); Mich. Sup. Ct. Adm. Order No. 1971, 383 Mich. Rept. xxxvi (1970).

[39] National Legal Aid and Defender Association, R. Rogers and S. Singer, *Study And Recommendations For Kentucky Statewide Public Defender System* 11-13 (1973) (American University Criminal Courts Technical Assistance Project).

Mexico, Rhode Island and Vermont.[40] A centrally-administered state system has also received approval over locally-controlled systems by the National Study Commission on Defense Services and the National Conference of Commissioners on Uniform State Laws.

Although no two state systems are likely to be structured in exactly the same fashion, there is a basic organizational model presently followed in states of varying defense needs. An organizational chart of a model system is shown in Diagram B.

All state systems are operated under the auspices of a state defender's office. The Connecticut statute, for example, provides that the Chief Public Defender has authority to "administer, coordinate and control the operations of defender services and be responsible for the overall supervision and direction of all personnel, offices, divisions and facilities. . . ." In a number of states, the state defender is given authority to create local or regional defender offices in such number and location as dictated by the requirements of the state. For example, the New Jersey system services a relatively small land area with a substantial population of over seven million. The New Jersey State Public Defender established defender offices in seven of the state's twenty-one counties, grouping the remaining fourteen counties into regions containing two or three counties. Each region has its own defender office and several regions have branch offices in the separate counties. The Alaska state defender system, on the other hand, services a state with a land area covering four time zones and a population of only about 300,000 people, but has a structure very similar to that of New Jersey. The Alaska Public Defender Agency has eight offices which provide services on a regional basis, divided according to judicial districts, some of which have more than one office. Because of the state's geographic exigencies, defenders must travel by plane and boat in order to maintain a full-time defender staff providing services to all areas of the state. Furthermore, in a centrally-administered system, all local and regional offices are administered by deputy defenders who are appointed and supervised by the state defender office. In addition to the local and regional offices, a separate appellate division with local branches handles appeals for all defender offices located in the state. Finally, a core staff under the direct supervision of the state defender assists the defender in the overall administration of the state system.

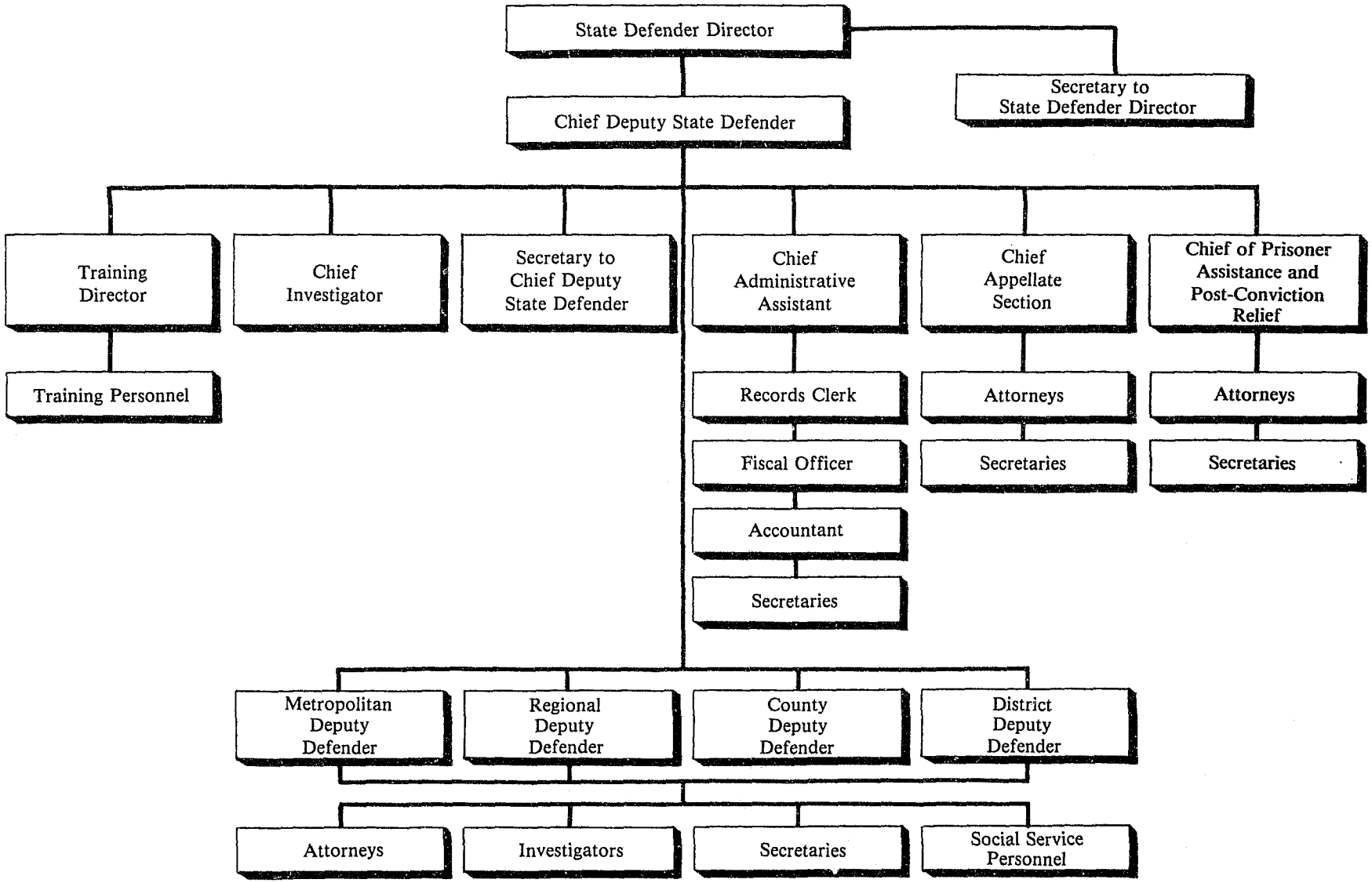
a. *Provisions of uniformly effective and efficient defense services.* A centralized state system can coordinate defense services throughout the state to eliminate disparities related both to the scope and range of representation and the quality of services provided on the local level. With the enactment of proper state legislation, the state defender can allocate attorneys to each local defender office in order to ensure that all eligible defendants receive effective representation. Studies conducted in Georgia seem to indicate that the primary rationale for that state's current movement towards a centrally-administered system is the lack of alternative modes of ensuring that counsel is available in rural areas of the state where appointed counsel are in short supply and waivers of counsel are frequent. Indeed, the State Public Defender of Colorado has found that centralized administration made it feasible to transplant defenders trained in the cities to sparsely populated areas where the state defender had been unable to interest private practitioners in becoming full-time deputy defenders. A centralized state system can also properly allocate support services to local offices on a uniform basis. Investigators, experts in ballistics and handwriting analysis, psychiatrists, and others can be dispatched to the locality in need of such services. Furthermore, a separate appellate division of the state system offers an experienced staff, free of ethical conflicts and well-versed in the appellate process which can provide effective services to all local offices.

To ensure that uniformly high quality services are provided throughout the system, the central office can implement training and evaluation programs. Defenders (and investigators) from all local offices can be provided with a series of lectures and workshops on criminal and forensic sciences, and inexperienced personnel can also benefit from orientation seminars. Moreover, a centralized body of legal research can provide invaluable sources of information, especially to local offices functioning on restricted

[40] Conn. Gen. Stat. Ann. § 51-289 *et. seq.* (Supp. 1977); Alaska Stat. § 18.85.010 *et. seq.* (1974) (see Appendix A for contact person); Colo. Rev. Stat. § 21-1-101 *et. seq.* (1973); Del. Code Ann. tit. 29, § 4601 *et. seq.* (1974); Haw. Rev. Stat. § 722-1 *et. seq.* (Supp. 1974); Md. Ann. Code art. 27A, § 1 *et seq.* (1976); Mass. Ann. Laws ch. 221, § 34D (1974); N.J. Stat. Ann. § 2A:158A-1 *et. seq.* (1971) *as amended,* (Supp. 1976), (see Appendix A for contact person); N.M. Stat. § 41-22A-1 *et. seq.* (Supp. 1975); R. I. Gen. Laws § 12-15-1 *et. seq.* (1969) *as amended,* (Supp. 1976); Vt. Stat. Ann. tit. 13, § 5201 *et. seq.* (1974), *as amended,* (Supp. 1976).

Diagram B.

STATE DEFENDER SYSTEM



budgets. The state office is able to prepare and disseminate current case summaries including slip opinions of the United States Supreme Court and state appellate courts, briefs and motions on many issues pertaining to criminal defense, and video tapes on mock trials and other proceedings. Furthermore, the state defender's administrative staff is able to monitor and evaluate the defense services provided by each local office and make appropriate alterations where necessary.

A centralized state system not only provides effective defense services on the local level, but also offers efficiency and economy of operation. The central office can maintain detailed fiscal records relating to expenditures of each defender office in the state. This enables an efficient budget, the allocation of funds for both the personnel and non-personnel needs of local offices, and the projection of future needs for the entire defense system. Moreover, the accumulation of legal research in one centralized location makes available to all the expertise of a few. This, together with the opportunity for the standardization of forms, motions and jury instructions eliminates unnecessary duplication of effort and results in the saving of countless numbers of attorney hours. These and other obvious factors, such as the cost savings derived from bulk purchasing, point up additional economic advantages which accrue to a state-administered system.

b. *Protection of professional independence.* A centrally-administered state system protects the professional independence of defenders operating on the local level by insulating them from judicial influence and political pressures. As the Governor's Commission on Criminal Justice Standards and Goals in Georgia noted, "[w]hen the defender . . . is controlled locally it is more difficult for him to handle unpopular cases and he is more subject to political pressure." [41] The state system can alleviate political pressure affecting the local defender's ability to properly represent his clients. In highly controversial cases, the Colorado State Defender has on occasion sent the Deputy State Defender from the central state office to handle a case in order to preserve the local defender's ability to continue functioning in the same jurisdiction.

[41] Governors Commission on Criminal Justice Standards and Goals (Georgia), *Courts Study Team Recommendation Memo No. CT 7-B, Concerning Issue No. 7: Statewide Indigent Defense* (September 27, 1974).

c. *Issue of local autonomy.* A crucial issue in the design of the centrally-administered state system is the degree of control to be exercised by the central office. The need for some local autonomy to meet the peculiarities of local jurisdictions was the basis for abstentions by both the National Advisory Commission and the American Bar Association on the question of the appropriate level of organization for defender services. A central office, physically distant and lacking awareness of the daily problems of the locale, may be incapable of "tailoring [the defender office] to the needs of the community." Moreover, defenders themselves have argued that a central state office would dictate policy to local defenders so as to interfere with their handling of cases, often to the detriment of the client. A centrally-administered state system should, therefore, provide for local autonomy in certain respects without detracting from the many benefits offered by centralization. Thus, the model proposed in the next section incorporates a measure of autonomy in the daily operations of the local offices within a centrally-administered state system.

d. *The question of congruence.* In determining whether to establish a state-level defender system, the question arises, can a defender system organized along state lines function effectively in the absence of a state level organization for other components of the criminal justice system? While a criminal justice system having all components organized along the same jurisdictional lines is optimal, it is not essential. As one criminal justice scholar has noted, prosecutors in Colorado continue to be organized along county lines, while defenders are organized in a centrally administered state system.[42]

The trend among court systems, like defender systems, is toward unification at the state level.[43] If, in a given state, county court structures and prosecutive districts are less than optimal, then changes should be encouraged. Defender systems should not be bound to follow the existing creaking machinery. In a jurisdiction where the courts have been working

[42] Skoler, *supra* note 1, p. 27.

[43] *See,* American Judicature Society, COURTS OF LIMITED JURISDICTION: A NATIONAL SURVEY (Final Draft, 1975); American Bar Association Commission On Standards of Judicial Administration, STANDARDS RELATING TO COURT ORGANIZATION (Tentative Draft, 1973).

without success to achieve unification, defender unification may help to accomplish that goal.

There are several reasons why court structures should be reactive to changes in defender system structures, rather than vice versa. Defenders have great difficulty in staffing far-flung justice of the peace courts. Moreover, where preliminary hearings, arraignments and trials are held in different buildings, defenders are unable to provide continuous representation for an individual client. Finally, criminal courts would not exist in the absence of the adversary system which seeks to provide an opportunity for the defendant to avail himself of the law's protection.

C. Option #1: Structure of the Centrally Administered State Defender System and Extent of Local Autonomy

A centrally-administered state defender system with proper allowances for local autonomy is the most effective structure for the organization of defender services. Defender services organized at the state level ensure the uniformity and effectiveness of legal representation to every jurisdiction, and guarantee the professional independence of individual defenders. This is, indeed, a significant step toward the realization of equal protection of all citizens within a state.

1. *Role of state defender director vis-a-vis local and regional offices.* As previously mentioned, in a state defender system, the planning and creation of local or regional defender offices is undertaken by a state defender office. The state defender director appoints deputy defenders to head local and regional offices and sets general policy and guidelines regarding the operation of such offices. The state defender also monitors and evaluates the services provided by all offices in the state system. Monitoring and evaluation would include frequent visits to and on-site evaluations of each local office conducted not less than once a year by the central office staff, and contracting with outside agencies periodically to conduct evaluations of the entire state system. On the other hand, the daily administration of the local and regional offices and the handling of individual cases would be the responsibility of local deputy defenders. A study conducted by the National Center for State Courts recognized that "[s]uch a system would bring some consistency into a state's defender system, and yet would still permit some variation at the county level." [44]

a. *State defender's appointment of deputy defenders.* The appointment of deputy defenders by the state defender director is preferable to appointment by a local board. As in the selection of the director, the independence of deputy defenders must be assured by the appointment process. Although local boards might be capable of providing the necessary safeguards, there is still the danger of political influence on the local level. An evaluation of a defender office in upstate New York revealed that "[p]olitical party affiliation is a primary consideration in the selection of the public defender . . . Attorneys are 'expected' to make political party contributions by purchasing dinner tickets for political functions." [45] A state defender, far removed from the influences of local politics, can offer more assurance of an independent selection of deputy defenders.

The recruitment of attorneys can be accomplished more productively by a state defender hiring for the entire state system than by local boards hiring for individual offices. Active recruitment, especially the recruitment of minority applicants, is more efficiently performed by a central office advertising in national and local publications and processing applications in a systematic manner. Advertising campaigns conducted by many local offices would be redundant, more time consuming and probably devoid of adequate national focus. The state defender can also organize recruitment and internship programs in the state's law schools to serve the needs of all local defender offices, many of which lack access to law schools.

Most state systems, like large defender offices, employ a sufficient number of attorneys so that the turnover rate can be anticipated and budget planning made possible to allow all yearly hiring to be performed simultaneously. This not only promotes efficiency in the hiring process, but enables entry-level training to be accomplished on a highly systematic basis. A recent study of the large Public Defender Service in the District of Columbia pointed out that

[44] National Center For State Courts, N. Elkind, M. Colton, and F. Bremson, IMPLEMENTATION OF ARGERSINGER V. HAMLIN: A PRESCRIPTIVE PROGRAM PACKAGE (1974).

[45] National Legal Aid and Defender Association, S. Portman, H. Paik, J. Gramenos, and L. Wenzell, *Evaluation Of Monroe County, New York Defender Office* 9 (1973).

". . . starting all new attorneys together . . . permits concentration of time and resources in a limited period, ensures uniform dissemination of skills, information and experience, creates entry level group reinforcement and communication and reduces responsibilities of supervision in practice." [46]

The state defender can ensure that all deputy defenders are hired according to policies uniformly applied throughout the state system. The central state office can devote study to the development of merit selection criteria that will facilitate the hiring of attorneys who are both professionally competent and likely to be effective as deputy defenders. The selection criteria can be evenly applied to all candidates, minimizing biases and ensuring fair and equal treatment in hiring practices. The state defender's appointment of deputy defenders is yet another advancement toward establishing uniformity throughout the state defender system.

b. *State defender's setting of general policy and guidelines.* The state defender must have certain authority over the local deputy defenders to enable the state system to reap the full benefits of centralized administration. Thus, it is his responsibility to develop general policies and guidelines designed to improve the quality of representation provided by the system and promote uniformity of operation in all local offices.

Directives from the state defender concerning case processing, in particular, are needed to maintain high quality services in all local offices. Such inquiries as the minimal amount of case preparation necessary before entering a guilty plea or proceeding to trial, the definition of maximum caseloads, the mechanics of providing early representation and the circumstances under which continuous or stage representation should be instituted are some of the more complex problems confronted by most defender offices. Local offices would benefit from state directives in this regard, especially in view of the considerable impact the resolution of such problems have on the quality of representation afforded. Directives are also necessary to inform the local offices of the standards by which they will be evaluated and alert the public to the services it should expect.

Other general policies and guidelines are necessary to promote the equal treatment of both clients and defender attorneys. All defender offices in the state system should employ the same eligibility standards in determining the availability of defender services to prospective clients. In this way, all defendants can have an equal opportunity to receive services, regardless of geographic location. In addition, uniform policies concerning defender salary, fees for panel attorneys, and the hiring and firing of personnel are especially relevant to the equal treatment of all defender attorneys.

c. *State defender's monitoring of local offices.* The state defender must assume the responsibility of ensuring that all local offices in the state system are providing effective defense services. A report by the Boston University Center for Criminal Justice has recommended that "[possibly] the greatest hope for increased systematic review of representation by public defenders lies in the process of internal standard setting, monitoring and evaluation by public defender offices themselves." [47] Frequent evaluations of local offices yield valuable information regarding the strengths and weaknesses of each office. Firsthand knowledge of local operations gathered through on-site visits often leads to constructive changes which increase both the effectiveness and efficiency of the defense agency. Furthermore, the state defender can determine whether the policy directives of the central office are both being carried out and meeting the needs of the local offices through frequent visits. The state defender's visitation to the various offices throughout the system helps to establish a solid line of communication between the central office and the local offices. This promotes more effective administration enables more appropriate responses to the needs of local offices, and brings cohesion and unity to the state system.

The state defender should also contract with outside agencies to periodically evaluate the state defender system. Experienced consultants can offer fresh approaches and insights which could prove beneficial to the state defender. Such consultants would presumably be knowledgeable not only in evaluation techniques but, perhaps more significantly, in the innovative defense programs being proposed and implemented in other jurisdictions throughout the nation. Furthermore, outside evaluations can assist the state legislature in determining whether or not the state defender's request for funds are realistic

[46] United States Department of Justice, Law Enforcement Assistance Administration, AN EXEMPLARY PROJECT: THE PUBLIC DEFENDER SERVICE OF THE DISTRICT OF COLUMBIA (1974).

[47] S. Krantz, C. Smith, D. Rossman, P. Froyd and J. Hoffman, RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN 227 (1976).

and necessary for the maintenance of high quality defense services.

A recently completed Evaluation Design prepared by the National Legal Aid and Defender Association provides a useful guide to both state defenders and outside agencies conducting evaluations. The Evaluation Design features "interview check lists" which outline the questions which should be asked of the defender director, attorney staff and section chiefs, the investigation and clerical staff, clients, judges, district attorneys and correction personnel, and community organizations, the bar association and private attorneys to assess the effectiveness of the defender operation. There is also a "facilities checklist" to determine whether the defender office is sufficiently equipped and efficiently organized and whether the courts and jails permit proper consultations between attorneys and their clients. Moreover, the Design contains a reproduction of national standards which are keyed into the subjects to be discussed during interviews. Other documents and materials pertaining to the defender system under evaluation are also available in the Design which, when utilized by an experienced evaluation team which includes skilled personnel, provides an excellent framework for outside evaluations.[48]

In addition to extensive interviewing, an evaluation should consist of the personal observation of defenders in the courtroom. After viewing a variety of court proceedings involving different defense attorneys, an experienced evaluator can develop a sense of the quality of representation generally afforded by the local office. Courtroom appearances can be particularly useful in determining the extent to which defenders prepare their cases, pursue their clients' interests with zeal and dedication, and maintain a proper degree of independence from the court. Personal observation should also be supplemented by a review of selected case files and an examination of local office statistics and policies.

d. *Local autonomy over daily administration and handling of cases.* Local autonomy is preserved in the authority delegated to deputy defenders over the daily administration of the local office and the handling of individual cases. Local autonomy in daily administration is needed to adjust the operation of local offices to the peculiarities of the communities served. The creation of the Roxbury Defenders office pursuant to an LEAA grant to the Massachusetts Defenders Committee is noteworthy. Roxbury Defenders is a neighborhood office which tailors its legal and social services to meet the needs of a community with substantial ethnic and racial concentrations and related poverty and crime problems. The office is geared to provide services for an unusually high felony caseload. Ninety per cent of the 1000 defendants annually represented by the office are charged with felonies. Moreover, because of the poverty and ethnic composition of the area, the office must take innovative steps towards developing a rapport between the defender staff and the client community. Only through local administration can such a neighborhood office adequately respond to the needs of the community it serves. Although the Roxbury office may be an extreme example, most deputy defenders require the authority to adjust daily operations to satisfy the unique demands of their local communities.

Local autonomy in the handling of individual cases protects the attorney-client relationship. At times, the state defender may seek to influence the way in which certain cases are handled on the local level in order to protect the interests of the state system as a whole. For example, a state defender might attempt to alter the tactics of staff attorneys considered to be too aggresive or too inclined to use a federal forum in vindicating the rights of a client for fear that such tactics would agitate local judges and result in stiffer sentences and more negative rulings in general for defender clients throughout the state system. This would interfere with the operations of a local office in its handling of individual cases and should not be permitted. Sacrificing the interests of even one client for the benefit of the many would be ethically and legally unsound. The sanctity of the attorney-client relationship must be preserved to maintain the integrity and effectiveness of the state defender system.

2. *Pre-existing local defender and assigned counsel programs.* There may be local defender and coordinated assigned counsel programs currently in existence which are providing high quality defense services. These programs should not be eliminated upon the implementation of a centrally-administered state system. Instead, the state defender should be permitted to contract with such local entities to provide defense services in their area. However, the state defender must also be responsible for ensuring that pre-existing programs comply with national

[48] National Legal Aid and Defender Association, R. Rovner-Pieczenik, A. Rapoport and M. Lane, EVALUATION DESIGN FOR THE OFFICES OF THE PUBLIC DEFENDER (1976).

standards[49] in order to prevent any deterioration of the quality of services rendered at the local level.

In the event that the on-going defense program is determined to be in full compliance with national standards, it should be eligible to receive state funding and any necessary back-up services provided by the office of the state defender. If the program fails to comply with national standards, such program should be allotted a breathing period in which to comply. If, upon re-evaluation after such time, the program continues to fall below national standards, the office of the state defender should itself replace the pre-existing program.

a. *Maintenance of pre-existing programs dependent upon compliance with national standards.* A goal of any defense system is to provide high quality services to all eligible defendants. As long as pre-existing local programs continue to fulfill this goal, they should be permitted to co-exist with a statewide defender system. The state defender must continuously monitor the performance rendered by such programs to ensure that national standards are maintained. Conformity with national standards will not only promote the existence of high quality defense services throughout the state, but will also help to insulate the local programs from political pressures. The various branches of local government will realize that interference with the contracting programs will simply result in the imposition of a branch of the office of the state defender in their area.

Although pre-existing qualified defender and assigned counsel programs should be allowed to coexist with a centrally-administered state system, the state defender should be prohibited from contracting with any newly-created local defense programs unless they perform a function which cannot be adequately performed by the state defender system. Otherwise, all jurisdictions could conceivably establish local programs to contract with the state office. This would seriously hamper the effectiveness of the state system. The presence of autonomous local programs scattered throughout the state would fragmentize the operations of a centralized administration. The state defender's attempts to develop uniformity throughout the state system and ensure the professional independence of local offices would be weakened. Moreover, the central office would be rendered incapable of allocating personnel to meet either the immediate or changing needs of local jurisdictions. Coexistence between local autonomous defense programs and a centrally-administered state system leads to ineffective defense services and should be strongly discouraged except in the case of pre-existing programs.

b. *Effects of continued non-compliance with national standards.* A pre-existing defense program's initial compliance with national standards entitles it to remain in existence despite the institution of the state defender system. The program's continued compliance with national standards should also entitle it to receive state funding and necessary backup services. The Georgia Governor's Commission on Criminal Justice Standards and Goals recommended that "[c]onsideration should be given for circuits to continue . . . defender systems meeting state criteria for quality defense services and supported by state grants." The amount of state funding should be comparable to that which is allocated to an office of the state defender of similar staff size and caseload figures. Local programs should also have similar access to backup services as is available to offices in the state system. It is essential that the clients served by such local programs have an equal opportunity to receive high quality defense services as defendants represented by state defender attorneys.

Non-compliance, on the other hand, should not only terminate a local program's eligibility for state funding and backup services, but should also place it in jeopardy of dissolution. A contracted program's failure to provide services which are consistent with national standards eliminates its justification for continued existence. However, dissolution should not occur without first allowing a deviant program a breathing period during which necessary revisions can be instituted. The program should be notified of the existence and nature of its non-compliance by the state defender and be given 120 days in which to conform to national standards. A breathing period of such duration helps to ensure that a contracting program does not remain below standards for long periods of time, yet allows the program sufficient time to amend its deficiencies. In the event noncompliance still persists after the termination of the breathing period, the program should be replaced by the state defender's office.

Such a scheme finds support in the statutes of two locally-based state funded systems—previously discussed. In Ohio, all local defense programs, both defender and assigned counsel, are required to comply with standards developed on the state level. Failure to comply after a designated breathing period

[49] "National standards" refers to the recommendations of national policy-making bodies, *supra*, Chapter I., Part D.

results in the loss of a substantial amount of state funds. The Kentucky statute enacts an additional reprisal for non-compliance. The State Public Defender's disapproval of a defense plan submitted by a local jurisdiction leads not only to the loss of state funds, but also to the institution of a defense program developed by the state in the defaulting jurisdiction.

3. *Relationship of trial and appellate functions in a state system.*

a. *Current modes of providing appellate services.* Nationally, the approach to providing appellate representation in response to the U.S. Supreme Court's mandate in *Douglas v. California*[50] has been even more haphazard than the provision of trial level services. Yet the problems in delivering quality appellate defense services may exceed those inherent in trial level work. Appellate work requires a scholarly review of errors committed during the trial stage by a lawyer whose experience and knowledge of criminal law and procedure make it possible to identify those errors. Moreover, the handling of an appellate matter may be complicated by the fact that the conviction may occur in one county, the client may be imprisoned in another county, the court of appeals to which the conviction will be appealed may be located in yet another county, and the local defender office or appointed lawyer may be in still another county. The appellate lawyer must not only coordinate with the trial lawyer, but must frequently conduct fact investigations in the county where the offense is said to have occurred, interview the defendant in prison, review the transcript obtained from the court below, and orally argue in the appeals court.

The means of delivering appellate defense services to the poor varies widely throughout the country. In areas served by local defender offices, appeals are handled in several ways. Some local defender offices handle few or no appeals, so that appeals are farmed out by judges to local assigned counsel. Quite often, the result of the lack of an organized system for providing appellate services is failure to properly notify the defendant of his right to appeal; thus, timely appeals may not be had in meritorious cases.

Other defender offices do handle appeals, either, as in some metropolitan areas, in a separate division, or by assigning the attorney who handled the case at the trial level to conduct the appeal. Where the trial attorney also handles the appeal, as is often the case in defender offices, a number of problems arise. First, the trial lawyer may lack the experience and skill which comes with frequent appellate practice to spot the issues. Secondly, the attorney may have difficulty in focusing in on problems which he or she did not recognize at the time of the trial. Third, the splitting of responsibilities between trials and appeals generally results in confusion and a diminution of the attorney's capacity to function effectively in either arena inasmuch as the timing dates and action dates of trials and appeals differ greatly as does the pace of the work. While an appeal may be in process over a several year period, trials frequently require immediate action and court appearances. While the appellate attorney's time must be spent in thoughtfully reviewing the issues, conducting research, and laboriously writing the appellate brief, the trial attorney's time must be spent primarily in the courthouse itself and in visiting clients who are not in the same facilities as are the appellate lawyer's clients. Perhaps of the greatest concern is the fact that the appellate lawyer must frequently urge the incompetency of the trial attorney. Thus, defender offices where the trial lawyers handle their own appeals are faced with a conflict of interest problem.

In still other defender offices, cases which originate in the office are handled by the office, but cases which, for one reason or other, were handled outside the office, e.g., because the defendant was ineligible for services at the time of the trial or because a portion of cases in the jurisdiction are automatically referred to assigned counsel, are handled by counsel appointed by the court.

Finally, a considerable number of states have separate defender facilities for appeals. In states which employ a centrally-administered state defender system for both trials and appeals, the appellate function is handled by an appellate division of the state system (e.g. New Jersey). Some states with locally-based trial-level defense systems have created a state-administered defender system for appeals and/or post-conviction matters (e.g. Illinois). A third method used to process appeals in a state without state-level organization is establishing appellate units in several existing defender offices which serve designated regions throughout the state (e.g. Florida).

Diagrams C, D, and E depict the New Jersey, Illinois and Florida appellate systems. These dia-

[50] *See* Chapter I, *supra,* for a discussion of "right to counsel" cases.

Diagram C.

APPELLATE STRUCTURE IN NEW JERSEY

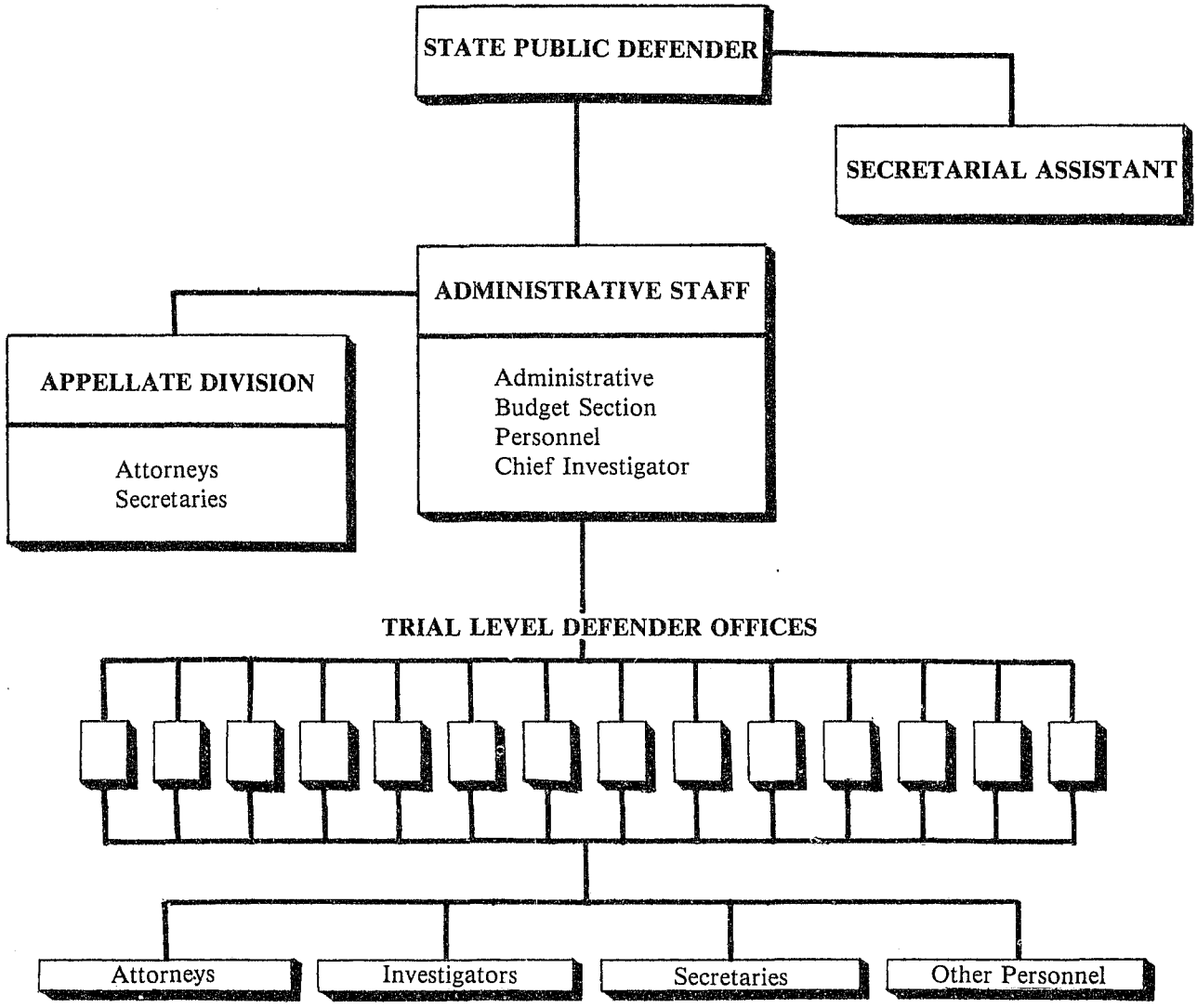


Diagram D.

ILLINOIS APPELLATE DEFENDER SYSTEM

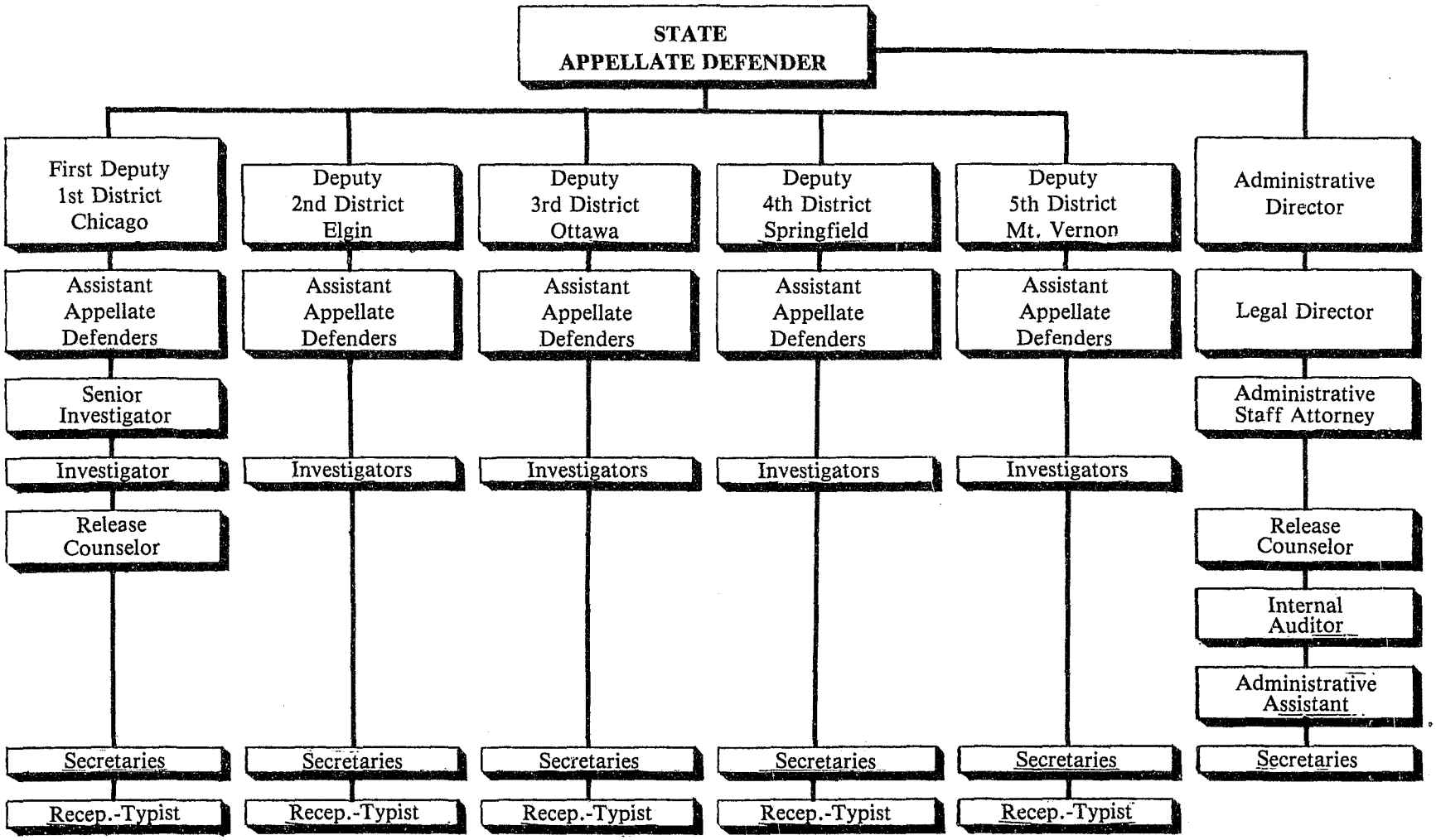
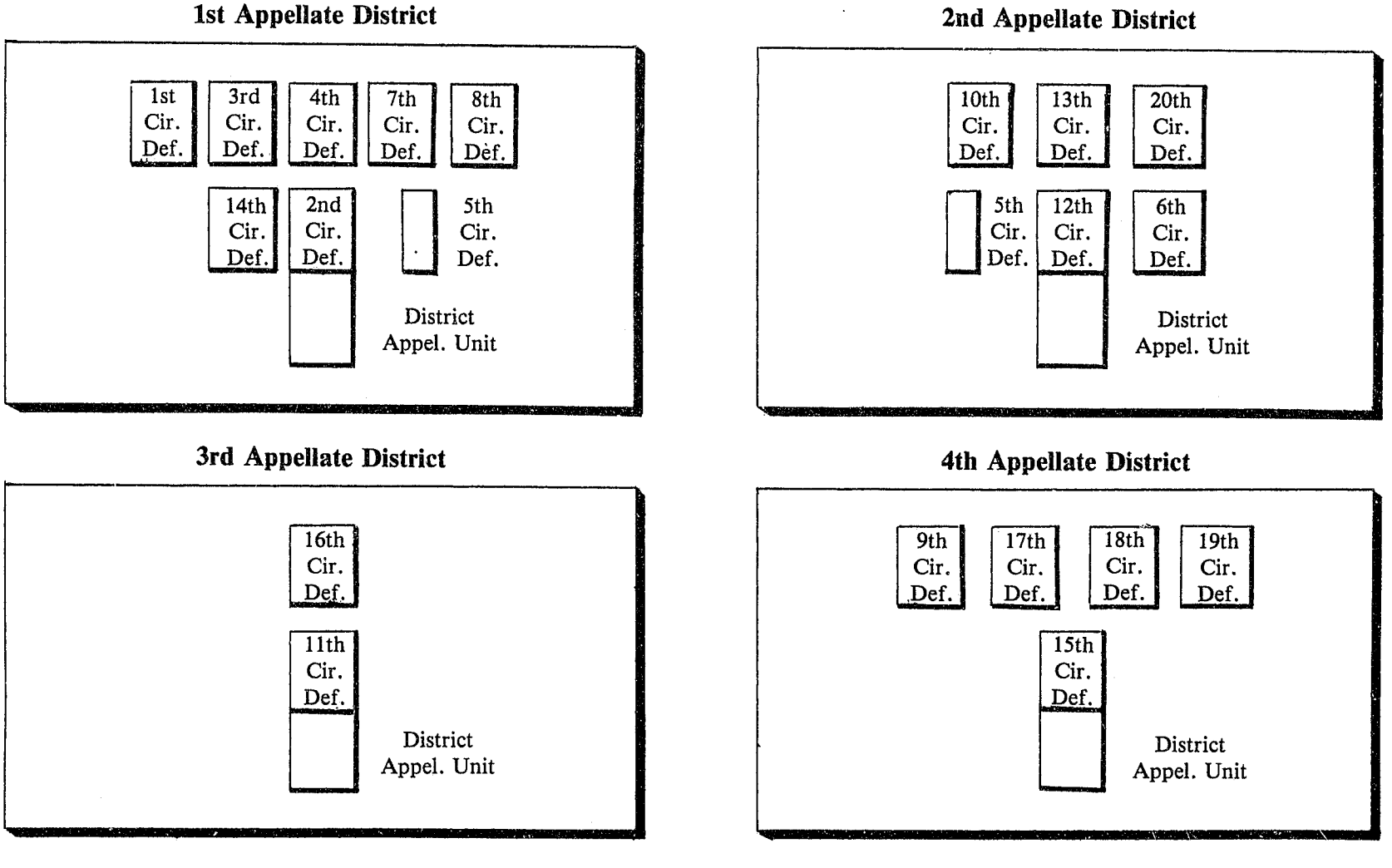


Diagram E.

APPELLATE STRUCTURE IN FLORIDA
(Felony Appeals)



grams are not intended as official reproductions of the various systems; rather, they serve to emphaszie the structural differences among organized appellate systems.

One observer has noted that the absence of an organized system for handling appeals has resulted in serious delays at all levels of the appellate process. In one state, court clerks were forced to spend an inordinate amount of time on criminal cases to ensure that all issues had been properly raised. Attorneys from the Attorney General's office had to research defense issues and point them out to appointed counsel in order to avoid subsequent reversals or writs of habeus corpus. Defense counsel themselves were responsible for further delays because of their unfamiliarity with appellate preparation and because many requests came from younger attorneys to be relieved from case assignments.[51]

In light of the difficulty of appellate work and the inability of localities to handle appeals without serious handicaps which lead to ineffective representation, appeals are best handled within a separate division of a centrally administered state defender system. Such a system would ensure the independence needed to avoid conflicts of interest, would allow for different counsel on appeal in most cases, and would enable the appellate attorney to coordinate with the trial attorney so that the trial lawyer's knowledge of what has transpired is not lost.

b. *Appellate division in a state system.*

(1) *Importance of separation and independence.* The appellate division in a state defender system is a separate unit which handles only appeals. In a mixed system, a portion of the appellate cases would be handled by the assigned counsel component. The appellate divisions in states having a state system for both trials and appeals are usually organized in the following manner. The division is headed by an appellate director who is responsible to the state defender. The appellate division would be composed of as many district offices headed by deputy defenders as is necessary to adequately cover all of the appellate courts in the state.

It is essential that the appellate division of a state defender system be independent from other components of the criminal justice system, as well as from the trial division of the defender agency. Appeals by their very nature emphasize the errors committed by various participants in the legal system. Actions of the judge, the prosecutor and the defense counsel in the court below, the police during their detention of the defendant, and even legislators who drafted the statute or ordinance in question are all subject to criticism by the appellate lawyer. The more the appellate division effectively pursues and vigorously argues its appeals, the more resistance it receives from the officials under attack. Moreover, the appellate division is customarily subject to public disapproval for its efforts to "put convicted criminals back on the street." In order to withstand outside pressures and preserve its effectiveness, the appellate division must retain its independence.

The appellate division must also remain independent from the trial units of the state defender system to avoid potential ethical problems. Where the appellate and trial divisions are integrated, the appellate attorney would be confronted with a conflict of interest in cases involving the claim that trial counsel provided incompetent representation. The Illinois Supreme Court explained:

> This circumstance clearly confronts the public defender's office with a conflict of interest, since, on the one hand, its natural inclination would be to protect its reputation by defending against the charges of incompetency, while, on the other hand, its duty as an advocate is to aid the petitioner in establishing the veracity of these charges.[52]

Moreover, in an integrated system, the personal associations which develop between trial and appellate defenders can obscure the appellate attorney's professional judgment and loyalty to his client in cases where the performance of trial counsel is under scrutiny. The appellate attorney's performance may also be subverted by the fear of ostracism or retaliation from fellow defenders. Indeed, handling appeals under such circumstances could subject the appellate defender to discipline for violation of the Amercan Bar Association's Code of Professional Responsibility. The Code indicates that all attorneys should avoid projecting the appearance of impropriety and further states that "a lawyer shall not accept employment if the exercise of his professional

[51] Portman, *A State Public Defender's Office: Boon or Boondoggle?*, 47 CALIF. S. B. J. 92 (1972).

[52] *People v. Smith*, 230 N.E.2d 169, 170 (Ill. 1967). *See* Webster, *The Public Defender, The Sixth Amendment and the Code of Professional Responsibility*, 12 AM. CRM. L. REV. 739 (1975); *Angarano v. United States*, 312 A.2d 295 (D.C. App. 1973), *pet. for reconsid. denied*, 329 A.2d 453 (1974).

judgment in behalf of his client will be or *reasonably may be affected by his own personal interests.*"

A defender system which has separate appellate and trial divisions is certainly more likely to avoid conflict of interest problems. This may become increasingly significant as the amount of ineffective assistance claims rises on a national level. A study recently completed by the American Bar Foundation found that a substantial portion of the allegations raised on a collateral attack in the states tested involved the incompetency of counsel. The study reached this conclusion upon the examination of the official records of prisoners who filed collateral attacks in the state courts of Illinois, California, Texas and Colorado over a five-year period. However, the report made no determination whether the incompetency of counsel claims were primarily directed against the performances of defender attorneys as opposed to private appointed or retained counsel.[53] Nevertheless, the study may be a reflection of the increased failure of trial attorneys in general to satisfy higher standards of performance now required by a growing number of courts. The position adopted by many of the Circuit Courts of Appeal, rejecting the traditional minimal standard of ineffective assistance and requiring, instead, the performance expected of a competent criminal defense attorney,[54] may encourage a marked increase of incompetency of counsel claims in the near future.

In addition to preserving the independence of appellate attorneys, the creation of a separate appellate division furthers the development of an effective defense operation. The appellate division is comprised of attorneys who are skilled in handling criminal appeals and other post-conviction cases. Because of a sufficient caseload, the attorneys develop an expertise in criminal law and procedure which results in competent performances and allows the judicial system to function expeditiously.

A separate appellate division also processes cases in an efficient manner at a savings to the taxpayer. An appellate unit can effectively utilize the services of paralegals and law students to relieve attorneys from engaging in the routine aspects of each case. This enables attorneys to handle more total cases without compromising the quality of services rendered. Furthermore, the availability of an appellate brief bank and other in-house resources eliminates an unnecessary duplication of effort and facilitates the completion of research in a minimal amount of time.

Not only must appellate and trial functions be separated out within the defender system, but, in most cases, trial and appellate counsel should be different individuals for reasons elucidated above. In rare instances, however, the trial attorney's involvement with a particular case might justify his handling the appeal. Under such circumstances the trial attorney should be permitted to do so, provided there is an independent review of the record by the appellate division. Though such a procedure may not present the most efficient use of time, it is necessary, nevertheless, to ensure the effectiveness of the appeal.

(2) *Coordination between trial and appellate counsel.* The appellate attorney should, as a rule, review each case with the attorney(s) who handled it in the courts below. Although an appeal is traditionally based only upon the proceedings as described in the trial transcript, the trial attorney can provide supplemental information. Familiarity with the facts of the case enables the trial attorney to assist in clarifying unusually complex factual patterns. The trial attorney may also be aware of certain procedural errors in the proceedings below which he attempted to preserve for appeal. Moreover, especially in guilty plea cases, the appellate attorney should inquire about the trial attorney's preparation and handling of the case and his encounters with other participants in the legal process during the course of the proceedings. Information provided by trial counsel should be used according to the discretion of the appellate attorney who must remain in full control of each appeal.

The appellate and trial division may also coordinate efforts in another situation. The trial division should have the capacity to process interlocutory and emergency appeals. Interlocutory appeals are an integral part of the trial process and are sufficiently uncomplicated to be handled effectively by most trial attorneys. Emergency appeals, because of their nature, should be processed by the trial attorney who is in a position to provide the most immediate relief. In cases where the handling of such appeals is beyond the capacity of the trial office, the appellate division should stand ready to furnish necessary assistance.

The trial attorney may also find the appellate division useful in the preparation of cases in the

[53] American Bar Foundation, *Collateral Attack Of Convictions* (1976).

[54] *See,* Lichtman, *The Constitutional Requirements of Appointed Counsel in the Guilty Plea Process,* PUBLIC DEFENDER SOURCEBOOK 56-69 (PLI-NLADA ed. 1976).

pre-trial and trial stages. An appellate attorney might assist in the drafting of pre-trial motions, especially those involving difficult constitutional issues. The appellate attorney is well versed in this area of the law and can at the least establish a complete record for appeal if the case is not dismissed in the suppression hearing. Furthermore, an appellate attorney's advice may also be instructive in identifying issues which should be raised during the course of a trial or plea negotiations.

Proper coordination between the trial and appellate divisions can lead to more effective defense services for defendants. Each division should assume full responsibility for its own caseload but should seek assistance where necessary for the proper handling of cases.

D. Option #2: The Multi-County System

Although a centrally-administered state system is the most effective model for providing defense services, not all states are currently in a position to adopt such a system. Thus, the multi-county model is proposed as an alternative method of providing defense services, particularly in rural areas where part-time defender systems or *ad hoc* assigned counsel approaches would otherwise be employed.

1. *Regionalization to ensure full-time, organized defender services.* In states which have not yet established the Office of State Defender, local, political subdivisions having a sufficient number of cases to occupy two or more attorneys on a full-time basis should be required to establish an organized defender system. If a local political subdivision lacks a sufficient number of cases to occupy the full-time services of at least two attorneys, it should be required to combine with other political subdivisions to establish a regional defender system. Where regionalization is not possible, the local political subdivision should staff the defender office with a minimum of two full-time attorneys by merging the criminal and civil legal aid functions into one office.

a. *Minimum of two full-time attorneys.* Experiences in Vermont, Alaska and Hawaii demonstrate the need for at least two full-time attorneys in every defender office.[55] Sole defenders, even if full-time, are unable to perform certain necessary defense functions. Punctual court attendance is difficult where one defender must handle the full caseload. Cases can be scheduled in courts located in different geographical areas or in different parts of the same court structure at conflicting times. Even with adjusted scheduling, unanticipated occurrences both in and out of the courtroom often preclude proper court appearances. A sole defender needs the services of an associate who can at least cover in cases where the demands of case scheduling surpass the capabilities of a single individual.

Early representation programs cannot be operated effectively by one defender. Clients requiring immediate representation at police interrogations and lineups often cannot be serviced until the defender is available. The defender is often preoccupied with court appearances during the day and physically incapable of providing a standby service for clients arrested after office hours. Furthermore, conducting daily jail checks on a continuous basis is too taxing for one attorney and perhaps not the most productive use of the defender's valuable time.

Proper case preparation is difficult for one defender to accomplish without assistance. Completing the necessary legal research and factual investigations for each case is extraordinarily time consuming. Full preparation is usually sacrificed to provide time for the defender to perform other necessary defense functions. Furthermore, a defender needs another attorney to exchange ideas, particularly on case strategies and procedural technicalities. Joint case conferencing between attorneys inevitably leads to more effective representation of clients and is an important learning process for the attorney. Another defender is also needed to provide moral support during the representation of unpopular clients in rural areas.

A single defender who is performing necessary defense functions outside of the office is often inaccessible to clients. The defender remains unavailable for long periods of time, especially when traveling to different areas of the region. Other out-of-office work such as making court appearances, providing early representation to clients at the police station, and visiting clients in custody routinely contribute to the defender's unavailability. Clients not in custody seeking to confer with counsel about their pending cases must await the defender's return to the office. In this respect, a single defender resembles a part-time defender who is often attending to non-defender business outside the defender office. In addition, the

[55] The need for full-time defenders has been explored previously. The concern here is with the requirement of two attorneys for each defender office.

defender may also be inaccessible because of illness. In a one-attorney office, illness can cause serious backlogs not only for the defender's clients but also for the courts.

The single defender office has no continuity in experience or training. When the defender resigns, there is a severe disruption of defense services in the region. The attorney taking office is often overwhelmed by a heavy case backlog and various administrative responsibilities. The transition period is even more troublesome where the former defender's resignation was unexpected. The new defender must assume office without adequate training and often is opposed by at least a two-attorney office representing the State. Sometimes, the task is so demanding that the new defender also resigns soon after assuming the position. Furthermore, the attorney in a one-defender office cannot receive the necessary training from continuing education programs offered outside the region without disrupting office operations.

A model project recently conducted in the Northeast Kingdom of Vermont is a practical demonstration of the need for a minimum of two defenders in every defender office. The Northeast Kingdom, a three-county region with a combined total population of about fifty thousand, was served by a single-defender office. The National Legal Aid and Defender Association, pursuant to a federal grant and with the cooperation of state officials, instituted certain revisions in the office consistent with the National Advisory Commission standards and evaluated their effects over a one-year period. An evaluation team made several visits and collected and analyzed data prior to the onset of revisions, during the earliest stages of the project and at the expiration of the grant. Objective data consisted of statistics generated by the defender office and the Court Administrator of Vermont, a review of defender case files using predetermined criteria, and detailed time records of the activities of office personnel. Subjective data was gathered from interviews with participants of the criminal justice system and other parties external to the system. In a report recently released by the evaluators, it was concluded that the addition of a second attorney (the deputy defender) in the office significantly improved the quality of defense services provided in the region.

Upon joining the staff, the deputy defender, whose prior criminal trial experience was limited, received on-the-job training from the original defender. Training consisted of in-court observations and the eventual taking of new assignments under the supervision of the defender. After training, a team approach to case processing was implemented. The deputy was delegated the responsibility of handling case intake at arraignment, and after consultation with the defender, retained those cases of a less serious nature. Subsequently, the defender and deputy began rotating arraignment schedules, thereby dividing the intake of cases from all three counties, and each attorney provided continuous representation from arraignment through final disposition. The defender was also requested to identify older cases with less serious charges to provide the deputy with the opportunity to conduct hearings and trials under defender supervision. It was anticipated that the time lag in the processing of cases through the courts would enable the deputy to gain the necessary competence and experience to handle felony trials when the need arose.

The evaluation team reached the following conclusions concerning the addition of the second defender in the model office:

> The addition of the deputy, despite his limited experience and training, had a positive impact both within the Defender office and on the criminal justice system. The division of case intake relieved the Defender of the pressures of constantly being in court. Substantial out-of-court time enabled him to undertake substantive case preparation. Although the Deputy lacked experience, the opportunities for the Defender to conference cases and discuss strategies had a positive effect both on the training of the Deputy and for the preparation of the Defender.
> . . . The Court maintained that absent the Deputy, the overwhelming demands of the pending caseload had raised a legitimate question regarding competency of defense counsel. . . .
> . . . States Attorneys see increased Defender competence, more selective and judicious use of court procedures, motion practice, and greater skill in plea negotiations. The phrase used to describe the change in the defender office is 'attorney control of cases'. . . .
> . . . Attorney-client relationships . . . have improved with increased Defender capability. More intensive attorney-client interviews and earlier preparation foster better relationships. . . .[56]

[56] National Legal Aid and Defender Association, H. Jacobson, and J. Marshall, *Evaluation Of The Model Defender Office Project* (1976).

b. *Boundaries of regional grouping.* The most important consideration in determining the boundaries of a regional grouping is the total geographical area of the participating subdivisions to be served by the regional defender office. The area must be of limited size to allow the defender office to adequately serve its eligible clients. Even with a two-attorney office, such defense functions as making punctual court appearances, providing early representation, and being accessible to clients cannot be performed effectively if the defenders must travel considerable distances. Furthermore, extensive travel may not prove cost-effective. Attorneys may accumulate an excessive amount of "dead time" which will not justify a substantial budgetary allotment for travel expenditures.

In assessing the size of a geographical area, certain factors should be considered. The distances from the defender office to the courts, jailhouses, and police stations existing throughout the region are particularly noteworthy. Furthermore, the condition of the roads or other means of transportation which affect the travel time needed to cover the distances should be examined. In addition, the political subdivisions which join to form the region should be adjacent to one another, if possible. This, of course, decreases both the total distance and travel required to reach all eligible defendants in the region.

Another significant consideration in establishing regional boundaries is the location of judicial districts within the region. Since the organization of the courts affects the defender operations, the defender office would not be able to serve parts of several judicial districts without causing confusion. Thus, the regional office should be wedded to the boundaries of one or a combination of judicial districts, assuming there is a sufficient eligible caseload to require the services of a minimum of two defenders. However, it may also be possible to alter judicial district boundaries or to make special calendaring arrangements in order for a defender office to function in an otherwise suitable geographical area.

c. *Feasibility of regionalization.* In some circumstances, regionalization may not be feasible as a result of geographical conditions. Especially in very sparsely populated areas, the amount of eligible caseload may be so minimal that a grouping which can provide a sufficient caseload for two full-time defenders must necessarily cover a wide geographical area. The attorneys would be required to travel such great distances that they would be incapable of providing effective defense services within reasonable budgetary limits.

In areas where geographical factors prohibit regionalization, the civil and criminal legal aid functions should be combined to support two full-time attorneys. Ordinarily, combining civil and criminal functions in one office should be strictly avoided. Such offices tend to emphasize the particular function towards which the chief counsel is oriented. If the chief counsel is a civil practitioner, criminal defendants may be deprived of adequate representation. In any event, because of the increasing need for specialization in criminal defense work, a combined office is generally unequal to the task. However, ensuring that each defender office is served by a minimum of two full-time attorneys is so vital that a combined office is still preferable to part-time defenders and even a one-person office. Therefore, in the limited instance where geographical conditions prevent regionalization, a merger of the civil and criminal legal functions should be instituted.

2. *State regulations to require maintenance of standards.* Even with the lack of a statewide defender system, it is essential that statewide regulations be promulgated to govern the organization of regional and local defender programs. Statewide regulations should be established in conformity with national standards concerning the staffing and budgetary requirements of such programs. This is necessary to ensure the provision of uniformly high quality defender services and to protect the independence of the regional or local office from political and judicial influence.

The staffing requirements of a regional defender office are determined by an assessment of several factors. The calculation begins with the premise that all regional offices have a minimum of two full-time defenders, for reasons explained previously. To arrive at the total number of attorneys required by an office, two further considerations are relevant. The amount of the projected caseload for the entire region divided by the annual number of felony and misdemeanor cases which should be handled by each attorney, according to national caseload standards, yields a general indication of the total number of attorneys required by the region. The projected caseload figures would be based primarily on an examination of the caseload totals of each participating county over recent years. However, allowances should also be made for other factors which may significantly alter the anticipated amounts. In particular, it should be recognized that the caseload

figures of the participating counties are a product of the defense program utilized prior to regionalization. If the program failed to provide any services to certain eligible defendants in the county or provided generally ineffective services to most clients, its caseload figures would be of minimal value in projecting the needs of the new regional system. Moreover, the total number of defender attorneys also depends upon the extent of the anticipated private bar participation in the region served. Thus, the percentage of eligible caseload to be allocated to the assigned counsel component of a newly created mixed system should also be included in the projection of defender caseload totals.

The second consideration relevant to the total number of attorneys required by a regional office is the travel time needed for making appearances and visiting jail facilities. In order to provide services to all eligible defendants over a wide geographical area, regional defenders accumulate substantial travel time. Consequential, the national caseload standards for attorneys should be adjusted downward when applied to regional defenders. The data presented in NLADA's Indigent Defense Systems Analysis Report supports this conclusion. It reveals that the average felony caseload for full-time defenders serving a population of under 50,000 is less than 50 felony cases per year for 52% of the defenders and over 200 felony cases per year for only 3% of the defenders. As the population of an area increases, so do the reported average attorney felony caseloads, to the point where no defenders serving populations of over one million handle less than 50 felonies per year and as many as 25% of the defenders handle over 200 felonies per year.

After the total number of attorneys required by a regional office is determined, other calculations can proceed. The size of the supporting staff, especially investigators and secretaries, is directly related to the number of attorneys staffing the office. The number of investigators is also a reflection of the travel time needed to make on-site examinations of crime scenes and conduct interviews of witnesses, law enforcement personnel and other relevant parties. In addition to the supporting staff, the non-personnel needs of the regional office can also be calculated. An itemized budget can allocate funds for rent, office equipment and supplies, and research facilities and materials. The budgetary allocations for both personnel and non-personnel needs should comply with national standards, reflecting the peculiar needs of a regional defender office.

In the event that regional defender programs do comply with national standards, some state funding should be available in most circumstances.[57] A similar proposal is found in a report submitted by the South Dakota State Planning Bureau describing a state "grant-in-aid" program.

> . . . The state could provide some sort of grant to assist units of government who meet minimum requirements to establish a public defender system, thus helping to bear the financial burden of an expended system. Local government which could not meet the established requirements could cooperate with neighboring units of government in order to qualify for such aid.

E. Location of Defender Offices

The proper location of offices in a defender system is based, in part, on the jurisdictional level of organization, state, regional or local, of the system involved. Moreover, decisions regarding office location also reflect efforts to promote the effectiveness and efficiency of the defense operation and attain client satisfaction for services rendered.

1. *The central state office.* The location of the principal state administrative office and the appellate defender office in a state level defender system (and perhaps the central office in a large multi-county system) should ordinarily be located in the state capital. Daily interaction with legislators, state supreme courts and intermediate appellate courts, requires the state offices to reside in close proximity to these bodies. The National Clearinghouse for Criminal Justice Planning and Architecture recommended that

> . . . a close relationship should exist between the office of the state defender and the legislature.

The Clearinghouse also noted that

> [a] strong working relationship should also exist between the office of the state public defender and the court of last resort. The office of the state public defender, therefore, should also be located as to provide easy access to the chief justice's chambers, as well as to the other state government officials.[58]

[57] See Chapter II, *supra*, for a fuller discussion of funding for regional defender systems.

[58] National Clearinghouse for Criminal Justice Planning and Architecture, *Guidelines For The Planning and Design of State Court Programs and Facilities*, Part E (Unpublished, 1974).

A number of state defender offices and state appellate offices are presently located in state capitals, such as Trenton, New Jersey; Montepelier, Vermont; Honolulu, Hawaii; Denver, Colorado; Boston, Massachusetts; Carson City, Nevada; and Springfield, Illinois. However, in states where the supreme court is not located in the state capital, the decision may become more complicated.

Other considerations might justify a different location for the state office. The major caseload activity usually arises out of the most populous city in the state, which often is not the state capital. State offices located in a population center would be in the immediate vicinity of many trial and intermediate appellate courts and have direct contact with a substantial portion of the client community. The Michigan State Appellate Defender Office, for example, operates out of Detroit, not the state capital. In addition, the proximity of the central state office to the local defender offices and to various penal institutions should also be considered. A state capital which is located in an isolated corner of the state might be too inaccessible to most local jurisdictions. Finally, in some cases, the site of a major university might offer attractive resources to a state defender office. In the event that the central state office is located in the state capital, these other considerations remain applicable to the location of other state offices throughout the system.

2. *Local offices.* Local defender offices should be located near the appropriate courthouses in each jurisdiction. Convenient access to the courts facilitates attorney-client interactions and maximizes the use of the defender's time. The National Clearinghouse for Criminal Justice Planning and Architecture noted approvingly that almost every Vermont defender office was within walking distance of the courts.[59]

However, whether local defender offices should actually be located within the courthouse structure is a more complex issue. Some have argued that where the office is stationed within the courthouse the defender's ability to deal with judges and prosecutors is enhanced. On the other hand, locating a defender office in such close proximity to judicial and law enforcement authorities presents an actual and apparent threat to defender independence. The recommendation of the National Advisory Commission is well taken. The Commission cautioned that the defender should "seek office locations that will not cause the . . . defender's office to be excessively identified with the judicial and law enforcement components of the criminal justice system. . . ." The defender's continuous presence in the courthouse may have a co-opting effect on the defender's ability to pursue the client's interests with necessary zeal and dedication. Private offices may also be necessary to maintain the confidentiality of the defense operation, especially the identity of defense witnesses and the like. Perhaps, more significantly, residence in the courthouse may seriously compromise the defender's image in the eyes of clients. The defender may appear to be an arm of the State, cooperating in the prosecution of the defendant and offering "deals" which do not further the client's interests. Consequently, the defender's office should not be located in such proximity to the courthouse that it becomes identified with judicial and law enforcement components of the criminal justice system.

A recent study conducted by the Boston University Center for Criminal Justice also recommended that the administrative offices of assigned counsel programs be located outside the courthouse. The authors reasoned that "[t]his is designed to maintain the character of the administrator's office as a program supplying the services of the private bar. An office in the courthouse might signify that the administrator's office is no different from any other public agency."[60]

While the defender office itself should not be located in the courthouse, defender interview and waiting rooms should be maintained therein. Attorney-client conferences require a setting which affords both privacy and dignity. Communications between defense counsel and clients can neither remain confidential nor be productive when conducted in crowded and noisy courtroom corridors. Moreover, defense witnesses need a waiting room in which to prepare adequately for their court appearances and avoid the inconvenience and uneasiness of remaining in courtroom corridors. The importance of such courthouse facilities to the defense function is recognized in the standards of the National Advisory Commission, the American Bar Association and the National Legal Aid and Defender Association, as well as the report prepared by the National Clearinghouse for Criminal Justice Planning and Architecture. Moreover, the National Advisory Commission also

[59] National Clearinghouse for Criminal Justice Planning and Architecture, P. Bach and D. MacGiluray, *Vermont Public Defender Facility Evaluation* (1975).

[60] Krantz *et al*, supra note 44, p. 253.

recommended that a lawyer's workroom with the following specifications be available in the courthouse:

> . . . The room should be furnished with desks or tables, and telephones should be available. It should be located near a law library. A receptionist should be available to take messages and locate lawyers. . . .

This would facilitate case preparation and further the effectiveness of the attorney's courthouse performance.

3. *Branch offices.* Statistics taken from a reexamination of raw data from the National Defender Survey reveal that a minimum of 6 rural, 13 urban and 20 metropolitan defenders employed branch offices in 1972. Branch offices are usually established to facilitate defender access to courts or client access to defenders.

In a regional defender system, the size of the caseload in a populous metropolitan suburb may necessitate the establishment of an office in that suburb. If the caseload is sufficient to justify the services of two full-time attorneys, ample supporting staff and additional administrative positions, and the suburb has its own criminal court, the decision to establish a branch office is relatively easy. However, if the area has no court, the relative importance of the accessibility to clients or to the court must be weighed. Alternatively, the unification of the court system may help to eliminate the need for branch offices having skeleton staffs.

The location of courts is also an important consideration in the decision of single county defenders to establish a branch office. Both the Solano County, California and Santa Clara County, California public defender offices set up branch offices to handle the business generated by outlying courts rather than require defenders from the main office to travel some 50 to 100 miles per day.

Defender offices serving metropolitan areas establish branch offices for a variety of reasons. The Los Angeles and New York City offices required additional offices to accommodate a multiplicity of courts. The Roxbury area in Boston and Hunter's Point in San Francisco created neighborhood offices in poverty areas to improve the defender's image in the community and generally further defender accessibility to clients. The Chicago area, under an experimental grant, recently established six small offices in poverty neighborhoods to provide an opportunity for the early representation of "walk-in" clients.

There are, however, competing considerations which may, for a given area, militate against the establishment of branch or neighborhood offices. A single office, or a lesser number of offices, can, by increasing the staff size, offer greater specialization and expertise and may also combat the "burnout" of attorneys. Centralization may increase efficiency and improve administration by enabling the director to more effectively supervise lawyers, allocate cases, monitor workloads, maintain records and be aware of attorney performance in order to make decisions regarding promotions. Furthermore, for reasons stated previously, the effectiveness of a branch office would be seriously hampered if the area's caseload was insufficient to require the services of a minimum of two full-time attorneys and necessary supporting staff. Finally, locating branch offices to coincide with the location of courts, especially in metropolitan areas, may adversely affect the defender's ability to implement a system of continuous representation. Where attorneys with substantial caseloads must travel excessively from one court to another, the impracticality of representing each client through all stages of the criminal proceedings becomes visible.

In conclusion, it is proposed that regional, metropolitan and single county defenders establish branch offices whenever defender access to courts, client's access to defenders or general operational efficiency are significantly enhanced thereby.

F. Conclusion

In sum, defender systems which are organized at the state level have the greatest opportunity to provide effective services. States utilizing this model are able to engage in statewide planning, allocation and coordination of services. Regionalization is most easily accomplished under a state system in order to facilitate the provision of full-time defense services and the sharing of support services and facilities. It also ensures that an organized method of providing defense services is available in every jurisdiction of a state and that minimum standards are met in each jurisdiction. It avoids duplication of functions and facilitates reporting and record-keeping which allows the public to keep apprised of the quality of services and the expenditures of public funds. And, perhaps most importantly, locating a defender system at the state level helps to ensure that the de-

fender remains an independent advocate, free of local politics and judicial control.

A state defender system also has an added advantage—the capability to provide appellate services which are separate and independent of the trial function, yet related in such a way that coordination of functions is feasible. States where defender services are wholly organized at the local level generally find that appellate capability constitutes the most serious gap in defense services. Given the special expertise necessary on the part of appellate lawyers and the physical distances of many appellate courts from the local scene, this is one of the most important functions which a centrally administered state system can perform.

Once a decision has been made regarding the funding and jurisdiction of a legal defense system, the next step is to designate the agency or agencies which will perform the services and to select personnel. The following chapters focus on this problem in both defender agencies and assigned counsel programs as well as in systems involving a mixture of the two.

CHAPTER IV. PROCEDURES FOR ESTABLISHING PUBLIC AND PRIVATE DEFENDER SYSTEMS

A. Introduction

A fundamental tension exists where the State, which prosecutes a poor person who has allegedly acted in a way that may result in a loss of liberty, is also constitutionally required to provide that person, at State expense, with effective, vigorous and independent legal representation in criminal and related proceedings. Because a defender is funded by and belongs to the entire community, a basic dilemma arises: while selection and monitoring of the defender function are necessary to ensure that the highest quality of representation will be provided, such necessities must never operate to inhibit the defender's loyalty to his clients and his zealous advocacy of and dedication to their legal causes. The challenge to, indeed the constitutional duty of, each jurisdiction, whether state, region or subdivision thereof, is to provide a selection, funding, and monitoring structure which systematically ensures highly qualified, independent and dedicated counsel to eligible persons in criminal and related proceedings while simultaneously avoiding any compromise of these qualities. Pressure and control or influence from hostile or irrelevant political factions must be avoided.

B. Pros and Cons of Existing Defender Selection Mechanisms

An analysis of current practices reveals several distinct methods used to select the head of a defender system, i.e., the defender director. These include election, appointment by the judiciary, selection by an executive official or legislative body, and selection by a defender selection commission or board. Each will be examined in terms of the stated objective of defender independence and high quality representation.

1. *Election.* Election is the least common method of selecting the heads of defender systems and exists in only a handful of jurisdictions.[1] While in theory it is supposed to enable the public to obtain awareness of the functions of the defender system and to expose incompetent performance, no major policy-making bodies have supported this approach.

The ability to become elected is not necessarily related to skill in criminal law or administration and a competent politician who lacks these essential skills may well get elected. The public at large experiences great difficulty in keeping abreast of the major candidates and has neither the incentive nor the background necessary to evaluate the qualifications of defenders.

To the extent that the public is aware of the performance of the defender director, their inclinations would undoubtedly be counterproductive. The public at large is not likely to take kindly to a defender who vigorously defends alleged rapists and murderers. Although politicians generally seek publicity, publicity regarding the provision of vigorous defense services in notorious cases would doom an elected defender. Indeed, a defender is likely to become unpopular in exact proportion to his diligence in performing his duties.

The system of voter selection of defenders tends to impinge upon the zealous representation of clients which is required by the Code of Professional Responsibility.[2] The only way in which an attorney can owe his primary allegiance to his client is to be independent of extraneous allegiances. However, an elected defender is bound to be responsive to the electorate and to political supporters.

Finally, the election process is not cost effective.

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[1] Defenders are elected in some counties in California (Cal. Gov. Code, §§ 27702, 27704 (West. 1968), throughout the state of Florida (Fla. Const. Art. 5 § 18 (Supp. 1977); Fla. Stat. Ann. § 27.50 (West. 1974)), and in some parts of Nebraska (Neb. Rev. Stat. §§ 29-1804, 29-1805.05 (1975)) and of Tennessee (Tenn. Code Ann. § 40-2014(b) (1975)).

[2] American Bar Association, CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7 (1974).

Elected defenders are forced to spend a great deal of money, time and energy to ensure re-election. This diminishes the number of hours that the defender director and, often, members of his staff, have available for performing their duties.

2. *Judicial appointment.* The selection of all or at least some of the state's county level defenders is made by the judiciary in such states as Georgia, Illinois (trial level), Indiana (trial level), Kansas, Kentucky, Oklahoma, Texas and Wyoming.[3] In all of these states, the defender director is guaranteed neither tenure nor due process protection from unjustified removal, but serves at the pleasure of the judiciary. Judicial appointment is also practiced in other states such as Colorado, Illinois, Indiana and Wisconsin which employ state level organization for either trials, appellate representation, or both.[4] In these jurisdictions, defender independence is made somewhat more secure by statutory authorization for a fixed term of office and, in three of these states, by a requirement that cause be shown for removal.

However, appointment of defenders by trial or appellate judges has been the target of substantial criticism. This criticism has taken the form of lawsuits, recommendations by national commissions, law review articles, and outspoken commentary by defenders who operate under systems of judicial appointment.[5] While, unlike the general electorate, judges are capable of rendering informed opinions regarding the performance of defenders who appear before them, in practice, judicial appointment tends to destroy the defender's ability to function as an independent and effective advocate.

Judicial appointment requires that the defense counsel "serve two masters" [6] and creates a potentially dangerous conflict. The zealous defender often makes time-consuming motions and engages in lengthy cross-examination of witnesses. Such defense tactics of necessity add to what may be an already overcrowded court docket and are apt to lead to antagonisms between the defender and the judge. Thus, there is a tendency for defenders whose reappointment depends upon the judge before whom they appear to recommend that their clients plead guilty rather than consume court time by taking a trial. The conflict of interest becomes even more apparent when the defender successfully appeals adverse decisions of the trial judge. As a result, the most restrictive form of judicial appointment of defenders is appointment by the trial judge. As the National Advisory Commission on Criminal Justice Standards and Goals pointed out, "The mediator between two adversaries cannot be permitted to make policy for one of the adversaries." Whether judges' policy control takes the form of refusing to recommend budgetary increases for the defender office or influencing the conduct of individual cases, the system of judicial appointment is harmful to the operation of an independent defender system. As Judge David Bazelon of the federal Circuit Court of Appeals in D.C. put it,

> Prosecutors are independent. Privately retained defense counsel are independent. Is there any valid argument for diminishing the independence of counsel for our indigent accused? . . . A 'role' for judges tends to dilute the independence of the defender and to produce an invidious double standard of justice which demeans our system.[7]

One of the arguments which is sometimes advanced in support of judicial appointment of defenders is that it takes defender selection out of politics. However, experience has not borne this out. According to a former Connecticut prosecutor who has since become a judge, the previous Connecticut system of judicial selection camouflaged the fact that names of prospective candidates were regularly furnished to judges by local political sources and routinely ratified by the judges.[8]

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[3] Ga. Code Ann. § 27-3206 (1972); Ill. Rev. Stat. tit. 34 § 5602 (1973); Ind. Stat. Ann. § 35-11-1-1 (Burns 1975); Kan. Stat. Ann. § 22-4517 (1974), *as amended* (Cum. Supp. 1976); Ky. Rev. Stat. § 31.170 (Supp. 1974); Mo. Stat. Ann. § 600.010 *et. seq.* (Supp. 1977); Okl. Stat .Ann. tit. 19, § 138.2 (1962); Tex. Civil Stat. art. 341-1 § 2 (1973); Wyo. Stat. § 7-9.10(b) (Cum. Supp. 1975).

[4] Col. Rev. Stat. §§ 21-1-101, 21-1-102 (1973); Ill. Rev. Stat. tit. 38 § 208-5 (1973); Ind. Stat. Ann. § 33-1-7-1 (Burns 1975); Wis. Stat. Ann. § 257.23(1) (Supp. 1976).

[5] *See, eg., Smith v. Superior Court,* 68 Cal. 2d 547 (1968); *Dockery v Boyle* No. 72c438 (N.D. Ill. Nov. 28, 1972); recommendations of the National Study Commission on Defense Services, American Bar Association, National Advisory Commission on Criminal Justice Standards and Goals, National Legal Aid and Defender Association; Newman, *Prosecutor and Defender Reform: Reorganization to Increase Effectiveness,* 44 CONN. BAR J. 576 (1970).

[6] The notion of defense counsel's serving two masters was disapproved in *Glasser v. United States,* 315 U.S. 60, 75 (1952), where counsel was required to represent two co-defendants.

[7] Hon. David L. Bazelon, letter to the Hon. Walter E. Washington, April 9, 1974.

[8] Newman, supra, note 5, p. 569.

In designing a defender system, planners should not neglect a key consideration—the perspective of the client and the client community. Studies of client perceptions have found that many defender clients view their lawyers as mere extensions of the law enforcement process because of their institutional position.[9] Court appointment of defenders further weakens the confidence of the client community in the defender organization.

3. *Legislative or executive appointment.* Appointment by an existing legislative or executive agency such as a legislature, mayor, county board or governor has, in some instances, proved to be a better means of selection than the previous alternatives. The most commendable feature of some of the existing systems using this design, particularly those organized at the state level, is their attempt to depoliticize the office of the defender by incorporating a broad-based input into the nominating process if not the actual selection of the defender director.

For example, in Vermont,[10] the state defender is nominated by the same selection board which nominates candidates for the judiciary; the governor must make his selection from this list of nominees. In Nevada, a nominating commission composed of the Chief Justice of the Supreme Court, three attorneys selected by the state bar and three laymen appointed by the Governor, with no more than two nominees in each category from the same political party present their candidates to the Governor for appointment.[11] In Alaska, the Governor's choice from among nominations submitted by the judicial council must be confirmed by both houses of the legislature.[12] In addition, in some jurisdictions where the state defender is appointed by the governor, the defender director may be given broad powers in the supervision of the defender office.[13]

However, the use of existing legislative or executive agencies to select the defender director has significant shortcomings. Mayors, legislators, county boards and governors must respond to constituent groups, including interests likely to be ideologically and politically opposed to those of the indigent community, and particularly those members of the indigent community who, when charged with crime, are entitled to the effective assistance of counsel. In addition, many legislators and executive officers, especially in recent years, have campaigned on platforms promising to eliminate the "problem of crime in the streets" and have also responded to a public concern that criminal defendants are given "too many advantages." Thus, legislative and executive officers are not likely to be capable of setting aside political considerations in the selection of a defender director. Their appointments are apt to be based on party politics rather than merit and the job of public defender is often awarded to a person who worked hard for the party or who lost in the race for some elective office.

Appointment of the defender director by legislative or executive officers does not alleviate the problem of client alienation. Clients view a defender who is appointed by the State as another arm of the State which arrests and prosecutes them. They find it difficult to believe that such a defender is willing to defend their case to the limit of his ability.

The problem of legislative or executive appointment becomes compounded when, as often occurs, the appointment power is combined with supervisory powers such as the power to approve the defender's budget. National bodies such as the National Study Commission on Defense Services and the National Advisory Commission on Criminal Justice Standards and Goals have commented that the defender who is restricted in this way is potentially no better off than he would be were judges to supervise his office.

4. *Creation of defender commission.* The selection of the defender director by an independent commission or board has been recommended by the National Study Commission on Defense Services, the American Bar Association, and the Defender Committee of the National Legal Aid and Defender Association. Such a commission, of all of the alternatives available, is most able to provide the necessary independence from political pressure, to ensure that merit appointments are made by those who are qualified to make judgments regarding qualifications, and to provide both the appearance and the reality of separateness which the client community finds essential to developing an attorney-client relationship. Because such a commission would be composed of persons having a wide range of backgrounds and

[9] *See* Casper, *Did You Have A Lawyer When You Went to Court? No, I Had A Public Defender,* 1 YALE REVIEW OF LAW AND SOCIAL ACTION 1 (1971); and Wilkerson, *Public Defenders as Their Clients See Them,* 1 AMER. J. CRIM. L. 141 (1972).

[10] Vt. Stat. Ann. tit. 4, § 601 *et seq.* (1972), *as amended,* (Supp. 1976).

[11] Nev. Rev. Stat. § 180.020(1), (2) (1975).

[12] Alaska Stat. § 18.85.030 (1974).

[13] *See, e.g.,* the New Jersey defender legislation. (N.J. Stat. Ann. § 2A:158A-7 (1971), *as amended,* (Supp. 1976).)

viewpoints, the defender would not be obligated to any single party or group. Since the commission's primary duty would be that of selecting the defender director, the members would take considerable care in the recruitment and screening process. Hopefully, the commission would include representatives of the client community, thus ensuring that the defender office is aware of and responsive to their needs. It is, of course, difficult to legislate impartiality into any system. However, the board selection method holds the greatest promise for the establishment of a defender system which will serve as an effective advocate for eligible persons accused of crime.

The creation of a defender commission serves several complementary functions as well. The commission can serve as a spokesman in interpreting the function of the defender office to the public and in dealing with the defender's funding agency. The commission can convey the community's concerns to the defender who might otherwise not be aware of or be sensitive to those concerns. Also, the commission will be able to observe the performance of the defender office in order to make judgments as to the tenure of the defender director and to initiate long-range improvements in the system.

An analogy to an independent board selection process operating in a non-private state defender system exists in Connecticut where the public defender services commission is composed of appointees of the judicial, legislative, and executive branches of government as well as representatives from the lay community.[14] However, the most prevalent use of the board selection method is presently found in the private defender corporations and the defender divisions of legal aid societies which exist in many of the largest U.S. cities. The private agencies tend to have boards which are less politically oriented.

The phenomenon of plea bargaining was recently studied in a research project conducted by the National Legal Aid and Defender Association under a grant from LEAA's National Institute of Law Enforcement and Criminal Justice. The study found that criminal divisions of legal aid societies report a lower rate of plea bargaining in felony cases than do other types of defender offices.[15] This may indicate that pressures to plead clients guilty are less intense where defenders have the insulation provided by board appointment.

C. The Defender Commission

The structure and functions of the Defender Commission should be geared to the overall goal of providing eligible persons accused of crime with the most effective representation possible. Thus, the Commission's structure and composition should be established so as to neutralize political influences in the Commission's membership and to ensure that membership is restricted to persons having both unique qualifications and an interest in maintaining a high quality, independent service.

In order to fulfill its desired function, the Commission should provide support and advice to the defender service without taking on control or substantial supervision. The resulting role is a delicate balance between careful observation, study and advice by an entity with the power to hire and fire the director, and strong leadership by a defender director who is selected for his or her administrative as well as criminal law expertise and whose term of office may only be terminated for cause.

The discussion of the Defender Commission which follows is applicable to both public and private defender organizations. Additional considerations which are peculiar to private defender agencies are explored at the end of this chapter.

1. *Composition of the commission.*

a. *Criteria for selection.* The following recommendation passed by the National Legal Aid and Defender Association provides a general guideline for inclusion in defender selection boards:

> Care must be taken to design a board composition and structure which will provide a representative cross-section of those segments of the community which have a direct and legitimate interest in the functioning of the Defender's office at its highest professional potential.

In addition to including a representative cross-section of the community on the board, there are several critical considerations. First, professional canons of ethics mandate that, because the Defender

[14] *See* Conn. Gen. Stat. Ann. § 51-289 (Supp. 1977). However, the composition of this Commission is marred by the inclusion of judges. For a discussion of the appropriate composition of such boards, see Section C below.

[15] National Legal Aid and Defender Association, S. Singer, B. Lynch, and K. Smith, *Report of the Indigent Defense Systems Analysis Project* (Unpublished, 1976).

Commission is in a position to advise the lawyers in a defender office, the majority of the Commission be composed of lawyers.[16] The statues of Maryland, New Mexico and South Carolina require that all or a majority of the defender board be attorneys.[17] This requirement is also found in the by-laws of defender corporations and legal aid societies.

The other critical considerations are that neither prosecutors, law enforcement officials or judges should sit on the Defender Commission. The interests of prosecutors and law enforcement officials are directly antithetical to those of the defender. Judges should be excluded primarily because their role as mediator between two adversaries is inconsistent with the role of the board as advocate on behalf of the defender agency. These proscriptions are contained in National Study Commission, ABA and NLADA standards.

In laying down criteria for the composition of defender boards a number of other factors should be weighed besides the general considerations of broad representation, attorney dominance and exclusion of prosecutors, law enforcement officials and judges. These factors relate to the qualifications of the attorney members, political party affiliations, client community representation, and lack of control by any single branch of government.

In light of the increasing specialization of the field of criminal defense work, attorney board members, in order to understand the operations of the defender system, must have a background in the practice of criminal law. This requirement is contained in the provisions governing a number of private defender associations and legal aid societies and in the New Mexico defender statute which provides that, "A person shall be qualified to serve as a member of the board if . . . he is well acquainted through his practice of law with the defense of indigent persons accused of crime." [18]

To have a truly representative cross-section of the community on the board and to instill confidence in the consumers of the service—the clients themselves—the board should include representatives of the client community. The most specific recommendation on this topic is that of NLADA's Defender Committee which advised, "At least one-third of the board members should be representative of groups whose members derive a particular benefit from the proper functioning of the defender's office." The lack of client input on the board hampers defender-client interaction, erodes community support for the defender operation, and increases disillusionment with the entire criminal justice system. Consideration should be given to placing one or more persons on the board who are ex-offenders as well.

A number of other organizations should also be considered for inclusion in the board. For example, the state or local bar association, because of its members' understanding of the criminal law and the value of support from the bar at large, is suitable for inclusion. Some local community defender offices have established boards which are almost entirely composed of community-oriented organizations. These boards have also attempted to reflect the racial, ethnic and sexual composition of the client community.[19]

One final consideration should be stressed as essential to the independent functioning of the defender system. No single party or branch of government should control the majority of seats on the Defender Commission.[20] The lack of an apolitical board structure prompted a lawsuit in Philadelphia alleging that the defender board, which was dominated by the city's mayor, would prevent the city's defender office from measuring up to American Bar Association standards on the grounds that the chief defender, acting for or under the influence of the mayor, would make decisions and influence staff attorneys to violate the standards of professional conduct by acting in a manner contrary to the best interests of their clients.[21] The Pennsylvania Supreme Court held that the scheme was not impermissible, particularly in light of certain safeguards built into the defender association's by-laws such as a prohibition against any defender employee's being a candidate for public office, a member of any committee of a political party, or a participant in political

[16] ABA CODE, *supra* note 2, Canon 3 and EC 3-6.

[17] Md. Ann. Code, art. 27A, § 9(a) (1976); N.M. Stat. § 41-22A-3(B) (Supp. 1975); S.C. Code § 17-3-60 (1976).

[18] N.M. Stat. § 41-22A-3(B)(3) (Supp. 1975).

[19] *See* Appendix A for a description of the Roxbury Community Defenders, Inc. in Massachusetts and the Criminal Defense Consortium of Cook County (Illinois), Inc.

[20] *See* the New Mexico statute, which provides: "Not more than two (2) of the members of the board shall belong to the same political party." (N.M. Stat. § 41-22A-3(C) (Supp. 1975), and the Connecticut statute (Conn. Gen. Stat. Ann. § 51-289(a) (Supp. 1977)).

[21] *In re Defender Association,* 13 CrL 2405 (Aug. 8, 1973).

campaigns. Nevertheless, the dangers inherent in political influences on the board were sufficient to lead to a lawsuit which was brought in part by a former President of the ABA.

The best procedure for establishing a Defender Commission having a broad and independent base is to incorporate the board structure into legislation or regulations. The organizations to be included should be specified and each organization should be allowed to select its own representatives.

b. *Size of the commission.* In arriving at an appropriate number of members of the Commission, two divergent factors should be considered. First, the Commission should be large enough to include representatives from all factions which have a legitimate interest in the effective operation of the defender system. Secondly, the Commission should be small enough to avoid domination by particular subgroups and to enable its members to function efficiently with a minimum of delay. The National Advisory Commission, which recommended against having a board, cautioned that boards can become bogged down when time is short in attempting to resolve controversial issues. This problem is minimized by having a board of manageable size and endowing the defender director with a major share of policy-making authority as the NAC advised.

Current state statutes provide a range of three members in Maryland and New Mexico to eleven members in Vermont and Massachusetts.[22] Some private defender agencies have boards with considerably more members such as the Toledo (Ohio) Legal Aid Society with a minimum of 21 members and the Philadelphia Defender Association with 30 members.

The most appropriate board size seems to be from 9 to 13 members depending upon several variables. The size and diversity of the projected client population that the defender organization must serve is of prime consideration. If, for example, the Commission is charged with overseeing a multi-office state public defender system or a large metropolitan defender office, its size should be more substantial than a commission involved with a sparsely-populated rural region. Board membership should also reflect the number of identifiable components of the client population. No significant community organization should be deprived of representation since client confidence in the defender is essential to competent performance. Yet, the Commission must avoid overloading not only to insure efficiency but also to retain the confidence of non-client factions in the jurisdiction. Choosing the most representative community agencies is worthy of serious attention and detailed study. Finally, the size of the Commission should also be affected by the number of non-client factions which have a legitimate interest in defender operations and may be instrumental in the fight for adequate funding.

2. *Conditions of service.* The statute or regulations establishiing the Defender Commission should set out the terms and conditions of service by the commissioners. Such considerations as length of service, removal and resignation procedures and payment for expenses should be addressed.

a. *Staggered terms.* A commissioner's term of service should be of a sufficient length to enable the board to benefit from his experience; however, the term should be short enough to protect against any member's dominating policy and to permit a continuing influx of new personnel. Furthermore, the commissioners should commence their service at different intervals to promote the continuation of policy and minimize the effects of political upheaval on board membership. In weighing these concerns, employment of three-year staggered terms with possibly a limit of two consecutive terms of service is recommended. This design finds strong support in the New Mexico, District of Columbia and Maryland statutes.[23] As a practical mattter, staggered terms are not yet possible when the Commission is first created. Recognizing this, the Connecticut statute suggests that one group of appointees each serve an initial term of one year, a second group of appointees, two years, and a third category, three years; subsequently all terms of service run for three years, thereby establishing the staggered terms.[24]

b. *Removal/resignation.* To further prevent political whim from corrupting board deliberation, commissioners should be guaranteed their full term of office on the board. Commissioners should be

[22] Md. Ann. Code art. 27A, § 9(a) (1976); N.M. Stat. § 41-22A-3A (Supp. 1975); Vt. Stat. Ann. tit. 4, § 601(b) (1972), *as amended,* (Supp. 1976); Mass. Ann. Laws ch. 221, § 34D (1974).

[23] N.M. Stat. § 41-22A-3(A) (Supp. 1975); D.C. Code § 2-2223(b) (3) (1973); Md. Ann. Code art. 27A, § 9(a) (1976).

[24] Conn. Gen. Stat. Ann. § 51-289(a) (Supp. 1977).

subject to removal from the board only upon a clear showing of disinterested or incompetent service. For example, a provision of the Roxbury (Massachusetts) Defender's Committee Articles of Organization states that a commissioner's position becomes vacant if he fails to attend three consecutive board meetings unless, at the next scheduled meeting, after receipt of proper notice of the threatened removal, the commissioner convinces a majority of the board members present that his absence was justified. Such a proposal is sufficiently definite to avoid the pitfalls of arbitrary discretion but is flexible enough to adjust to unexpected occurrences.

A member should be permitted to resign from the board at any time. At least 30 days before departure, the commissioner should provide the board with written notice of his intention. The vacancy should be filled by an appointee of the same group which selected the resigning member. The new member should complete his predecessor's term of office and be eligible for reappointment.

c. *Reimbursement of expenses.* It is recommended that board members not be compensated for their services but they should be reimbursed for traveling expenses and other reasonable expenditures incurred in the course of their duties. This is the current practice in such states as Hawaii and Maryland.[25] Moreover, the board should receive a budget sufficient to enable it to adequately perform its necessary functions.

3. *Role of the commission.*

a. *Selection of the defender director.*

(1) *Process of selection.* The primary function of the commission is to select the defender director. The commission should also assist the defender in drawing up procedures for the selection of the staff. While the commission ought not to perform the function of approving the selection of deputy and assistant public defenders, the commission must ensure that the procedures utilized are fair and consistent with the purposes of the office of defender.

Since the quality of a defender system depends foremost upon the competency of its defender director, the selection decision should be based solely on merit. It is, of course, difficult to legislate impartiality into any system. Hopefully, the means of appointment of the Commissioners will decrease the risk of partisan politics' influencing the selection process while increasing the likelihood that a highly qualified applicant will be selected on the merits. If the Commission has a Nominating Committee, it would be responsble for initially screening applicants and then the entire Commission would conduct its own investigations of the remaining candidates. The vote of every Commission member should be required to select the defender director and the Commission should persevere until unanimity is reached and the director is selected.

(2) *Qualifications of the defender director.* The majority of state statutes dealing with qualifications of the defender director simply require that he or she be a member of the state bar. Several states demand additional qualifications for the office. Rhode Island and Connecticut insist that a director must have five years of prior experience in the practice of law.[26] However, while this demonstrates a laudable attempt to ensure that the director is qualified, the number of years that an attorney has practiced are not an indicator of his ability to run a defender office. Rather than a mandatory length of time as a member of the bar, the requirements for director should be legal, administrative and teaching ability, political independence, and a firm commitment to the needs of eligible persons accused of crime.

On the other hand, such states as Idaho and New Mexico require that the director be experienced in criminal law.[27] This is not only a reasonable requirement, but should be made mandatory in every jurisdiction. Chief Justice Burger has emphasized that particular skills of advocacy are necessary for the effective representation of criminal defendants.[28] Some states are currently experimenting with programs of attorney certification as criminal law specialists. For example, in California, the criminal law certification requirements include:

> 1. Practice a minimum of five years in the state with the following minimum involvement in criminal law:
>
> a. Five felony trials by jury.
>
> b. Five additional jury trials.

[25] Hawaii Rev. Stat. § 722-9 (Supp. 1974); Md. Ann. Code art. 27A, § 9(d) (1976).

[26] R.I. Gen. Laws § 12-15-2 (1969); Conn. Gen. Stat. Ann. § 51-290 (Supp. 1977).

[27] Ida. Code § 19-855 (Cum. Supp. 1976); N.M. Stat. § 41-22A-4(B) (Supp. 1975).

[28] Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 FORDHAM L. REV. 227 (1973).

c. Four additional district court cases.

d. Any two of the following:

1) Five hearings and three petitions or appeals in designated courts.

2) Three appeals in which briefs were filed in designated courts.

3) Ten additional jury trials (with jury decisions).

4) Three years of full-time practice of criminal law in California.

2. Show that in at least three of the five years preceding the application, the candidate has spent one-third of his time in the practice of criminal law in California.

The California plan offers valuable suggestions concerning the kind of experience necessary for an attorney to become a specialist in criminal law. In evaluating the qualifications of a prospective defender director (who surely must be a specialist in criminal law) the California program is instructive.

This is not to suggest that a candidate must have practiced criminal law a certain number of years to qualify for the office. Of primary concern is not the quantity but the quality of that experience. It is highly desirable that the director have experience at all levels of the criminal process, especially in the trial courts, that the experience be recent, considering the rapidity with which the criminal law changes, and that it include some prior contact with the indigent accused. Candidates with prior judicial or prosecutorial experience should not be excluded from consideration but should be carefully scrutinized by the Commission to determine the reasons for career change. The director's demonstrated ability in criminal defense not only bears on the representation he personally affords clients. Perhaps, more significantly, it is instrumental in attracting a competent and career-oriented staff.

Administrative ability is just as essential for a defender director as expertise in criminal law and procedure. This is particularly crucial in those jurisdictions where the defender system is a multi-office network servicing a large geographical area. The functions of the director outlined in the next section emphasize the point.

The defender should be an individual capable of maintaining the confidence and respect of his staff, the Defender Commission and the public. He or she should possess qualities of leadership and tact and be able to develop innovative solutions to pressing organizational problems. Moreover, the defender might need special skills in certain circumstances such as the ability to speak a foreign tongue in a jurisdiction where most of the client population does not speak English, especially where the director heads a local office.

Finally, the defender must exhibit a dedication to the defender cause and be willing to work diligently and constructively to improve the quality of defense services not only in his own organization but in the nation as a whole.

(3) *Functions of the defender director.* The director should be required to perform a broad range of administrative functions. Given the large amount of administrative duties envisioned, little, if any, time would be left for the defender director of a state system to undertake actual case work. However, wherever practical, the director should handle some cases to maintain his technique in criminal practice and set a standard of excellence for all attorneys in the state system. The defender director of a small regional system having a small staff would regularly handle cases.

The director should be generally responsible for establishing and executing operational policy and control of the system including the formulation of rules and regulations to achieve efficiency and productivity. With the help of his staff, he should take primary responsibility for the preparation of the budget and should keep periodic financial and case disposition records for use in the calculation of direct and indirect costs. The director should also appoint sufficient staff, provide access to support services and establish the necessary defender offices to perfect the quality of representation afforded throughout the system. He should work in conjunction with the Commission on the preparation of the annual report which is to include "all pertinent data on the operations of the office, the costs, projected needs and to the extent experience may indicate, recommendations for statutory changes, including changes in criminal law or changes in court rules . . ." [29] The director should coordinate the receipt of services and funds offered the defender organization by federal programs and public or private sources. Finally, in certain defense systems using defender and assigned counsel plans, the director will be required to administer the entire system.[30]

[29] N.J. Stat. Ann., § 2A:158A-22 (1971).

[30] *See* Chapter V, *infra.*

(4) *Terms of Employment.*

(a) *Term of office.* In the majority of states which provide for defender systems by statute the defender director serves a set term of years. The most frequent term is four years; however, there are a number of exceptions.[31] Generally, the defender may be reappointed for another term.

Further, the National Advisory Commission recommends a four year minimum term and the Uniform Law Commissioners' Model Act suggests a six year term which is renewable.

Consistent with these bodies, the National Study Commission advises that the term of office be from four to six years in duration until reappointment or replacement occurs and should be subject to renewal. The Defender Commission should have the option of declining to reappoint if a majority of its members are of the opinion that the defender has not performed competently. This design will enable the director and his staff sufficient time to properly organize and operate the office but not saddle the organization with leaders who are less than satisfactory.

(b) *Removal.* The defender must function with job security if he is to be an innovative and effective advocate. However, the defender organization should not tolerate the provision of incompetent defense services. The defender director should be subject to removal during his term of office, but only for "good cause."[32] In this context, the National Advisory Commission's definition of "good cause" might be adopted:

> . . . permanent physical or mental disability seriously interfering with the performance of his duties, willful misconduct in office, willful and persistent failure to perform public defender duties, habitual intemperance, or conduct prejudicial to the administration of justice.

In order to prevent the infiltration of political influence into the removal decision and in the interests of justice, the defender should be entitled to a full due process hearing before the Commission. Such a proposal is found in the Connecticut public defender statute.[33] Removal should only be effectuated by a majority vote of all Commission members. Moreover, the Commission should also provide a written report stating the reasons for removal, and make the report available for public consumption. The defender director should have a right to appeal the Commission's decision in a court of general jurisdiction. Further appeals should also be available assuming proper exhaustion of remedies has occurred.

(c) *Salary.* Inadequate salaries discourage highly qualified attorneys from seeking the office of defender director. The attraction of private practice or even the prosecutor's office may be heightened by the realities of excessive caseload and under-funding which leads to defender "burn out" and the lack of careerism. As the American Bar Association Standards warn: "inadequate compensation leading to an inability to recruit and retain personnel of high quality is one of the greatest dangers in the creation of institutionalized defender services."

The National Defender Survey reported on defender salaries throughout the country. Out of those jurisdictions responding (233 defenders out of 509 mailed questionnaires), the survey found that "[a]lmost a third . . . of all chief defenders receive a salary of less than $11,000, while over half . . . make less than $16,000 annually." The survey further stated that "85% of all reporting defenders indicated that their salary is lower than that of their counterpart in the prosecutor's office."[34]

Certain factors should be considered in setting the defender director's salary. First, compensation should be set at a level which is commensurate with his qualifications and experience, and which recognizes the responsibility of the position. This emphasizes that the demands of the office will vary according to its size and location. The director of a small rural office, barring unusual circumstances, should not be as highly salaried as the director of a large metropolitan office or of an entire state-wide defender system.

In addition, the defender director's compensation should be comparable with that paid to presiding judges and be professionally appropriate when compared with the compensation of the private bar. This proposal finds support in the National Advisory Commission standards which recommend that the

[31] Ga. Code Ann. § 27-3206(b) (1972) (2 years); R.I. Gen. Laws § 12-15-2 (1969) (3 years); N.J. Stat. Ann. § 2A:158A-4 (1971) (5 years); Wis. Stat. Ann. § 257.23(1) (Supp. 1976) (5 years); Colo. Rev. Stat. § 21-1-101(2) 1973) (5 years); Del. Code Ann. tit. 29, § 4603a) (1974) (6 years); Iowa Code Ann. § 336A.3(1) (1977) (6 years).

[32] *See, e.g.*, Alaska Stat. § 18.85.040 (1974).

[33] Conn. Gen. Stat. Ann. § 51-290 (Supp. 1977).

[34] National Legal Aid and Defender Association, L. Benner and B. Lynch-Neary, THE OTHER FACE OF JUSTICE: A REPORT OF THE NATIONAL DEFENDER SURVEY 18 (1973).

defender's salary should not be less than that of the presiding judge of the trial court of general jurisdiction. Moreover, in referring to staff attorneys, the NAC standards conclude that their salaries should be comparable to those of attorney associates in local private law firms through the first five years of service. Highly qualified and experienced attorneys interested in the plight of the eligible accused must not be discouraged from seeking and retaining the office of defender director because of inadequate salaries. Our system of justice cannot demand anything less than just compensation for work performed.

Finally, the defender's salary should in no event be less than that of the chief prosecutor in the jurisdiction. In most cases both positions have similar legal and administrative responsibilities, yet the demands upon the defender may be even greater in light of the problems of excessive caseload, underfunding and the struggle to gain popular support for an unpopular cause.

In jurisdictions where the prosecutor is underpaid, the defender's salary should not be limited by that factor. Reference to the salaries of local judges and the private bar become particularly appropriate levels of comparison. The defender director should be treated with the same prestige and respect as the other attorneys in the jurisdiction and should be similarly compensated.

(d) *Full-time service.* Not only do inadequate defender salaries inhibit the attraction and retention of qualified personnel, they also tend to perpetuate the existence of part-time defenders. The earnings from private practice are needed to supplement inadequate defender salaries. The National Defender Survey reported that as of 1972 a majority of the nation's chief defenders (57.8%) were engaged in an outside civil practice to bring in additional income. Indeed, many part-timers who are sincere in their representation of the poor complain that they are actually doing full-time work for half-time pay.

As discussed in Chapter III, part-time defender directors should be prohibited. They lack the support staff and facilities that are indispensable to the provision of effective representation. Moreover, part-time attorneys cannot adequately supervise their staff; thus, the defender office suffers from fragmentation and disorganization.

It follows that defender directors should be required to be full-time employees, prohibited from engaging in the private practice of law. This recommendation has been unanimously endorsed by the National Study Commission on Defense Services, the National Advisory Commission, the American Bar Association, and the National Legal Aid and Defender Association as well as the provisions of the Federal Criminal Justice Act.

b. *Monitoring of defender performance.* The Defender Commission is not intended to play a supervisory role with respect to the defender system. However, neither is the Commission intended to disband with the hiring of the defender director. In light of its duty to make decisions regarding the hiring and removal of the director, the Commission must play a continuing role in monitoring the performance of the defender director, his staff, and the defender program.

Thus, the Commission must be available to investigate unresolved complaints from clients and from the client community. The Commission may also be empowered to initiate statistical studies of case dispositions so as to aid in the measurement of program effectiveness. "Effectiveness" would be measured in terms of ultimate case dispositions, length of pretrial delay (and the extent, if any, to which the defender program contributed to such delay), length and type of sentences and sentence alternatives, number and outcome of cases appealed, sufficiency of funding, and the general availability of defender services to the client group. The goal of the Commission is to maximize availability and quality of legal services at a reasonable cost to the public. Such studies serve to assist the Commission in demonstrating to the legislature the level of funding needed and whether the funds allocated are being properly spent.

As noted previously, it is the defender director who should be generally responsible for operational policy and control of the system, since his experience in administration and daily contact with the system make him uniquely qualified. However, where there are matters which may personally affect the defender director or which may lead to questions regarding his fairness, they should be referred to the Defender Commission. These will include the defender director's salary, defender system vacations and fringe benefits, procedures to be utilized in hiring personnel, and the fee schedule for payment of assigned counsel.

Decisions regarding the acceptance and rejection of cases should be made in accordance with governing legislation and national standards. The role of such a Commission does not extend to requiring that a defender office increase or decrease its caseload or alter the rate at which cases are closed. Moreover, the Commission ought not to interfere with an individual defender's relationships with particular clients, nor attempt to limit in any way his professional judgement as to how he should proceed in any given case.

Conflicts occasionally arise when a defender pursues a course of legal representation which offends others and therefore may undermine the defender office's position in the political system. In such situations, similar boards or commissions have responded by requiring the attorney to obtain prior approval of the Commission before accepting "non-routine cases." This may arise in the civil context more often than the criminal, especially where suits for injunctive relief are brought against governmental bodies as class actions. However, similar pressures resulting in loss of independence cannot help but apply in the criminal law context. Thus, the Commission has the difficult and sensitive task of monitoring the way in which defense services are provided without interfering with discretion, judgment, and loyalty of defender attorneys. Attorneys must be free to employ every applicable legal and ethical stratagem to effectively represent clients and must not be constrained by the Commission or by the political pressures to which the Commission may be responding.

c. *Public education.* The Commission should educate the public about the defender organization. Defenders are commonly misunderstood and often viewed as an institutional alliance with criminals. The Commission should explain that the defender's attempts to provide the most effective representation possible are mandated by the Constitution. The Commission should acquaint the public with the system's operations and demonstrate how increased funding could improve the quality of services. It should relate the strength of the defender system as essential to the continued integrity and stability of the entire criminal justice system. Moreover, upon request by the defender director, the Commission should be available to support the defender director's policies and interpret them to the appropriate parties.

The Commission shares this responsibility with the staff. The Defender Association of Philadelphia established a speaker's bureau to further community education. Moreover, members of the defender's staff have been involved in a panel and lecture series and have personally hosted several office visits by community organizations.[35] In addition, members of the staff of the Massachusetts Defenders have made presentations in public schools and before community groups. Also, the Director and Deputy have a weekly radio show devoted to community concerns, part of which is a question and answer dialogue between the public and the defender.[36] The defender should not only educate the public, but also learn from public suggestions. As a recent study of the Monroe County, New York office stressed, "[the] public defender should welcome community feedback concerning his office and look upon it as a valuable source of information to help improve his operations."[37]

The Commission should undertake special efforts to educate and receive feedback from the client community in particular. Those who are eligible for defender services must be made aware of the existence, the whereabouts and accessibility of the defender organization. Also, a distribution of literature explaining a citizen's rights and obligations when confronted by law enforcement authorities can serve to keep potential clients informed and raise community confidence in the defender organization.

d. *Legislative liaison.* One of the most important functions of the Commission is serving as a liaison between the legislature and the defender program when requested to do so by the defender director. The legislature is usually responsible for funding the program and its members may feel that this support entitles it to give considerable input (perhaps amounting to control) into the daily functioning of the program. This behavior should be avoided, as the legislature cannot help but represent interests which are seldom in accord with the interests of the eligible client. This is not to say that the legislature should not be concerned with the de-

[35] National Defender Project Staff, *The Philadelphia Defender Program*, 26 NLADA BRIEFCASE 118 (1968).

[36] National Legal Aid and Defender Association, P. Hughes, B. Bowman, J. Emery, T. Gottfried, J. Gramenos, R.A. Green, J. Shullenberger, M. Sowell, S. Van Ness, F. Wright and V. Ziccardi, *Evaluation of the Massachusetts Defenders Committee* 120 (1972).

[37] National Legal Aid and Defender Association, S. Portman, H. Paik, J. Gramenos and L. Wenzell, *Evaluation of the Office of Public Defender in Monroe County, N.Y.* 29 (1973).

fender program; rather the legislature should not interfere with the day-to-day operations of the program. To this end the Commission ought to solicit, receive, and consider whatever suggestions the legislature wishes to have considered. Nor should this be interpreted as a suggestion that the defender not have direct access to the legislature; rather he should have the assistance and support of the Commission whenever he exercises the prerogative to do so.

Hopefully, such a situation would also allow the defender director and his staff to operate free from direct political pressures. The defender director and his staff should be concerned primarily with providing competent defense services and not with the politics of the jurisdiction. In the model suggested, deputy directors and staff attorneys would be able to concentrate on legal work while the defender director, assisted by the Commission, would focus on community concerns, including those of the legislature, when appropriate.

4. *Administration of Commission.*

a. *Appointment of officers.* The Commission should be presided over by a chairperson elected by a majority vote of its members. Other officers such as a secretary and treasurer should be similarly elected as the need arises. On some defender boards, only commission members are eligible to become officers. Most articles of incorporation set the officers' terms of office at one year or until their replacements assume office.

The chairperson should run board meetings and be in close contact with the defender director to ensure a constant stream of communication between the Commission and the defender office. In addition, the secretary should keep minutes of board meetings and notify members of the time and place of such meetings. Finally, the treasurer should be responsible for assisting in the preparation of the organization's budget, reviewing the defender director's periodic financial reports, and watching for opportunities to obtain additional outside funds from governmental or institutional sources.

b. *Commission meetings.* The entire Commission should meet on a regular basis. Special meetings may be called by the chairperson upon his own motion or upon the request of the defender director or a specified percentage of board members. All commissioners and the defender director should receive written notice of the time and place of all meetings, including the business to be discussed at the meeting within a reasonable time prior to commencement.

A majority of the Commission's members present (e.g., 5 of 9) should constitute a quorum and any resolution or motion should be passed by a majority of those present. However, the selection of the defender director is of such significance that it should require the approval of two-thirds of the Commission (so that if only six members attend the Commission meeting, all six must concur in order to select a director.) Moreover, there should be no voting by proxy.

The Commission should be subject to the State Administrative Procedures Act which provides a means of challenging agency actions and offers guidelines for the conduct of hearings. Furthermore, where the apparent violation of constitutional rights is at stake judicial review of Commission activity should be possible.

D. Local Advisory Committees

The concept of local advisory committees is designed primarily to provide local input to the defender director in a state or multi-office defender system. The director of a large system may tend to be ill-informed about problems that arise in the day-to-day operations of its member offices; local bodies contribute to the defender director's ability to respond to such problems as they arise. The need for such committees varies depending upon the size of the jurisdiction, the diversity of the population, and the desire of localities for input. Thus, the advisory committee may be considered an optional feature.

Another situation where an advisory committee would be of value is in a jurisdiction which has not established an official board or Defender Commission to provide input to the defender office on a regular basis. Where no official body has been established, a citizens' advisory group becomes more essential.

1. *Functioning of local advisory committees.* Local advisory committees would service designated geographical areas such as judicial districts, counties, cities, or neighborhoods. Their duties might include the following:

a. Provide a political buffer for the defender office.

b. Interpret the work of the office to the community.

c. Serve as a sounding board and critic on issues concerning the operation of the program.

d. Sponsor and carry out, in cooperation with the office, programs that inform people of their legal rights.

e. Articulate community concern about the local program and its relationship to the main office and generally communicate the community's needs to the defender offices.

f. Assist in ascertaining the scope of the need for legal assistance in the community.

g. Support the defender director in presentations before budgetary authorities.

h. Assist in coordination between the defender office and attorneys who participate in assigned counsel panels.

2. *Composition.* The composition of an advisory committee would vary depending upon such factors as the existence of a regular board or Defender Commission, its desired functions, the size of the jurisdiction, the groups which desire to provide input, and whether it is designed to provide input from a large area or an ethnic neighborhood. Some examples of existing boards may facilitate an understanding of the factors to be considered.

The Maryland defender statute[38] provides that, in addition to the board of trustees which appoints and advises the defender director, each judicial district has a district advisory board which observes the operation of the district office and provides advice to both the district office and the defender director. The members of the advisory boards must be residents of their district since the purpose of these boards is to give the localities a voice in the functioning of their local offices.

The Criminal Defense Consortium of Cook County, Inc.[39] a defender system composed of six neighborhood offices in and around Chicago, Illinois, has a somewhat different purpose for its advisory committees. Like Maryland, the defender director is appointed by a board. However, inasmuch as the program serves six low income neighborhoods, neighborhood community councils have been established to enable client community groups, who are not necessarily represented on the formal board, to have a means of communication with the offices that serve them. Thus, each neighborhood is represented by a separate community council reflecting the groups which are active in that community. These councils are composed primarily of lay persons while Maryland's district advisory boards are primarily composed of lawyers.

[38] Md. Ann. Code art. 27A, §§ 3, 9, 10 (1976).

[39] For additional information, see Appendix A.

E. Additional Considerations Peculiar to Private Agencies

In some states, private defender agencies contract with governmental bodies to provide defense services for the jurisdiction. California, Georgia, Hawaii, Kentucky, New York and Texas provide the option of contracting out by statute;[40] Ohio, Washington State and Wisconsin have permitted the use of such contracts without statutory authorization. The existence of non-profit corporations supplying defense services is widespread and includes such metropolitan jurisdictions as New York City, Philadelphia, Detroit, Milwaukee, Seattle and Portland.

The most attractive feature of the private defender agency is its assurance of defender independence. In concept, at least, the corporation has its own Board of Directors and thus defender personnel are presumably responsible only to the corporation and not subject to outside political pressures. The Defender Committee of the National Legal Aid and Defender Association has argued:

> This [the non-profit corporation] may be the best method of assuring the independence of the defender operation, continuity and defender leadership through changes in political control of the state, and entirely free the defender from political considerations.

Similarly, the American Bar Association standards stress the independence gained from selecting the defender director by a governing board as "one of the most advantageous features of private defender systems."

On the other hand, the private agency which operates on a contract basis may suffer from a lack of stability due to uncertainties regarding renewal of its contract. In many cases, this reliance can be as detrimental to the independence of a private program as can political pressures upon a public defender program. As a result, the National Study Commission chose not to take a position favoring either the public or private model, but instead concentrated on the features that should be incorporated in each to ensure maximum effectiveness.

[40] Cal. Gov. Code § 27713.5 (Supp. 1977); Ga. Code Ann. §§ 27-3203, 27-3205 (1972), *as amended,* (Supp. 1976); Hawaii Stat. § 722-10 (Supp. 1974); Ky. Rev. Stat. § 31.160(b) (Supp. 1974); N.Y. County Law § 722 (McKinney 1972), *as amended,* (Supp. 1976); Tex. Civil Stat. art. 2372p-1 (1971), *as amended,* (Supp. 1976).

The following section discusses means of ensuring the stability of a private defender system which contracts with a state or county. These considerations are apart from those discussed earlier in this chapter inasmuch as criteria relating to the composition and administration of the board or Commission, its duties such as selecting the defender director, and the qualifications and expectations of the defender director. remain constant regardless of the type of defender system adopted.

1. *Selection of the agency: the question of competitive bidding.* Jurisdictions attempting to choose the appropriate agency to render defense services should not employ competitive bidding as a means of selection. The purpose of requiring competitive bidding for governmental contracts is to ensure the lowest cost to the taxpayers. However, in the area of defense services, the emphasis on cost has obfuscated the need to provide quality services. An adequate factual and legal case preparation requires scientific investigation capability, a law library and sufficient personnel as bare essentials for rendering effective assistance of counsel. Because they are viewed as too costly, such services may become expendable as a result of competitive bidding.

A California case, *Phillips v. Seely*,[41] considered whether competitive bidding for defense services contracts ought to be required of the funding source as a matter of public policy. In that case, the county board had entered into a contract with a private attorney after informal negotiations without first contacting other attorneys. The court held that competitive bidding was not required, explaining:

> Plaintiff seeks to bring the agreement to render legal services to indigent persons within the purview of public works contracts. They cite no authority for such position, and our research fails to disclose any. Here the service to be rendered at public expense was professional in nature. Since the Board has responsibility both to the public and to the indigent person in need of counsel, the Board is entitled to rely upon its own knowledge and judgment as to the reputation of counsel in the county in order to equate the experience, reputation and skill of counsel with the amount of funds to be allocated to defense of indigent cases, and thus contribute in cooperation with the court to the ultimate goal that indigent persons be adequately represented by adequate counsel.

[41] 43 Cal. App. 3d 104, 117 Cal. Rptr. 863 (1974).

The professional nature of the services to be rendered appears to have been the decisive factor in the California court's decision.

Peter Drucker, in his well-known treatise on management,[42] evaluated the use of competition in service institutions such as those involved with the administration of justice. He explained that although competition yields quality products for most businesses, it is inappropriate for service institutions. Unlike business organizations, defender offices offer a "product" which is not susceptible to product specifications or consumer testing. Defenders provide representation that must be tailored to each individual case. As a substitute for bidding, Drucker urged outside evaluations.

The use of competitive bidding seems a convenient way for a jurisdiction to "legitimize" the underfunding of indigent defense systems. Competitive bidding for the lowest price tends to produce the least amount of service, according to Drucker. The agency will be forced to skimp on important services which will seriously diminish the quality of representation afforded. It will neglect to file certain pre- and post-trial motions and even waive certain preliminary hearings in the name of cost effectiveness. Certain scientific tests to discover exculpating evidence or dispute prosecutorial evidence will be foregone because of the unavailability of funds. Moreover, expert witnesses and investigators will be deemed expendable in cases where their services are not absolutely essential. Generally, the agency will simply not be staffed with an adequate force of legal and non-legal talent necessary to provide effective representation. As a result, clients will be pressured into pleading guilty in more cases rather than exercise their right to trial. A defender agency of this quality is unacceptable and should be prevented from materializing.

To evaluate a proposed services contract, the concept of effective assistance of counsel can be relied upon as a minimal standard of quality. The District of Columbia Circuit in *United States v. DeCoster* outlined certain duties that should be performed by all defense attorneys.[43] For example, counsel's duty to confer with his client "without delay" requires the development of early representation programs in the defender office. Pre-trial

[42] P. Drucker, MANAGEMENT: TASKS, RESPONSIBILITIES, PRACTICES 164 (1974).

[43] See the guidelines listed in *U.S. v. DeCoster*, 487 F.2d 1197, 1203-4 (D.C. Cir. 1973).

motions to release the defendant on bail, secure psychiatric examinations or suppress evidence are viewed as indispensable functions of all attorneys on the defender staff. Defender offices must have sufficient funds to provide such avenues of defense. Moreover, attorneys must conduct investigations sufficient to raise "all available defenses." This means interviewing all witnesses involved, attempting to discover prosecutorial evidence and completing adequate legal research. This also suggests that defenders have access to scientific investigation techniques, the funds to hire expert testimony and the use of a law library.

The defense plans proposed by private corporations must at a minimum comply with the *DeCoster* standards. But jurisdictions should look beyond these bare minimum standards in assessing whether a contractor would provide high quality services.

2. *Nature of contract.* The agreement between the private agency which has been selected and the funding source is commonly reduced to a written contract. These are usually one-year contracts that articulate the defense services expected of the agency and the compensation to be provided by the hiring jurisdiction.

A general opening statement concerning the quality of services to be provided might prove useful. The contract between King County, Washington and the Defender Association declares:

> Services rendered under this contract will be of the same high quality as the client would expect from private counsel if he had the funds to hire one.[44]

The same contract further elaborates upon the scope of services, that is, the types of cases where representation will be provided. It states that the Defender Association will furnish "immediate legal assistance to all eligible persons" including representation during investigation stages, at police lineups, interrogations and physical examinations; hearings for pre-trial relase, revocation or granting of probation and actions taken on deferred sentences; trial proceedings and sentencing; and appellate review.[45]

Furthermore, the projected number of cases or units to be handled by the defender agency should also be specified. The contract between Multnomah County, Oregon and the Metropolitan Public Defender Service states that the defender will provide representation in the following number of cases: 1,600 felony cases; 800 misdemeanor cases; and up to 1,000 civil commitment cases. Furthermore, the services must be evenly distributed over the course of the contract period, assuming the cases are available. The contract between Washington County, Oregon and the defender office offers a scheme which provides a more precise basis for calculating the defender office workload. Under this contract the defender is required to provide services for 1,200 "units" during the contract period. A unit is defined by estimating the amount of work needed to handle various types of cases, so that some cases are assigned more than one unit.

The procedures to be pursued in the event that the defender agency is required to provide representation in more cases than anticipated should also be articulated in the contract. The King County, Washington contract uses this terminology:

> In the event that the felony caseload increases or in the event that the Administrator assigns more felony cases to the Defender Association than presently anticipated, and the increase is more than a temporary fluctuation, the Defender Association is authorized to make and submit for approval and payment of additional expenditures as required for any budgeted items . . .

It is important for the agency to have the power of readjustment should the increase of cases occur. However, while the King County contract's language is a step in the right direction, the requirement that the defender office must submit a statement for approval to the county board in the event of a caseload increase is unwieldy and creates uncertainty on the part of the defender director. Proper planning should provide for a formula which is built into the contract. Since the defender office has no control over the size of the office caseload there should be no requirement of ratification by the funding authority if the quality of services is to be maintained. The formula should be based upon the cost per case or per unit which is reflected elsewhere in the contract.

The majority of contracts for private agencies which perform defender services are only a year in length. While these contracts could be made to

[44] Contract between King County, Washington and the Defender Association, Art. II, § 206 (1974).

[45] For additional information on the King County-Defender Association contract, see Appendix A.

contain a clause for automatic extension, there is some difficulty in attempting to bind a governmental unit in the event that there is a change in the next election year. Thus, one county board could enter into a long-term contract, but the county board which succeeded it might repudiate the contract.

Some of the shortcomings of a contract situation were highlighted in a Des Moines, Iowa civil program. Beginning in 1967 the Legal Aid Society in Des Moines was funded by the Office of Economic Opportunity, and although the program was controversial from its inception, its funds were secure while the OEO program lasted because of the provisions of federal law that prevented federally funded programs from being defunded except for cause.[48] In 1969, on the other hand, the Legal Aid Society was funded to provide defender services in the Model Cities area under a grant from the City of Des Moines. There was no federal statutory protection built into the contract that guaranteed funding beyond the contract period which was one year. Every indication was made to the program that funds would be available for a five year period. Experienced defense lawyers were employed and additional office space was provided for by a multiple year lease. After a year and one-half's time the program had raised many controversial issues that caused several city council members in seeking election to run on a promise that they would eliminate the Legal Aid Society from their Model Cities program. They were elected and they fulfilled their promise; the program was terminated.

The defender agency must be assured of its continued funding in order to function properly. This is necessary to attract and retain highly qualified attorneys and non-legal staff. It is a prerequisite for leasing office space and equipment and developing a long-range budget. It is essential for the organization to maintain overall continuity. Without guaranteed funding, the defender cannot operate with sufficient independence. The thought that making too many waves may ultimately undermine the agency's existence will deprive clients of the most effective representation possible.

Consequently, it is essential to long-range planning and effective service that where a defender agency is established pursuant to contract, provision be made, either by law or by contract, for the continuation of the defender service beyond the contract period. This could be accomplished by means of a clause which makes renewal of the contract automatic if the contracting agency has complied with its obligations during the past year. The only item requiring renegotiation is the precise amount of the budget. While the formula for computing the budget should remain the same, an annual renegotiation is necessary to take account of changes in the cost of living, fluctuations in criminal caseload, replacement of equipment and one-time capital expenditures.

F. Conclusion

The defender system envisioned in this chaper is a viable program which is assured of continued existence, is able to function free from inhibiting political influences in its zealous representation of clients, and is headed by a director having the greatest possible competence in criminal defense work and administration. These goals are facilitated by utilizing a Defender Commission or independent board method of selection and by ensuring that the continued existence of the agency is provided for by law or contract.

These goals are in no way limited, however, to defender systems. Mixed systems utilizing assigned counsel must be equally circumspect in ensuring that lawyers representing eligible clients are free from influences which might lead them to breach their professional responsibilities towards their clients. For this reason the next chapter of this manual addresses assigned counsel program boards as well as the overall structure of mixed systems.

[48] *See* 45 C.F.R. § 1067 (1974).

CHAPTER V. PROCEDURES FOR ESTABLISHING MIXED SYSTEMS AND ASSIGNED COUNSEL COMPONENTS

A. Introduction

The National Defender Survey published in 1973 revealed that the use of assigned counsel was widespread in the United States. Specifically, it reported that 8% of all metropolitan areas (population over 500,000), 47% of urban areas (population ranging from 50,001-500,000) and 80% of rural areas (population under 50,000) employed the assigned counsel approach.[1] As the study revealed, in a majority of jurisdictions, the local judge appoints counsel on a random and unsystematic basis. Attorneys are often selected from lists personally compiled by the judge or furnished by the bar association or from among attorneys who happen to be present in the courtroom when the need for appointment arises. The attorneys who receive appointments are frequently inexperienced in the practice of criminal law. Such a method of case assignment is commonly called an *"ad hoc,"* or random assignment, approach.

Every nationally recognized body that has studied the *ad hoc* approach to assigning counsel has flatly rejected it. President Johnson's Commission on Law Enforcement and Administration of Justice, which was chaired by Attorney General Katzenbach, recommended that any jurisdiction which had not yet done so should move away from random assignment of defense counsel by judges. This view has been reaffirmed by the National Study Commission on Defense Services, the American Bar Association, the National Advisory Commission on Criminal Justice Standards and Goals, the National Legal Aid and Defender Association, and the drafters of the Federal Criminal Justice Act.

The *ad hoc* approach has a number of serious deficiencies. Perhaps the greatest drawback is the frequent unavailability of qualified criminal defense attorneys to accept appointments. This has often resulted in the appointment of lawyers from other specialties such as patent law who are incapable of providing a competent criminal defense. In many cases, particularly in rural areas, the inability of judges to readily identify and contact assigned counsel has resulted in waivers of counsel. Defendants may be pressured into pleading guilty without the benefit of counsel rather than languish in jail prior to trial while the court attempts to contact a lawyer. In less populous areas where few lawyers reside, this is sometimes referred to as the "myth" of assigned counsel.

In addition, counsel's inability to enter the case until judicial appointment prevents early representation which is an indispensable component of an effective defense system. *Ad hoc* plans rarely include any provisions for the initial training or the continuing education and development of a skilled and vigorous defense bar. This causes inefficiencies in the criminal justice system and court delays, as lawyers lacking criminal law expertise must spend more time in preparing their cases or else produce an inadequate defense. Moreover, funds for investigative and other vital support services are traditionally absent from this approach, thereby crippling the effort to provide a complete defense.

The *ad hoc* approach offers an inequitable method of case assignments which further undermines the quality of defense services offered. Attorneys commonly experience, or at least suspect, favoritism in the judicial selection of counsel. In those jurisdictions where adequate compensation of assigned counsel exists, appointments may be determined according to patronage; where compensation is inadequate, the judge can choose to burden certain attorneys with the majority of case assignments.[2] The inequities of

[1] National Legal Aid and Defender Association, L. Benner and B. Lynch-Neary, THE OTHER FACE OF JUSTICE: A REPORT OF THE NATIONAL DEFENDER SURVEY 38 (1973) (hereafter referred to as THE OTHER FACE OF JUSTICE).

[2] One study in Kentucky revealed that some attorneys received only one appointment per year while others received as many as twenty appointments in one year. Bird, *The Representation of Indigent Criminal Defendants in Kentucky*, 53 KY. L. J. 508, 511-514 (1965).

judicial appointment erode the attorney's ability to perform independently of judicial influence. Attorneys who covet appointments may be tempted to dispose of their cases expeditiously to please the court, although this may be contrary to the best interests of their clients. Those attorneys who do not receive preferential treatment grow resentful and likewise become disinterested in performing adequately. This problem is compounded where judges review vouchers for counsel fees.

The client's perspective is also important in assessing a defense system. Clients perceive an apparent conflict of interest where the appointing judge is also the trier of fact.

The inefficiency of the *ad hoc* approach is also reflected in an inability to collect and analyze data essential to the evaluation of and planning for the provision of defense services. For example, data concerning the amount and types of cases handled and their resulting dispositions, the availability of attorneys capable of providing services and the overall cost effectiveness of the plan is not readily ascertainable. In addition, the *ad hoc* approach offers an inefficient utilization of available attorneys, often resulting in an overlapping of case assignments.

Finally, the *ad hoc* process hampers the development of community interest in the improvement of defense services. Since there is no central organization responsible for overseeing the provision of services, interested community factions are without a means of focusing their attention. Their support or potential support of the defense cause will likely never materialize. Moreover, community movements dedicated to the expansion and improvement of defense services are without the necessary leadership under a decentralized plan. In sum, the *ad hoc* approach offers no hope to the future growth and development of defense systems which are capable of providing effective representation in an efficient manner.

The rejection of the *ad hoc* approach is not meant to suggest that the private bar should be excluded from participation in an indigent defense system. The National Advisory Commission pointed out that the involvement of the private bar draws attention to needed reforms and develops a broad-based support for the overall improvement of the system. Furthermore, the private bar can inject fresh ideas into the existing criminal process which are not apparent to those who are involved in the process daily. Judge Bazelon of the Federal Circuit Court of Appeals in the District of Columbia has pointed out that "[f]requently those whose daily task is to administer criminal justice become accustomed to things as they are and overlook shortcomings which are obvious to an outsider.[3] Indeed, several landmark decisions in criminal law are the product of new ideas presented by the private bar.[4] Furthermore, with the arrival of *Argersinger v. Hamlin*, the private bar is needed now more than ever to fulfill the increased manpower demands exacted upon the defense system by an expanding caseload. Indeed, the participation of the private bar is so invaluable that the American Bar Association standards declared that "[a]n almost indispensable condition to fundamental improvement of American criminal justice is the active and knowledgeable support of the bar as a whole."

The question, then, is not whether but *how* to incorporate the services of the private bar into a defense system without falling subject to the pitfalls of the *ad hoc* approach. The solution lies in systematizing the private bar's participation by implementing a defender-assigned counsel mixed system.

B. Mixed Systems

A growing interest in the implementation of a mixed defender and assigned counsel system has recently developed. Traditionally, in jurisdictions employing defender systems, the private bar has been utilized as merely an adjunct to assume conflict of interest and other cases. The defender office merely co-existed with an *ad hoc* assigned counsel method of appointment without any integration between the two components. The mixed system, on the other hand, attempts to institute an organized and coordinated blend of the defender and the private bar, contemplating a substantial participation by each component.[5] In order for such a system to function effectively, the assigned counsel administrator, whether this person is the defender director or an independent administrator, must maintain full authority over compiling the list of panel members and assigning individual cases to the lawyers.

The development of a mixed system has gained approval in the recommendations of national policy-making bodies, legislative enactments on the state

[3] *United States v. Thompson*, 361 F.Supp. 879, 884, n. 12 (D.D.C. 1973).

[4] Pye, *The Administration of Criminal Justice*, 66 COLUM. L. R. 286 (1966).

[5] *See also*, the Glossary of Terms following this chapter.

and federal levels, and in various studies of defense systems.[6] The coordination of the services of the defender organization and the assigned counsel system can serve to improve the performance of each component. The private bar could utilize the support services and training programs existing in the defender office. Defenders can be a valuable resource available to private practitioners seeking advice on perplexing problems of criminal defense. Similarly, the private bar can offer the defender office special expertise in certain cases, support in the community, and fresh approaches and insights from those not inured to procedures which may be in need of revision.

In designing the method of administering a mixed system, two major inquiries arise. The first concerns the types of administrative structures worthy of implementation. The second relates to the allocation of case assignments between the defender and assigned counsel systems.

1. *Acceptable models for the administrative structure of mixed systems.* There are two acceptable alternative structures available to a jurisdiction implementing a mixed system. One possibility is having the defender director administer the assigned counsel component, thereby assuming whatever functions the administrator of an assigned counsel program would perform. Under this design, the budgets of both defense components would be combined. The alternative design maintains the defender and assigned counsel components as separate, independent entities. Under either model, the administrator must be independent of the court system. The term "administrator" as used in this chapter may refer to either the defender who is administering the entire mixed system or the administrator of the assigned counsel component of a mixed system. Mixed system structural models are depicted in Diagram F below.

a. *The defender-administered mixed system.* A mixed system administered by the defender director is designed to offer centralization in structure and operation. The defender director is charged with managing the defender office, including the development of operational policy, the selection and supervision of the defender staff and the performance of managerial tasks. Furthermore, the defender director is also the assigned counsel administrator. As administrator, the defender, in cooperation with the private bar and with the assistance of the Defender Commission, would bear the primary responsibility for the establishment, maintenance and training of an attorney panel as well as for all other administrative and support functions of the assigned counsel component.

The Federal Defender Program (FDP) in the Northern District of Illinois is an example of the defender-administered mixed system. The program was developed pursuant to the mandate of the Criminal Justice Act which gives jurisdictions the option to develop a mixed system as their "plan for furnishing representation" to eligible criminal defendants.[7] The FDP is administered by the Executive Director who is responsible for the operation of the defender office comprised of seven attorneys and the recruitment and coordination of an eighty-member assigned counsel panel. The Director has instituted a "duty day" system of case assignment which distributes appointments between the defender office and the panel members on a rotating basis. Each month, the Director provides a list to the judges and other concerned agencies which indicates for each court day the name of either a panel attorney or FDP itself. The designated attorney is responsible for all appointments made on his "duty day." This appears to be an equitable case appointment process. Furthermore, because it ensures ready contact between the attorney and client, the program also enables the early representation of defendants. Moreover, each attorney (defender or panel) is required to provide continuous representation to their clients in all matters concerning the present case or subsequently-initiated cases. Finally, both defender staff and panel attorneys share the FDP library and a detailed motion and brief bank, participate in training seminars and exchange information and advice concerning pending cases. In these and other ways, the Federal Defender Program provides effective representation to defendants in its jurisdiction.[8]

[6] Washington State Bar Association, *Methods for Providing Representation for Indigent Criminally Accused* 8 (1975) (mixed system recommended as best system for most Washington counties); LaFrance, *Criminal Defense System for the Poor*, 50 NOTRE DAME L. 41, 61-62 (1974); Cappalletti and Gordley, *Legal Aid. Modern Themes and Variations*, 24 STAN. L. REV. 347, 377, (1972); *Report of the Conference on Legal Manpower Needs of Criminal Law*, 41 F.R.D. 389, 408-409 (1966).

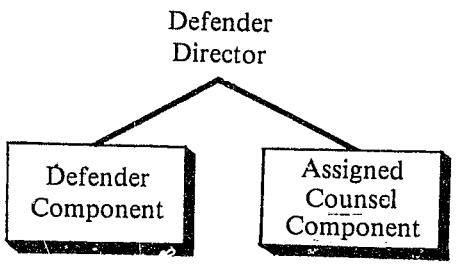
[7] 18 U.S.C. § 3006A(h)(2)(B) (1964) *as amended*, (1970).

[8] For the listing of a contact person regarding FDP, see Appendix A. The federal defender programs in the Northern District of California (San Francisco) and the Eastern District of Michigan (Detroit) are presently moving towards the adoption of a defender-administered mixed system resembling the FDP model.

Diagram F.

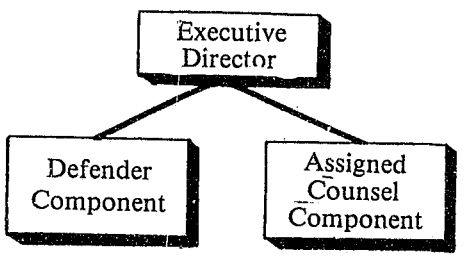
MIXED SYSTEM STRUCTURAL MODELS

(1) Defender-Administered Alternative



(2) Independently-Administered Dual System Alternative

(3) Super-Structure Proposal



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1 OF 2

The state legislatures which have considered the administrative relationship between the defender and assigned counsel have generally opted for the defender-administered mixed system. The Maryland statute, for example, offers a valuable model for the development of such a system. The district (local) public defenders compile and maintain a list of private attorneys who are categorized according to ability and experience pursuant to standards issued by the (state) Public Defender. The district defender assigns panel attorneys to cases in a manner designed to maximize private bar participation in the defense system. The Public Defender compensates the panel attorneys for services performed and expenses incurred according to fee schedules established by the defender and from funds derived from the defender's budget. In addition, the Public Defender is authorized to provide staff and technical assistance to panel attorneys. Only in cases involving conflicts or a refusal by the defender office to provide representation, does the statute reserve the right of the court to appoint counsel.[9]

Similarly, the New Jersey statute requires the State Public Defender to manage trial pools of lawyers. The defender is authorized to divide the workload between the defender staff and the trial pools in a fashion that promotes an efficient defense operation and stimulates the continual development and interest of the private attorneys.[10]

There are other systems currently in existence which resemble the defender-administered mixed system but cannot legitimately be classified as such. These systems are characterized by the presence of judicial involvement with the administration of the assigned counsel panel. This is such a significant deviation from the proposed defender-administered model that it alone serves to disqualify these programs as acceptable mixed system designs.

b. *Separate defender and assigned counsel entities (dual systems).* The separate defender and assigned counsel administrative structure preserves the independence of both entities. The defender office functions under the direction of the defender director, and the coordinated assigned counsel system is operated by the administrator. The defender director is given no authority over the administration of the panel component. However, under this model, both entities should seek to coordinate their efforts in such matters as training and support services to the extent that it is feasible as well as in the allocation of caseload. In order to facilitate coordination, it may be useful to establish an advisory committee similar to that recommended in Chapter IV.

This model can, in some respects, provide greater flexibility to localities within a centrally administered state defender system. In the event that a new state defender system is established in a state which has a high quality coordinated assigned counsel system operating in one county, the assigned counsel system may be maintained alongside the defender component in that county. Moreover, this model may provide one means of securing greater local autonomy in the context of a state defender system. It would be possible for each county in a given state to coordinate its own assigned counsel component locally while still relying upon the centrally administered state defender system to handle a large portion of the eligible cases.

(1) *Mixed system model variations.* There are few defense systems currently in existence which are examples of the mixed system model employing separate entities.

One example is the Nassau County, New York system. The county contracts with the Mineola Legal Aid Society to provide representation in the Mineola District Court. An assigned counsel plan developed pursuant to Article 18B of the New York statute handles felony and misdemeanor cases in the county's outlying courts only. The local bar association selects qualified applicants for the panel and an administrator assigns cases to attorneys from either the misdemeanor or the felony panel list. The so-called 18B assigned counsel plan handled about one-third of the county's legally indigent cases distributing them among some 550 active panel attorneys in 1972. Although the Nassau County system functions with two independent defense entities, each handling a substantial portion of the caseload, it may not fully be considered a "mixed system." This is because of the apparent geographical division in the allocation of cases and the lack of coordination of training or support services between the two components.

Another system which has some characteristics of the "dual system" model exists in Seattle-King County, Washington. That jurisdiction has a defender office as well as a coordinated assigned counsel sys-

[9] Md. Ann. Code art. 27A, § 6 (1976).

[10] N.J. Stat. Ann. §§ 2A:158A-7, 2A:158A-9 (1971), *as amended,* (Supp. 1976). *See* N.M. Stat. § 41-22A-8 (Supp. 1975) (Defender office must assist counsel not employed under Public Defender Act in appellate review or post-conviction proceedings).

tem supervised by an administrator. However, it differs from either of the recommended mixed system models in that the administrator performs some duties with respect to the defender office. The administrator screens all cases for eligibility and assigns cases on a three-to-one ratio to the defender office and to appointed counsel.[11] A somewhat similar system, whereby a single board and Executive Director would serve as a "super structure" over both components, was recommended in a report issued in the District of Columbia.[12] However, this approach was rejected by the National Study Commission on the grounds that it presented additional problems of its own while failing to offer any significant advantages over the other mixed system models.

The Snohomish County, Washington system is an example of a plan similar to that used in Seattle-King County in an area of smaller population. The administrator of the county's Department of Assigned Counsel screens defendants for eligibility and then assigns both felony and misdemeanor cases to either private attorneys from a previously compiled list or to the Snohomish County Public Defender. The defender agency is a fundamentally independent non-profit corporation presided over by a board of directors which contracts with the county to provide defender services. It is interesting to note that in 1974 the defender organization filed a grant application to create a defender-administered mixed system. The plan envisioned the assignment of 20% of all cases to the private bar with the Public Defender Office's Director retaining supervisory control over the cases for the purposes of evaluating the services provided by counsel and making recommendations as to compensation. However, the current system in operation in the jurisdiction resembles the Seattle-King County plan and remains a hybrid between the independently-administered design and the D.C. superstructure proposal.

(2) *Examples of the assigned counsel component.* Since there is little in the way of existing mixed systems having a separate coordinated assigned counsel compoent, some examples of coordinated assigned counsel programs in jurisdictions lacking any defender program are instructive. The following examples, while not exhaustive, illustrate the structure of such systems.

San Mateo County, California is an example of a pure coordinated assigned counsel system operating in a jurisdiction containing some 600,000 persons. In San Mateo County, defense services are furnished pursuant to a contract between the county bar association and the county government. Under the terms of the agreement, the bar association is paid for providing defense services in criminal, juvenile and mental commitment cases according to a designated formula based on the number and general category of cases. To meet its obligations, the association established the Private Defender Program headed by a full-time Administrator who has the overall responsibility for administering the program under the auspices of the Private Defender Committee of the bar association. The Administrator developed a carefully-screened panel of attorneys experienced in criminal defense and made provisions for the eventual induction of inexperienced practitioners onto the panel. Cases are assigned by the Administrator in accordance with a rotating schedule in a systematic and effective manner.

The panel attorneys are compensated for services rendered according to a fee schedule devised by the bar association. The bar further undertakes the responsibility of furnishing investigative and other support services necessary to provide effective representation, maintaining training and continuing education programs for panel members and assisting the courts in establishing and applying eligibility standards. Provision is also made for assigning attorneys at the earliest stages of the legal proceedings. Assigned counsel assume independent responsibility in the case except for whatever consulting and other outside assistance are requested.

The San Mateo program also has a permanent staff of three attorneys managed by the Administrator; the staff assume some casework where necessary. However, the small percentage and limited type of casework performed by the staff probably makes it no more than a support arm of the private bar. But, as the caseload of the jurisdiction increases, the Administrator may turn to the staff with greater frequency because of the growing difficulty of coordinating the attorney panel. If this does occur, the San Mateo program could become a mixed system resembling the defender-administered federal system in the Northern District of Illinois.[13]

[11] For additional information on the Seattle-King County mixed system, see Appendix A.

[12] Joint Committee of the Judicial Conference of the D.C. Circuit and the D.C. Bar (Unified), *Report on Criminal Defense Services in the District of Columbia* (1975).

[13] For additional information on the San Mateo County coordinated assigned counsel system, see Appendix A.

The Skagit County, Washington, plan demonstrates the use of a coordinated assigned counsel system in a rural, as opposed to an urban, setting as found in San Mateo County. The Skagit County plan provides services to an area of some 50,000 people. In Skagit, a contract exists between the county and a nonprofit corporation called Accused Indigent Defenders (A.I.D.). The corporation, in turn, contracts with attorneys practicing in the jurisdiction to perform defense services in criminal, juvenile and mental illness cases. The program is administered by a part-time non-attorney director who manages the small twenty-two member panel. The program employs a fair and systematic case assignment method, provides for early client contact by means of jail checks, offers the assistance of the administrator who is a skilled investigator upon request of counsel, and adequately compensates attorneys according to a fee schedule promulgated by the corporation's Board of Directors.[14]

The major shortcomings of the Skagit system, which may be typical of small systems with limited funds, are the lack of an attorney director to provide expertise in the handling of cases and to monitor the panel, and the absence of training and sufficient investigative resources and other supporting services. The larger San Mateo program, on the other hand, is able to fulfill these needs.

(3) *Feasibility of implementing a mixed system.* Whether a jurisdiction can implement a mixed system depends upon the feasibility of developing the assigned counsel component. An assigned counsel component cannot be developed without a sufficient number of practicing attorneys who display a willingness and interest in participating in such a program. An ample percentage of these attorneys must have attained the level of competence and experience necessary to adequately handle the serious and complex criminal cases.

The amount of the eligible caseload experienced by the jurisdiction is a significant factor in determining whether an assigned counsel component should be established. A sufficient number of cases is necessary to enable panel members to retain and improve their skills in criminal law, and to maintain an interest in continuing their participation in the program. Also, the caseload must be of sufficient quantity to justify the receipt of enough funds to adequately compensate the panel attorneys, maintain the administrative staff, and provide necessary support services.

c. *Comparison of mixed system models.*

(1) *Advantages of defender-administered model.* A mixed system that delegates the responsibility of administering the assigned counsel compoment to the defender director is characterized by certain distinct advantages over the other alternative design. A central administrator is able to develop a system that provides more effective representation in several respects. First, the unification of the two components serves to make timely appointment of counsel easier, especially where particular attorneys are needed to provide services in special cases. Furthermore, a unified training program is a more efficient means of ensuring that all attorneys operating in the system are kept apprised of recent case developments and are equally benefitted by teaching programs.

Perhaps more significantly, the attachment of the assigned counsel panel to the defender office increases the feasibility of a common pool of support services. Investigators, social workers, expert witnesses and crime lab resources can be shared by both system components. The National Defender Survey revealed that 62% of assigned counsel systems had no investigators at all and that 60% of the defenders surveyed had no full-time investigators on their staff.[15] A combined system with an increased volume of cases can justify the funding for full-time investigators who would be available to both defender and panel attorneys. Furthermore, in a large defender office one or more social workers may be employed full or part time and can be of valuable assistance to assigned counsel. Their services are especially useful in requests for pretrial release, in preparing sentencing recommendations, at probation and parole revocation hearings, and in juvenile and mental commitment proceedings. Moreover, the combined resources of both system components makes the availability of expert witnesses and the use of crime labs more of a possibility. In sum, a common pool of support services essential to the provision of an effective defense is made more feasible by a defender-administered mixed system

A defender-administered system not only promotes more effective representation, but also offers a more efficient and equitable means of directing the defense operation. Caseloads can be regulated more conveniently and appointments made more equitably

[14] For additional information on the Skagit County coordinated assigned counsel system, see Appendix A.

[15] THE OTHER FACE OF JUSTICE, p. 68.

and appropriately between the defender office and the panel attorneys. Also, a single fiscal procedure is more economical and the assigned counsel fee voucher process can be made more manageable. Furthermore, a unified record-keeping procedure is a more efficient means of gathering data useful to system evaluation and planning. A combined system can also respond faster to suggestions offered by the court and bar associations and presents a less confusing image to the public. A defender-administered system makes the overall review, monitoring and evaluation of the defense system more efficient and effective.

(2) *Advantages of independently-administered model and disadvantages of defender-administered model.* The adoption of the independently-administered mixed system design has the advantages of avoiding some of the problems inherent in the defender-administered program. The major problem plaguing the defender-administered system is devising a procedure by which to assign conflict of interest cases without violating ethical standards. Where the defender and assigned counsel components are integrated and under a single director, the defense system may be analogized to one large law firm. In situations where there are multiple defendants, it is unethical for two or more attorneys in the same law firm to represent co-defendants. Furthermore, in appeals or post-conviction cases involving a claim of incompetency against trial counsel, perhaps even a more serious conflicts problem arises where the trial and appellate counsel are members of the same program. If the analogy relating the mixed defense system to a law firm holds, the system is faced with a perplexing ethical dilemma if it attempts to allocate conflict cases between the defender and assigned counsel units. On the one hand, providing the necessary defense services may violate the prohibition against representing clients where there is a conflict of interest; on the other hand, refusing representation may leave an eligible defendant without any defense at all, which is inconsistent with the right to counsel guaranteed by the Sixth Amendment.

Although an independently-administered mixed system fully avoids the ethical dilemma because the defense components remain unintegrated, the defender-administered system may have some recourse in its own right. First, it could be argued that the extent of unity or integration of the two defense components is distinguishable from the private law firm. Since service on the panel is only incidental to the the principal interest of the members, which is the private practice of law, their involvement with the system is not such that it would make their interest and loyalty identical with that of the defender. Moreover, panel attorneys and defenders do operate out of different offices which presumably keep separate case files. In addition, a defender-administered system could dispense with conflicts cases involving co-defendants by assigning them completely to panel members. Panel attorneys seem sufficiently independent from each other to avoid conflicts problems, assuming separate support services are available. Indeed, an independently-administered mixed system itself would probably adopt a similar resolution of a conflicts dilemma in cases involving three or more co-defendants.

Defender-administered systems face a second problem not present in independently-administered programs. Defenders themselves are concerned that the defender director's power is so extensive that it may appear to the private bar that defenders are "taking over" the entire system. This could cause resentment on the part of private attorneys and the bar association to the detriment of the mixed system and defenders in general. Relations between the defenders and the private bar may be considerably more compatible if the private bar retains control over the assigned counsel system.

Defenders also are concerned with a third difficulty presented by the defender-administered system. Defenders recognize that their budgets are already strained by current caseloads. They fear that the funding source will not increase the budget sufficiently to accommodate a newly acquired assigned counsel caseload. If so, some defender-administered systems could be rendered incapable of providing effective representation to all defendants. Keeping the defender and assigned counsel independent and separate may prompt the funding source to allocate more total funds to the system as a whole. However, the argument cuts the other way as well. Compensating the assigned counsel out of the defender budget might result in strong support from the private bar for an increased single budget.

(3) *Disadvantages of independently-administered, dual system, model.* Although the independently-administered mixed system avoids the problems of the defender-administered design, it, of course, lacks the many advantages of that design. Moreover, the independently-administered program is beset with problems of its own. Two systems operating in the same jurisdiction may cause fragmen-

tation of defense services. There may be competition between the two systems to provide services at the lowest cost, thereby diluting the quality of representation afforded, in much the same way as competitive bidding damages a private defender system. Early representation may be difficult to achieve because of the initial uncertainty as to which system has jurisdiction over the case. Two administrators cannot allocate cases between the systems as effectively as a single administrator, so one system may receive too many cases, or a particular case requiring special expertise may be "lost" in the shufflle between systems. Furthermore, the administrative costs of running two systems may duplicate expenses in such areas as budget preparation, purchasing, record-keeping, monitoring staff performance and public relations, thereby increasing the overall cost to the taxpayer. Finally the competition between the two defense components might result in two weak systems rather than a strong unified defense program.

(4) *Neither model excluded.* In sum, there are advantages and disadvantages to both models discussed above. However, given the dearth of experience to date with mixed systems wherein both defense components are organized, either model is acceptable.

2. *How to determine the mix.*

a. *Percentages of cases distributed.* There is no precise formula that can be used to calculate what percentage of total caseload should be allocated to the defender and to the assigned counsel components. The distribution of caseload should vary according to the relative sizes, expertise and availability of the two defense components. These factors may be especially affected by the character of the community served—whether urban or rural—and by the local history of defense facilities in the jurisdiction attempting to implement a mixed system.

However, there is one overriding goal that should govern the case distribution process in every mixed system. As the National Advisory Commission proclaimed, the participation of the private bar must be "substantial" in order to maintain its involvement in the defense system. A "defender monopoly"[16] over the jurisdiction's eligible caseload may result in the diminution of the private bar's participation, and without an active panel of competent and dedicated private practioners no true mixed system could survive.

Most state legislatures have not attempted to preserve the substantial participation of the private bar in areas served by defender offices. They have instituted a catch-all provision in their statutes which permits the court to appoint an attorney other than the defender "for cause." Whether "cause" means merely conflict of interest or case overload in the defender office or whether it also constitutes the need to promote the private bar's involvement is not elucidated by the statutes. However, it seems that the requirement of cause is intended to limit the percentage of cases handled by the private bar in areas where defender offices exist. This sentiment is captured in Hawaii's statute which provides that if "conflicting interests exist, or if the public defender for any other reason is unable to act or if the interests of justice require, the court may appoint other counsel."[17] Similarly, the California statute states that in counties which have a public defender, private counsel is to be appointed only in those cases "in which the court finds that because of a conflict of interest or other reasons, the public defender has properly refused to represent the person . . ."[18] In interpreting the California statute, a state appellate court refused to compensate a private attorney who had been appointed by a lower court to render defense services, because, contrary to the statute, the defendant had previously refused the services of the defender office.[19] Other statutes in such states as Arizona and Tennessee appear to make the local defender the exclusive mode of representation,[20] and a Massachusetts case concluded that in non-capital cases, private attorneys should be appointed "sparingly."[21]

However, some jurisdictions have enacted legislation that promotes the substantial participation of the private bar. The clearest example of this is the District of Columbia statute which prohibits the de-

[16] S. Krantz, C. Smith, D. Rossman, P. Froyd and J. Hoffman, RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN 255 (1976).

[17] Haw. Rev. Stat. § 722-5 (Supp. 1974).

[18] Cal. Pen. Code § 987.2(a) (West. 1970), *as amended,* (Supp. 1977).

[19] *In re J.G.L.,* 43 Cal. App. 3d 447, 117 Cal. Rptr. 799 (1974).

[20] The Arizona statute, for example, reads: "In counties which have a public defender, the public defender shall represent all persons entitled to appointed counsel whenever he is authorizd by law and able in fact to do so." Ariz. R. Crim. P., Rule 6.5(b).

[21] *Abodeely v. County of Worchester,* 227 N.E. 2d 486 (1967).

fender office from providing representation in more than 60% of the jurisdiction's cases. The 40% figure for private bar representation is made feasible in the District of Columbia by virtue of its large population of lawyers. Other statutes employ more general terminology. The federal Criminal Justice Act requires that a "substantial portion" of the eligible cases be handled by private attorneys. Also, in Maryland, the district defenders are required to allocate cases to panel attorneys in such proportion as to effectuate the "maximum use of panel attorneys . . . insofar as practicable." Similarly, the New Jersey statute authorizes the defender to assign cases to pool attorneys in a manner designed to "stimulate the continual development of professional experience and interest in the administration of criminal justice." [22]

Although the private bar has commonly been excluded from substantial participation in the mixed system, the defender office was deprived on at least one notable occasion. In Detroit the local judges adopted the practice of assigning almost all of the eligible cases to court appointed attorneys. In order to increase the participation of the defender office, the Michigan Supreme Court issued an administrative order requiring the Detroit courts to assign a minimum of 25% of the eligible caseload to the Defenders' Association of Detroit.[23]

b. *Types of cases handled.* Each jurisdiction will have to arrive at the proper percentage of cases which should be allocated to the private bar and the defender office in order to assure their substantial participation in the mixed system. An interesting question arises concerning the types of cases which should comprise that percentage. Should a jurisdiction devise a plan which distributes only cases of a particular kind, however substantial the percentage, to one of the defense components?

A case allocation plan should not *a priori* preclude allocation of any specific type or types of cases from assignment to either component of a mixed system. The defender office has been excluded from providing representation in capital cases in some jurisdictions. The Florida statute explicitly reserves the court's right to assign capital cases to the private bar.[24] In Philadelphia, a capital case is routinely referred to the private bar even without statutory authorization.[25] This practice suggests that the defender is not competent to handle the difficult and important cases. However, it may be employed in some jurisdictions as a means of assuring that the private bar handles the more lucrative cases. Whatever the basis, such a scheme is degrading to the defender and tends to destroy his credibility with clients. It is disruptive of a mixed system which has as its goal ensuring that cases are allocated equitably and in a way that enables both components to gain expertise.

The private bar has also been allocated only certain types of cases in other jurisdictions. Typically, on both the federal and state levels, panel attorneys have received only those cases which present a conflict of interest or case overload to the defender office. In the Arizona federal defender program, the variety of cases distributed to the private bar was expanded to include cases involving informants, cases where protracted litigation is likely (e.g. land fraud) and cases where defendants are marginally eligible for the services of the defender office. To use the assigned counsel panel for only certain types of cases is contrary to the spirit of the mixed design. Such practice negates any real feelings of professional cooperation and parity between defenders and the panel attorneys. Private attorneys begin to view themselves not as part of a defense component, but rather as a supportive arm of the defender office. However, this is not to suggest that panel attorneys may never be needed to provide representation in certain types of cases. Rather, it emphasizes that the panel members should not be allocated *only* certain types of cases and be excluded from assignment in others.

"Substantial participation," then, acquires an expanded meaning. The percentage of cases allocated to each component should not be the only factor worthy of consideration. If one component is receiving assignments in only certain types of cases, then, regardless of the actual percentage of total caseload received, its participation is not substantial enough. Assuming the component is staffed with a sufficient number of able attorneys, such compo-

[22] D.C. Code § 2-2222(a) (1973); 18 U.S.C. § 3006A (a) 1964), *as amended,* (1970); Md. Ann. Code art. 27A, § 6(b) (1976); N.J. Stat. Ann. § 2A:158A-9 (1971).

[23] Michigan Supreme Court, Administrative Order (May 11, 1972).

[24] Fla. Stat. Ann. § 27.51(I) (West. 1974), *as amended* (Supp. 1977).

[25] Ziccardi and Wright, *Public Defender Representation in Pennsylvania* 24 (1974).

nent must be allocated additional cases to enable it to receive case assignments of more than one variety. This is necessary to assure the perpetuation of the mixed defense system.

c. *Development of the plan for case assignment.* A case assignment plan must allocate cases between the defender and assigned counsel components as well as among individual panel attorneys in an equitable and effective manner. Attorneys should receive balanced workloads and defendants should be afforded counsel capable of providing effective representation. To achieve that goal, an administrator should be delegated the responsibility of designing the operational and administrative controls necessary for the orderly disposition of cases. In particular, the administrator should select an assigned counsel panel, develop a rotating system of assignments with allowances for variance when necessary and consistently monitor the quality of representation provided by the system.

(1) *Establishing the attorney panel.*

(a) *Selection of panel members.* The first step in the establishment of the panel is a solicitation of all members of the practicing bar in the area to be served by the system.[26] In Racine County, Wisconsin, this was accomplished by direct questionnaires to bar members inquiring whether they wished to receive case assignments. A broad-based solicitation process not only avoids favoritism but, as one study revealed, leads to more effective representation.[27]

However, willingness to serve on the assigned counsel panel is not the only criterion for panel selection. Attorneys must demonstrate an ability to provide criminal defense work at a competent level. The words of Judge Halleck in *United States v. Chatman* are instructive in this regard:

> There are those who still maintain that the standard of 'adequacy' to represent a criminal defendant is admission to the bar. It is simply blinking at reality to suggest that every member of the bar is capable of providing effective representation in criminal cases.[28]

Jurisdictions have employed a variety of screening techniques in the selection of the attorney panel. For example, in New York County, the Committee on Criminal Courts of each of the two existing bar associations selects applicants for the Indigent Defendants' Legal Panels during regular meetings of the full committee.

However, the administrator seems most capable of fairly assessing the credentials of the attorney applicants. The governing board of the assigned counsel system should assist the administrator by submitting policy guidelines concerning standards applicable to attorney selection. The administrator may require applicants to submit detailed resumés with particular emphasis on criminal defense experience and appear for personal interviews with follow-up inquiries where appropriate.

Moreover, a detailed questionnaire similar to the one used by the Harris County, Texas, Indigent Program might be employed in the selection process. The questionnaire elicits from attorney applicants detailed information concerning their prior experience in criminal practice. Such information includes the following: the identity of the courts where appearances have been made; the types and number of motions filed; the extent of criminal trial work as lead counsel; the number of misdemeanors and felonies handled by plea bargaining; attendance at criminal law institutes; and the degree of prosecutive and indigent defense experience. The questionnaire also asks about the extent of the applicant's participation in legal organizations and state and local bar activities. Finally, the questionnaire inquires about the names of criminal lawyers and judges who would recommend the applicant for panel membership. It should be noted that although the opinion of judges concerning attorney competency should be invited and respected, the judiciary should not have a controlling voice in the selection of panel members, in order to preserve attorney independence.

The panel selection process should also make provision for attorneys who are not experienced in criminal defense but who are willing to develop their skills and be inducted on the panel upon completion of a training program. The "apprenticeship" program instituted by the San Mateo County, California assigned counsel administrator is worthy of special consideration. The inexperienced applicants are first required to observe the criminal process in various courts throughout the county. Subsequently, the applicants undergo practical training under the supervision of a regular panel member. The administrator

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[26] The underlying assumption made here and throughout this section is that the attorneys' fees paid by the jurisdiction are sufficiently adequate to make panel membership a desirable goal.

[27] Kittel, *Defense of the Poor: A Study in Public Parsimony and Private Poverty*, 45 IND. L. J. 90 (1969).

[28] *United States v. Chatman*, 42 U.S.L.W. 2593, 2594, 15 CrLR 2157, 2159 (D.C. Super. Ct., May 7, 1974).

determined that such training should generally include the following:

(a) A minimum of two arraignment calendar observations and one supervised direct handling of said calendar.

(b) Presence at a minimum of three initial interviews between client and supervising attorney, and conduct of one such interview under supervision.

(c) Assisting in a minimum of three misdemeanor matters, including the handling of one trial or other adversary hearing under supervision.

(d) Presence at a minimum of three separate negotiating conferences between the supervising attorneys and the district attorney.

(e) Assisting in a minimum of three felony matters at the municipal court level, including the handling of one preliminary hearing under supervision.

(f) If interested in juvenile or mental health matters, appropriate observation and assistance in such cases, as prescribed.

(g) Reasonably good attendance at training sessions, as announced.[29]

After completion of the program, the attorney becomes a panel member and is first assigned to light arraignment calendars and less severe misdemeanor cases.[30]

Inexperienced attorneys should not be condemned for errors resulting from unfamiliarity with local criminal law or procedures. Mistakes are a natural part of an attorney's learning process. However, it must be remembered that above all, defendants are entitled to the *effective* assistance of counsel as guaranteed by the Constitution in all cases, including those where inexperienced attorneys are involved.

(b) *Categorizing of attorney capabilities.* After the assigned counsel panel has been selected, the administrator should make an initial categorization of each attorney's competency and expertise. This might be based on such factors as criminal law experience as a private practitioner, public defender or former prosecutor; general reputation among judges, members of the bar and the community at large; and academic proficiency and past attendance at continuing education programs. Categorization is necessary ensure that cases which are of varied complexity are asssigned to attorneys capable of providing effective representation. The American Bar Association recommended that attorneys be classified into one of two groups: the first would be the "primary roster," composed of attorneys capable of assuming primary responsibility in a criminal case; the other group would consist of the remaining attorneys who would be assigned as co-counsel in order to gain the needed experience and familiarity with the criminal courts and procedures. The San Diego County, California defense system employs a more detailed categorization method. Court-appointed attorneys are divided into three groups: the first handles only misdemeanors; the second may provide representation in minor felonies; and the third is eligible to assume responsibility in homicides and cases involving other serious felonies. Furthermore, the administrator in some jurisdictions might also maintain a list of attorneys who have an expertise in a specialized area of criminal law which has appeared with increased frequency in recent cases in that jurisdiction. The categorization of attorneys should be continuously revised and updated to reflect changes in attorney experience and performance.

(2) *Assigning cases to panel members.*

(a) *General rotating procedure.*

(i) *Rotation between defense components.* There are two levels of rotation inherent in the mixed system. First, from the overall perspective, cases must be rotated between the defender organization and the assigned counsel system to effectuate the substantial participation of each component. In a defender-administered mixed system, the necessary coordination between the two components might be

[29] The federal defender program in the Southern District of California has the additional training requirement of the completion of an educational program in federal criminal law. However, Project 19 of the Wisconsin Council on Criminal Justice's 1973 Criminal Justice Improvement Plan suggested a less demanding apprenticeship program. It would allow attorneys to achieve panel certification upon assistance in only three criminal cases and three juvenile cases.

[30] A study of the New York 18-B attorney panels recommended a program designed to cultivate a continuing influx of highly competent young attorneys into the criminal field. A "public interest criminal law office" was proposed on an experimental basis. The office would be staffed by a corps of professional criminal lawyers who would train and advise private attorneys. It was anticipated that especially the younger attorneys practicing in New York city law firms who were interested in providing criminal defense would be attracted by such a program. This in turn would further the overall interest of the practicing bar in the criminal defense of eligible persons. Carter, *Report on the Legal Representation of the Indigent in Criminal Cases* 27-28 (1971).

achieved by implementing the "duty day" plan of the Illinois federal defender program which was described earlier in general terms. The defender develops an assignment schedule each month. The schedule is formulated first by determining which panel attorneys are eligible for case assignment according to a rotating system. Then a specific number of these attorneys are designated for assignment according to the pre-determined percentage of mix between the two defense components. Next, the panel attorneys select their own convenient "duty days" and the other days are delegated to the defender staff. On his duty day, the designated attorney is present in the defender's office, available for immediate assignment.

Coordination between the two separate defense components in an independently-administered mixed system is more difficult. An advisory committee could be established to develop a scheme for the automatic allocation of cases between the components on a rotational basis. The committee might adopt either the duty day plan whereby attorneys regularly spend a given day accepting cases, or a plan similar to the one used in the federal defender program in the Southern District of California. This would require the advisory committee to prepare an alphabetical schedule every six months interspersing panel attorneys with defenders in a pre-determined ratio. Attorneys would simply be assigned sequentially according to the prepared schedule.

(ii) *Rotation among panel attorneys.* The second level of rotation in the mixed system is among the panel attorneys of the assigned counsel unit. There are two main objectives which the administrator seeks to attain in developing a rotating schedule of attorneys. First, the more serious and complex cases should be assigned to attorneys with a sufficient level of experience and competence to afford proper representation.[31] Second, apprentice members of the panel should only be assigned cases which are within their capabilities; however, they should be given the opportunity to expand their experience gradually under supervision. In developing the schedule, the administrator should refer to the existing categorization of panel members which divides the attorneys according to skill and experience, consistent with these objectives. In effect, the administrator must coordinate two or more subpanels of attorneys in a rotation process that assures each attorney a fair share of appointments.

(b) *Varying the rotation.* Rotating attorneys from an established list is, in its simplest form, an uncomplicated process of case allocation. The attorney on the top of the list is first selected, then the next attorney on down until all attorneys have received appointments and then back to the beginning of the list, and so on. Where there are two defense components which must share assignments or where there is an increased number of panel attorneys, especially inexperienced attorneys, the rotating process becomes more complicated. But the real complexity of the process comes to light when the administrator must vary the normal rotation to accommodate special circumstances. The most common circumstance has already been mentioned, i.e., that when the complexity of the case surpasses the capability of the next attorney on the list, the administrator must vary the rotation to make an appropriate assignment. Other circumstances which are probably less apparent but which likewise bear on the system's ability to provide effective representation are discussed below.

(i) *Special circumstances involving both components.* One circumstance falling into this category is the appellate or post-conviction case where the issue raised is the incompetency of trial counsel. In an independently-administered mixed system, if the defender office provided the representation at trial, the case should be handled by the assigned counsel component when the appeal alleges incompetency of the trial attorney.[32] In a defender-administered system, the administrator faces an even more difficult ethical dilemma in such situations; this is because the panel attorney may not be considered sufficiently independent from the defender staff to handle the appeal without a conflict of interest. Of course, in any mixed or coordinated assigned counsel system, the same attorney who was trial counsel should not handle the appeal if the claim involves the incompetent performance of counsel on the trial level.

Another special circumstance peculiar to mixed systems is where a case should be assigned to one

[31] One study suggested that in difficult cases, rural communities should attempt to acquire the most capable attorney available, even if an attorney from a different county or town had to be appointed. South Dakota District II Planning and Advisory Commission on Criminal Justice, *The Defense Of Indigents In District II* 50 (1973).

[32] *See* Webster, *The Public Defender, the Sixth Amendment and the Code of Professional Responsibility: The Resolution of a Conflict of Interest* 12 AM. CRIM. L. REV. 739 (1975).

defense component for strategic purposes or as a matter of efficiency. For example, a case that appears to be one requiring a protracted trial might more appropriately be assigned to a defender staff lawyer who is employed full time rather than to a private practitioner.

Finally, in a mixed system, the defendant should be given the option of selecting either defense component for the initial appointment of counsel. A healthy competition between the defense units, each vying for the approval of the client community should lead, in the long run, to more effective services. One experiment in New Haven where defendants were allowed to choose between the defender and assigned counsel "operated to assure in large measure that experienced, effective counsel were most frequently chosen with a high degree of client satisfaction." [33] Moreover, a similar plan has been adopted on a regular basis in the New York City system.

(ii) *Special circumstances generally applicable to the assigned counsel component.* The second category of special circumstances are those which exist whether or not a mixed system is present. One such circumstance is where multiple defendants are involved. It would be a conflict of interest in most cases for one attorney to represent co-defendants.[34] Different panel attorneys would have to be assigned to the case in an effort to avoid the ethical problem. This would apply to both a defender-administered and an independently-administered mixed system; in the latter, one co-defendant could still be represented by the defender office. In multiple defendant cases, the initially-assigned attorney might select the defendant whom he desires to continue representing. The remaining co-defendant(s) would then be assigned by the administrator to other panel attorneys.

Another special circumstance is where a case requires the special expertise of counsel. For example, cases involving draft evasion, tax fraud or deportation probably can be handled effectively by only a few attorneys. The administrator should refer to his categorization of panel members (or defenders) in an effort to identify an attorney with the necessary expertise for assignment.

[33] LaFrance, *Criminal Defense Systems for the Poor,* 50 NOTRE DAME L. 41, 70 (1974).

[34] *E.g. People v. Chacon,* 69 Cal.2d 765, 73 Cal. Rptr. 10, 447 P.2d 106 (1068); *Holloway v. Arkansas,* 23 CrL 3001, (1978); *Annot.,* 34 A.L.R. 3d 470.

Furthermore, the regular appeal of a case may cause a special assignment. As recommended in Chapter III, an attorney other than trial counsel should handle routine appeals. A different panel member would have to be assigned either in the case where a panel attorney was trial counsel or where a defender was trial counsel and the defender office does not have a separate appellate division.

Finally, for administrative purposes, other special assignments might be undertaken. A consolidation of one case with other pending cases of the client might call for an adjustment of the rotation process. Also, an effort to pair a defendant with a particular attorney where a previous attorney-client relationship existed between them might be grounds for special assignment as well. In addition, quite often the services of an attorney may be required on short notice. A suspect may be in the process of being interrogated or placed in a lineup, or a witness testifying in a proceeding may be subject to self-incrimination and a request for counsel is made. The administrator might have to bypass the next attorney in rotation if he is unavailable and appoint another attorney from the panel (or even from the administrator's staff) who can render the services.

C. The Governing Structure of the Assigned Counsel Component in Dual Mixed Systems

1. *Governing Board.*

a. *Composition.* The composition of the governing board should closely resemble that of the Defender Commission. Board members should represent a diversity of factions with no single branch of government having a majority of votes; organizations concerned with the problems of the client community should be represented; a majority of the board should consist of practicing attorneys; and the board should not include judges or prosecutors. The board may consist of approximately nine to thirteen members, depending upon the size of the jurisdiction, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented. Moreover, like defender commissioners, board members should serve staggered terms, be reimbursed for expenses, and be subject to removal only for disinterested or incompetent service. These criteria apply to both private and public assigned counsel systems.

Two of the criteria bearing on the selection of

board membership are of particular significance—attorney domination and judicial and prosecutorial exclusion. With attorneys dominating the board, the compatibility between the board and the panel attorneys is enhanced. Moreover, attorneys on the board are more likely to have an understanding and appreciation of the needs of other lawyers and thereby develop more productive policies for the system. Also, attorneys can garner the support for the defense system from the local bar association of which they may be members. In the long run, attorney dominance will prove instrumental in developing a capable and productive governing board and an effective defense system.

On the other hand, judicial or prosecutorial membership on the board would prove counterproductive and even destructive. The very reason for creating an assigned counsel component was to avoid the pitfalls of the *ad hoc* approach to case assignment. Under that approach it was possible for judges to exercise their power over attorneys in a whimsical and discriminatory manner. Such semblances of the *ad hoc* design should be excluded from the assigned counsel system, and particularly from its governing board. In addition, prosecutors should have no place on the governing board, as their interests are generally contrary to the development of a strong and effective defense system.

Finally, there is one other aspect of board membership for the assigned counsel component. Panel attorneys should not simultaneously serve as board members. A conflict of interest, or at least the appearance of such, is too real, because of the possibility that the administrator may afford a panel attorney who is also a board member preferential treatment in the assignment of cases and the approval of fee vouchers.

b. *Role of the governing board.*

(1) *Comparison of governing board and Defender Commission roles.* Where the mixed system has an independent assigned counsel component, it, like the defender system, should have its own board or commission. However, compared to the Defender Commission, this board is likely to assume a more active role in the operation of the defense system. The differences between a defender system and an assigned counsel program are significant. The defender director will, in most cases, be in charge of a full-time staff and will have to make important day-to-day decisions in managing the defender office. Thus, the expectation of most defender directors will be the ability to operate the system with a minimum of intervention from the Defender Commission. In contrast, the assigned counsel program is generally a creature of the local bar association, since, in most instances, coordinated assigned counsel programs have been organized by a committee of the bar. The bar association, through its membership on the governing board of the assigned counsel program, will undoubtedly retain a lively interest in continued involvement in the operation of the system. Therefore, the major distinction between the Defender Commission and the governing board of an assigned counsel component is the more extensive involvement of the board in the operation of the defense system.

On the other hand, the governing board is in many ways similar to the Defender Commission. The board, like the Commission, selects the administrator, provides general policy input and garners public and legislative support for the defense system. Both bodies seek to ensure that the defense system is providing the most effective services possible under existing contraints yet refrain from interfering in the handling of indvidual cases.

(2) *Selection of the administrator.* The primary function of the board is the selection of the administrator. The entire board can either act as a selection committee for the appointment of the administrator or in the alternative, provide for a special selection committee. In any event, the administrator, who is the key individual in the operation of the assigned counsel plan, must be selected on the basis of merit and merit alone.

(a) *Qualifications of the administrator.* The board should specify the qualifications for the position of administrator and disseminate them to interested applicants. At a minimum, the administrator should be a qualified attorney licensed to practice in the jurisdiction where the assigned counsel system functions. Moreover, it is essential that the administrator also have extensive experience in the field of criminal defense. A knowledgeable criminal defense lawyer is the most qualified to properly categorize panel attorneys according to demonstrated skill and experience in criminal defense; to evaluate and critique the performances of panel attorneys both to assure that the system's standards are being fulfilled and to offer constructive suggestions, especially to neophyte attorneys; to vary the normal rotation process in light of special

circumstances which are recognizable only to the sensitive eye of the criminal defense specialist; to develop proper criminal defense training programs and make the necessary support services available; to properly evaluate the reasonableness of the panel attorney fee request in a particular criminal case; and to generally ensure the provision of effective criminal defense services.

Administrative ability is also an important qualification of an assigned counsel administrator. Especially in areas having a large volume of cases of which a substantial number are not handled by a defender system, the operation of the case assignment process requires extraordinary administrative skill. The administrator must not only adjust and readjust the normal rotating list to accommodate special circumstances, he must also coordinate a nonpermanent staff of private practitioners whose own case schedules are constantly changing. Moreover, administrative talents are essential to the efficient processing of attorney fee vouchers and the exercise of other fiscal responsibilities.

The ability to maintain proper relations with the various elements of the criminal justice system is yet another qualification of an administrator. The administrator must be able to work cooperatively with both prosecutors and judges while retaining an independence of attitude necessary to preserve the rendering of effective defense services. Further, the administrator must maintain proper relations with the private bar to perpetuate its interest and participation in the assigned counsel system. Finally, the administrator must work together with the defender organization to provide the necessary defense services for the jurisdiction.

(b) *Terms of employment.* The administrator should serve a term of office for a definite period of time, usually from three to six years, and be eligible for reappointment for successive terms. He should be subject to removal only upon a showing of good cause in a hearing before the governing board. Furthermore, the administrator's salary should be sufficient to attract and retain an individual of high caliber to meet the many demands of the position. In no event should the salary fall below that of the chief prosecutor in the jurisdiction served. Finally, the administrator and staff should be guaranteed the payment of reasonable expenses to allow participation in continuing education and bar association and defender association functions. These and related proposals should be adopted for reasons already articulated in the earlier discussion of the defender director's term of office and will not be repeated here.

(3) *Exercising fiscal and organizational control.*

(a) *Fiscal control.* The governing board has extensive fiscal duties in the functioning of the assigned counsel system. The board should be responsible, with the assistance of the administrator, for developing the program's budget and winning approval of it from the funding source. It must maintain contact with the funding source in order to adjust the budget from time to time in accordance with the nature and extent of services actually rendered by the system. Secondly, the board must establish a fee schedule for the payment of panel attorneys for services performed and expenses incurred. Such a schedule should be structured to adequately compensate attorneys for effort, skill and time properly expended for the defense of their clients. Finally, the payment of attorneys is ultimately the responsibility of the board as well. The board should delegate to the administrator the task of approving the vouchers up to maximum amounts allowed by the fee schedule. However, all requests for compensation beyond the maximum and all appeals of the administrator's decision on the payment of vouchers fall under the power of the board. The board should, in most situations, appoint a panel of attorneys to perform this function.[35]

(b) *Organizational control.* Like the Defender Commission, the governing board should continually monitor the assigned counsel system to determine whether it is providing effective services. It should be particularly responsive to client complaints and suggestions from the private bar. Moreover, one of the many inadequacies of the *ad hoc* approach was its inability to collect data necessary for the proper evaluation of and future planning for the assigned counsel plan. Thus, the board should also initiate statistical studies of the assigned counsel system to fulfill this necessary function.

The governing board should provide broad policy input to the defense system. It should develop only general policies that relate to the structure of the defense system and the activities of the system's participants. The board must refrain from interfering with the administrative management of the defense

[35] For a fuller discussion of the assigned counsel fee schedule, see Chapter II, *supra*, pp. 20-22.

operation or an attorney's handling of cases. The board's major involvement with the operational policy of the system is in the realm of fiscal control, as already mentioned.

(4) *Gaining public support for the defense system.* The governing board must encourage the public, the courts and the funding source to recognize the significance of the defense function as a vital and independent component of the criminal justice system. It must be realized that the coordinated assigned counsel program is a relatively new form of providing defense services to the eligible accused. It remains virtually untested and actually exists in only a very few jurisdictions throughout the country.

The public must be educated about the need for developing a defense system. Providing services to eligible defendants is not a good faith gesture that is expendable when funds are scarce. It is a constitutional requirement that must be fulfilled by every jurisdiction without exception, however unpopular the task.

The cooperation of the courts is instrumental in the development of the assigned counsel system. The board must be successful in persuading the judiciary to relinquish the appointment power which it now retains in the many *ad hoc* processes in existence nationwide.

Finally, the funding source must be convinced that the assigned counsel plan is cost effective. The board must demonstrate that such a plan is the most appropriate expenditure of taxpayer funds for that jurisdiction. The board must also show that the assigned counsel component can and does provide effective defense services.

2. *Relationship of board to administrator.*

a. *Administrator operating individually.* The administrator should be delegated certain functions to be performed without the involvement of the governing board. The administrator should be solely responsible for establishing and maintaining the case assignment process. This includes the selection of panel attorneys, the evaluation of attorney performance, and the authority to take appropriate measures to maintain a competent level of services. Moreover, the administrator should develop orientation and training programs for both the experienced criminal defense attorney and the neophyte panel member where this need has not been fulfilled by a sister defender service. This perpetuates the active participation of the private bar and promotes a high level of attorney performance. Furthermore, the administrator should provide access to support services for, as the American Bar Association declared, a defense plan "should provide for investigatory, expert, and other services necessary to an adequate defense."

Finally, as already mentioned, the administrator should handle the task of approving the ordinary payment of panel attorney fee vouchers. This is a useful way of enabling the administrator to keep in direct contact with the daily operation of the system. He receives first-hand knowledge of the amount of time attorneys need to handle specific cases and can keep track of the dispositions of each case handled by the program.

b. *Administrator operating with board.* There are also other functions which the administrator performs in conjunction with the governing board. First, the administrator must be available to assist the board in performing any of its responsibilities upon request. Because the administrator has an intimate working knowledge of the assigned counsel system, he should join the board in the development of the budget. The administrator should also work with the board in planning and establishing the fee schedules and in exercising other fiscal controls over the system.

The administrator has other duties which may require board approval. The administrator hires staff personnel as the requirements of the program demand. Also, panel attorneys can be removed by the administrator, but his decision is subject to the review of the governing board.

In general, a good working relationship between the governing board and the administrator promotes a more efficient and effective assigned counsel program.

D. Conclusion

The two alternative mixed system models proposed in this chapter have the same goal—that of strengthening the defense component of the criminal justice system by infusing additional attorneys and fresh ideas into the system. Whenever a sufficient supply of criminal defense specialists is available, it is important that their talents be tapped. Moreover, it is important to continually train and involve more lawyers in the criminal defense field in order

to meet burgeoning caseloads and to enhance the quality of services provided by the field. While the establishment of defender systems constitutes a significant step toward improving the image of criminal defense work, the support and participation of the private bar is needed in this effort.

CHAPTER VI. CONCLUSION

A. The Trend Toward Defender Systems

As early as 1919, Reginald Heber Smith, in a study of legal aid, saw the value of organized defender services. He made the following unwavering assessment:

> The defender in criminal cases, whether publicly or privately supported, is unquestionably the best immediate method of securing freedom and equality of justice to poor persons accused of serious crimes. It is a complete solution of the difficulties in the existing administration of the criminal law which have placed poor prisoners at a serious disadvantage, and it remedies some of the most glaring abuses which have brought the criminal law into disrepute . . . Since 1914 it has spread very generally throughout the country, and has made more headway in legislatures and in the community at large than the proposed reforms in court reorganization and simplification of procedure. In three years it has made more impression on the public mind than its more ancient ally, the legal aid society, has been able to make in forty years.[1]

The system which Smith lauded in 1919 continues to spread, albeit less quickly than he anticipated. While defender systems serve two-thirds of the nation's population today, less than one-third of the counties in the United States are served by defender systems.

The centrally administered state defender system is gradually becoming the answer to providing organized legal defense services for some 2,000 counties presently utilizing *ad hoc* assignment of counsel in criminal matters. The foregoing chapters draw upon the experience gained during the sixty year history of defender services, and particularly, in the period since the *Gideon* and *Argersinger* decisions, in setting forth specific guidelines for establishing defender systems.

[1] JUSTICE AND THE POOR 127 (Memorial Ed., 1967).

B. Implementation

The passage of legislation such as the model statute provided in Appendix B is a prerequisite to the establishment of a state level system. However, practically speaking, state defender legislation will not be passed in the absence of clear and convincing data presented to the state legislature. A number of states which have successfully passed state defender legislation began by conducting a survey of legal assistance being provided to the criminally accused in each locality. These surveys provided legislators with hard facts concerning the actual and projected costs of services for various defense system models and the costs of such systems in comparable states. Appendix A of this manual, plus the discussion in the preceding chapters, will provide the reader with direct access to some of the jurisdictions which may serve as examples. In addition, assistance may be obtained at the national level through some of the agencies listed in Part D of Chapter I.

The basic thrust of the systems proposed in this manual is the unification and sharing of legal defense services in order to ensure a uniformly high quality and overall availability of services. This means that, where state level organization is not feasible, groups of localities should join together in order to share personnel and facilities for maximum cost- and people-benefit.

State-level, or, at least, multi-county financing will enable counties with low tax bases to provide defense services that would otherwise be unattainable. Smaller counties can thus be served by defenders who ride circuit, possibly in tandem with local judges. Investigative and other necessary resources are made feasible by virtue of spreading the costs over a wider area.

Safeguards are built into the proposed models to ensure that the defense component maintains appropriate separation and independence from other components of the adversary system of criminal justice. These safeguards are intended to ensure against both actual infringements on the attorney-client relation-

ship and the appearance of impropriety in the eyes of the clients who are served by the system.

Among the safeguards are state level organization to insulate the defender director from local political, judicial and community pressures and the further insulation provided by an independent selection process. Just as private lawyers are independent of external pressures, so defense counsel for the poor should follow the private sector model to the extent feasible. Selection of a state defender director by an independent commission is thought to show the greatest promise for achieving this goal.

While organized defender systems are widely believed to offer the greatest opportunity for providing the expertise and efficiency to handle the huge workload mandated by current high court decisions and state legislative requirements, there are some drawbacks to total reliance on organized defender offices to assist the poor in criminal cases. Such systems may lack the fresh insights and ideas of those who are not in daily contact with the criminal justice system. Moreover, given the increasing costs of lawyers' fees and the growing number of people who are unable to afford to pay the cost of representation, some feel that reliance on organized defender systems poses a threat to the private practitioner's ability to become self-employed.

This manual proposes two alternatives to deal with these concerns. Both are types of "mixed systems," which, as defined in Chapter V, envision participation of the private bar in coordination with the defender system. Under the first alternative, the head of the local defender office will administer an assigned counsel panel and monitor the panel to ensure high quality performance. Under that model, the panel attorneys will be paid from the budget of the state defender system, as is done in several existing jurisdictions.

The second alternative entails a greater amount of local input and responsibility. Under that model, a locality may elect to establish a separate assigned counsel program to augment the services of the state defender system. However, such a locality must then also provide the funding for the local program and will hopefully establish an advisory committee to determine how and in what proportions cases will be allocated between the defender and assigned counsel components.

C. Checks and Balances in the Adversary System

Given the necessity of maintaining an equilibrium between the defense and prosecutive sectors of the criminal justice system, some scholars have proposed naming the chief defender in a state the "Defender General." While this manual, following the recommendations of the National Study Commission on Defense Services, has instead chosen the term "State Defender Director," the importance of parity cannot be over emphasized. Parity is recognized in jurisdictions such as Vermont, which employs the "Defender General" appellation, and in New Jersey, where the chief defender in the state is also the Public Advocate, a cabinet official.

The lack of parity in some states is compounded by statutes which restrict the defender director's salary to a percentage of that provided for the chief prosecutor and by inadequate staffing patterns in defender offices. Defenders are often forced to rely on the State's facilities for evaluation of evidence because they lack the funds to employ independent experts. Such reliance not only impinges upon the confidentiality of the attorney-client relationship, but tends to bias the outcome of tests in disciplines which have yet to develop a firm scientific basis (e.g. document examination, fingerprints, parafin tests, polygraph, voiceprints, etc.). Society becomes the loser when the wrong person is convicted.

The key to the concept of a strong defense component is adequate funding. Legislatures must be made aware of the fact that criminal defense services is a constitutionally mandated requirement which helps to preserve the rights of all Americans. In addition, funding agencies must recognize that starving one component of the system results in court backlogs which impede the swift punishment of persons found to be criminals. Thus, appropriations for defense services must be sufficient to provide a balance within the criminal justice system.

GLOSSARY OF TERMS

Ad hoc appointment: Random appointment of counsel on a case by case basis by the court from among private lawyers in the locale served by the court.

Administrator: The individual who heads an assigned counsel program.

Assigned counsel system: A method of providing legal defense services to poor persons accused of crime by members of the private bar utilizing a systematic method of assignment.

Centrally-administered state defender system: A system for providing legal defense services to the poor which is funded by the state and centrally administered by a State Defender Director.

Defender Commission: A body composed primarily of lawyers and representatives from the lay community whose primary function is the selection of the defender director.

Defender director: The individual who heads a public or private defender system.

Defender system: A method of providing legal defense services to poor persons accused of crime whereby public or quasi-public officials are appointed or elected to render services, and do so through an employed staff.

Deputy director: The individual who heads a local or regional office in a centrally-administered state defender system.

Eligible person: A person who falls within the financial guidelines for legal representation at public expense.

Local defense system: A defender, assigned counsel or mixed system for providing legal defense services which is funded and organized at the city or county level.

Mixed system: A method of utilizing both defender and assigned counsel attorneys whereby both components are coordinated and there is substantial participation of the private bar.

Multi-county (regional) system: A defender, assigned counsel or mixed system for providing legal defense services, created and funded by two or more participating counties, which serves eligible persons in those counties.

Panel attorneys: Private attorneys who are selected by the Administrator to handle the cases of eligible persons from time to time on a case basis.

Private defender system: A defender system organized as a non-profit corporation or association. Such a defender system may be a separate corporation or part of a legal aid and defender society.

Public defender system: A defender system established as a governmental agency having staff classified as public employees.

State-financed, local defense system: A system for providing legal defense services to the poor which is financed by the state, but has little or no centralized administration or uniformity among the various counties in the means of providing services.

APPENDIX A
IMPLEMENTATION OF PRACTICES IN SELECTED JURISDICTIONS

SOURCES AND ADMINISTRATION OF FUNDING

ILLINOIS STATE APPELLATE DEFENDER

Description:

The Illinois State Appellate Defender receives funds through a procedure which protects defender independence and furthers the stability of the defender agency. The agency submits budget requests directly to the appropriating authority after approval from its own governing board. Moreover, allocations for office space, facilities and related expenses are specifically included in the defender's budget.

Contact: Theodore A. Gottfried
State Appellate Defender
300 E. Monroe Street
Suite 100
Springfield, Illinois 62701
(217) 782-7203

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Description:

The assigned counsel fee structure employed in the federal system pursuant to the Criminal Justice Act is exemplary. It compensates attorneys at the rate of $30/hour for in-court practice and $20/hour for out-of-court practice up to stated maxima for felonies ($1000), misdemeanors ($400), appeals ($1000) and post-trial and probation revocation proceedings ($250).* Payment in excess of the maxima is permitted in extraordinary cases.

Contact: William A. Foley
Deputy Director
Administrative Office of the United States Courts
Supreme Court Building
Washington, D.C. 20544
(202) 393-1640

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* Revisions in the Criminal Justice Act increasing the stated maximum amounts (and perhaps the hourly rates) are presently under consideration. Such revisions would enable assigned counsel to keep pace with tht private bar rates which due to economic realities and the complexity of criminal defense, continue to increase. Moreover, since the number of payment requests exceeding the maximum limits is so large, the courts are unduly burdened with administrative tasks. Conversion with William A. Foley, April 14, 1977.

ORGANIZATIONAL STRUCTURE

VERMONT DEFENDER GENERAL

Description:

Vermont offers practical models for both the centrally-administered state defender system and the multi-county system.

The state defender system has several noteworthy features. The Defender General holds primary responsibility over the operation of defense services throughout the state which is mandated by statute: "No other official or agency of the state may supervise the defender general or assign him (additional) duties . . ." The Defender General also has the power to supervise the training of all defenders, including the development of a statewide training program. Nine defender offices have been established statewide, each of which is headed by a public defender selected by the Defender General.

The state system includes several offices serving more than a single county. One office serves three counties located in northeastern Vermont. The office is composed of two full-time attorneys, one full-time investigator and clerical staff. The attorneys have coordinated their responsibilities regarding court appearances, case intake and preparation and client accessibility so as to provide a full-time defender service to eligible clients.

Contact: James L. Morse
Defender General
43 State Street
Montpelier, Vermont 05602
(802) 828-3168

ALASKA PUBLIC DEFENDER AGENCY

Description:

The Alaska Public Defender Agency demonstrates the feasibility of administering a statewide defender system over an extensive geographical area. The Agency has eight offices which provide services on a regional basis, divided according to judicial districts. Some judicial districts have more than one office. A defender office may serve an area as large as 200 by 300 square miles and may include archipelagos of varied-sized islands, which necessitates travel by boat and plane.

Contact: Brian Shortell
Public Defender
333 K Street
Anchorage, Alaska 99501
(907) 279-7541

DEFENDER SYSTEM BOARDS

CONNECTICUT PUBLIC DEFENDER SERVICES COMMISSION

Description:

The Public Defender Services Commission serving the centrally-administered state defender system is a recent example of a relatively independent board selection process. As prescribed by statute, the Commission is composed of individuals appointed by the legislative, executive and judicial branches (the latter constituting the process' major shortcoming), as well as representatives of the lay community. Furthermore, the appointment of board members demonstrates the means of achieving staggered terms.

Contact: James D. Cosgrove
Chief Public Defender, State of Connecticut
83½ Lafayette Street
Hartford, Connecticut 06106
(203) 566-5328

CRIMINAL DEFENSE CONSORTIUM OF COOK COUNTY (ILLINOIS)

Description:

The criminal Defense Consortium of Cook County is a newly-created project funded by LEAA in a grant from the Illinois Law Enforcement Commission. It is designed to enhance early representation of and defender accessibility to clients by having its offices located in the county's poverty neighborhoods. Neighborhood advisory boards for each of the six neighborhood offices ("community councils") provide a useful vehicle for local input on the central board. The board is composed of representatives appointed by a number of agencies which include several law schools in the city of Chicago, the Illinois State Bar Association, the Lawyers' Committee for Civil Rights Under Law, the Chicago Council of Lawyers, Chicago Volunteer Legal Services, United Charities of Chicago, the Legal Assistance Foundation, the Illinois Public Defender Association, the Illinois Defender Project, the Illinois Appellate Defender Agency and the National Legal Aid and Defender Association.

Contact: Marshall J. Hartman
Executive Director
Criminal Defense Consortium of Cook County, Inc.
77 S. Wacker Drive
Chicago, Illinois 60606
(312) 782-6710

ROXBURY DEFENDERS COMMITTEE, INC. (MASSACHUSETTS)

Description:

The Roxbury Defenders Committee is structured to serve the needs of a local community with ethnic and racial concentrations and poverty-related problems. Of particular interest is the organization's community oriented governing board which under its original by-laws included such groups as the Black United Front, Model Neighborhood Board, Youth Inc., Model Cities Administration, La Alianza Hispana, Inc. and Boston Legal Assistance Project.*

Contact: Geraldine Hines
Executive Director
Roxbury Defenders Committee, Inc.
124-126 Warren Street
Roxbury, Massachusetts 02119
(617) 445-5640

PRIVATE, NON-PROFIT DEFENDER ORGANIZATIONS

KING COUNTY, WASHINGTON—DEFENDER ASSOCIATION CONTRACT

Description:

The contract between King County, Washington and the Defender Association provides some of the important considerations which should be incorporated into a private defender's contract with a governmental unit. In particular, the contract includes: a specific enunciation of the defender organization's responsibilities towards clients and its powers and duties in general; a description of the procedure used to allocate county funds to the defender agency; a stipulation preserving the flexibility of the budget which is essential to ensure quality representation in the face of an unanticipated caseload increase; and a declaration of the defender organization's independence from governmental interference.

Contact: W. Kirkland Taylor
Executive Director
Seattle-King County Public Defender Office
623 2nd Avenue
Seattle, Washington 98104
(206) 447-3900

* The composition of the Roxbury Defenders' governing board is currently undergoing changes.

MIXED SYSTEMS AND ASSIGNED COUNSEL COMPONENTS

FEDERAL DEFENDER PROGRAM, NORTHERN DISTRICT OF ILLINOIS

Description:

The Federal Defender Program of the Northern District of Illinois is a prime example of the defender-administered mixed system model. The program's "duty day" system of case assignment and the effective cooperation between the defender staff and the panel attorneys in such areas as research, training and case discussion are especially noteworthy.

Contact: Terence F. MacCarthy
Executive Director
Federal Defender Program, Inc.
219 S. Dearborn Street
Chicago, Illinois 60604
(312) 435-5580

NEW JERSEY PUBLIC DEFENDER

Description:

A defender-administered mixed system which is statewide is exemplified by the New Jersey centrally-administered state defender system. The Public Defender is required by state statute to maintain trial pools of private attorneys who are available for appointment on a case-by-case basis. The Office of the Public Defender is charged with assigning pool attorneys, providing necessary investigative and other support services and compensating the attorneys directly from the defender budget.

Most significantly, this system demonstrates the effective operation of both a defender and an assigned counsel component on a statewide organizational level.

Contact: Stanley C. Van Ness
Public Advocate
520 E. State Street
Trenton, New Jersey 08625
(609) 292-1887

SAN MATEO COUNTY PRIVATE DEFENDER AGENCY (CALIFORNIA)

Description:

The San Mateo County system offers an exemplary model of a pure coordinated assigned counsel program existing in a metropolitan area. The assigned counsel program is under the auspices of the local bar association which contracts with the county government to assume responsibility for providing defense services. The Administrator has instituted an efficient and equitable method of case assignment. The selection process solicits skilled criminal practitioners and provides for the training of inexperienced attorneys for future panel induction. Attorneys are categorized and evaluated to facilitate proper case assignment and ensure the high quality representation of clients. Cases are assigned according to a rotating procedure that adjusts to accommodate special circumstances. The Administrator also processes attorney fee vouchers and performs other fiscal functions.

The governing board, which is the Board of Directors of the local bar association, has the overall responsibility for the operation of the defense component. Its primary task is the selection of the Administrator; it also exercises organizational and fiscal control over the system. Pursuant to the contract between the board and the local bar association, the latter assumes the responsibility of providing necessary support services and maintaining training and continuing education programs for panel attorneys.

Contact: Ramon S. Lelli
Administrator
Private Defender Program
333 Bradford Street
P.O. Box 1278
Redwood City, California 94064
(415) 364-5600, ext. 2891

SKAGIT COUNTY ACCUSED INDIGENT DEFENDER'S PROGRAM (WASHINGTON)

Description:

The Skagit County Accused Indigent Defender's Program (A.I.D.) is an example of a coordinated assigned counsel system operating in a predominantly rural area. The program has several commendable features.

The early representation of clients is effectuated by procedures instituted by the Executive Director. Each morning, the Director personally makes jail checks to determine whether potential A.I.D. clients are incarcerated. The determination of legal indigency is made primarily by the Director, who bases his decision upon the person's ability to pay for the cost of representation, and does not allow such considerations as the defendant's ability to post a bond or the financial resources of the person's family to influence his decision. Eligible defendants are then informed of their right to appointed counsel and are immediately provided wth an attorney in most cases.

Case assignments are made to attorneys in an equitable manner. The Executive Director categorizes the panel attorneys with reference to their prior experience and makes appointments in most cases on a rotating basis. Subsequently, the Director approves the attorney's fee voucher unless excess compensation is requested, in which case the request is presented to the board for approval.

Contact: Everett T. Mullen
Executive Director
Accused Indigent Defender's Program
208 Kincaid Street
P.O. Box 758
Mount Vernon, Washington 98273
(206) 336-5035

SEATTLE-KING COUNTY MIXED SYSTEM (WASHINGTON)

Description:

The Seattle-King County mixed system presents a unique structure for coordinating the defender and assigned counsel components of the defense system. Three defender offices contract with a county agency, the Office of Public Defense (OPD), to provide services, but otherwise operate independently of OPD in most respects. OPD makes the initial eligibility determination and OPD allocates felony cases to both the defender offices and to individual assigned counsel in proportions designated by a King County ordinance. OPD also administers the assigned counsel panel. It continuously updates a list of attorneys originally compiled by the King County Bar Association; regulates assignments according to skill and experience of the assigned counsel; can remove attorneys from the panel for cause; investigates and resolves client complaints against attorneys; sets attorney fees; and provides support services.

Contact: Bruce Wilson
Director
Office of Public Defense
191 Smith Tower
Seattle, Washington 98104
(206) 344-3462

APPENDIX B
NATIONAL STUDY COMMISSION ON DEFENSE SERVICES' MODEL STATE DEFENDER ACT

NATIONAL STUDY COMMISSION ON DEFENSE SERVICES'

MODEL STATE DEFENDER ACT

Prefatory Note

The Model State Defender Act which follows is a response to a widely felt need throughout the country. It is based upon a two-year study conducted by the National Study Commission on Defense Services under the "Standards Grant," a $400,000 research grant from the Law Enforcement Assistance Administration (LEAA) to the National Legal Aid and Defender Association. The actual drafting of the Act was done pursuant to a contract subsequently granted by LEAA's National Institute of Law Enforcement and Criminal Justice to the National Legal Aid and Defender Association. The purpose of the contract was to refine the work of the National Study Commission on Defense Services into a practical manual for use by system planners in establishing defender systems.

The provisions of the present Act closely track the language and intent of the National Study Commission's major recommendations. In addition, it draws from the wisdom of defender statutes in a number of jurisdictions and from the Uniform Law Commissioners' Model Public Defender Act. Defender statutes from the states of New Jersey, Connecticut, Maryland, Alaska, California and New Mexico as well as the federal statute, the Criminal Justice Act, served as prototypes for many of the Act's provisions.

While the present Act takes a similar approach in many respects to that of the fine work of the Uniform Law Commissioners, i.e., by stressing early representation, organized systems, and state level administration, it differs in a number of key areas. It resolves the question of defender selection, left in the alternative by the Uniform Law Commissioners, in favor of the independent commission selection method. In place of recoupment after trial, it provides for a partial payment in advance of trial. Unlike the NCCUSL Act, it explicitly provides for the establishment of a coordinated assigned counsel component to handle a substantial portion of the eligible cases, and provides for an option of one of two administrative structures for that component in a given locality. The options would allow the component to be administered either as part of the locality's branch of the state defender system or as an independent program operated under the auspices of a separate governing board and an assigned counsel administrator. Finally, it alters the scope of representation to be provided in accordance with recent court decisions at the state and national levels and current thinking as expressed by national policy-making bodies.

In these major respects, the Act departs from the substantive provisions of the NCCUSL Act. In other respects, it fleshes out the Uniform Law Commissioners' Act by establishing definite procedures for implementation of such objectives as early representation and equitable client eligibility determinations.

The present Act does, however, leave certain areas for determination by future bodies. A major unsettled area is the question of whether the state defender system should be established as a state agency or whether it should be created as a private, nonmembership, nonprofit corporation. Both public and private defender systems

have parallels today, but insufficient evidence is available at this time to determine which system is preferable. If a state selects the latter course, it is essential that the state provide in its legislation for the continued existence of the program, although the amount of workload and precise costs may be varied annually or biennially. Moreover, in no event should the state's contract for defender services be let on the basis of competitive bidding, since the inevitable result of such a practice is to undermine the quality of services.

A cautionary note is advisable with respect to two provisions of this Act. In Section 3(c), the Act prescribes the duties of the State Defender Commission vis a vis the Defender Director. It was intended that the defender agency for the state be administered by a strong, capable State Defender Director and that the Commission exercise a minimum of control outside of its primary functions of selecting the Director and terminating the Director in the event that just cause is shown. The Director, due to his or her daily contact with the program, is likely to have the best grasp of the program's needs and can respond expeditiously to changing situations. The Commission, on the other hand, is unpaid for its services and can be expected to play only a limited role.

Section 3(a)(1) provides guidance as to the background of Commission members. The National Study Commission was unable to provide specific designations for the makeup of the groups selecting commission members that would be applicable in every state. However, it is important, in selecting the organizations which will appoint their designees to the Commission, that groups reflecting the concerns of the community be represented to the end that the system will be as free from political and judicial influences as are private defense attorneys in representing their clients. Although some states have included governmental officials in the appointment process, members or appointees of branches of government are discouraged because their inclusion tends to inject political considerations into the operations of the defender system.

One final word of explanation is needed. The system contemplated by this Act would permit defense services to be administered independently of the state defender system in but a limited number of instances. For example, the Director may permit a preexisting defender or assigned counsel program to continue to serve the population in a given locality if it meets standards established by the State Defender Director. Such a program is also eligible to receive funds from the budget for the state defender system. In the second instance, a jurisdiction may establish an independent assigned counsel program to augment the State Defender Director's services, but such a program will receive no state funds. Third, the defender agency may contract out for specialized services, such as prison legal services, if it appears to be desirable to do so. However, the greater the degree of administration and coordination at the state level, the greater will be the opportunity to maintain standards and monitor performance, and these considerations should be weighed in determining the use of separate, independent defense programs for eligible persons accused of crime.

NATIONAL STUDY COMMISSION ON DEFENSE SERVICES' MODEL STATE DEFENDER ACT

SECTION 1 (Declaration of Purpose)

It is declared to be the policy of this State to provide for uniform, high quality, legal representation of eligible persons in criminal and related proceedings consistent with constitutional and public policy requirements of fairness, equal protection, and due process of law.

SECTION 2 (Definitions)

In this Act, the term(s):

(a) "eligible person" means a person who falls within the financial guidelines for legal representation at public expense prescribed in Section 9 of this Act;

(b) "Commission" means the State Defender Commission;

(c) "Director" means the State Defender Director;

(d) "Deputy Director" means the head of a local or a regional office of the state defender system;

(e) "defender(s)" includes both attorneys who serve as staff attorneys in the state defender system and assigned counsel who provide defense services on a case basis, but does not include secretarial, investigative, social work, or paraprofessional staff;

(f) "state defender system" means a system for providing defense services to every jurisdiction within a state by means of a centrally-administered organization having full-time staff;

(g) "assigned counsel program" means an organized defense program, administered by a full-time administrator, utilizing the services of private attorneys who handle the cases of eligible persons from time to time on a case basis;

(h) "panel attorney(s)" means private attorneys who are hired by the State Defender Director to handle the cases of eligible persons from time to time on a case basis;

(i) "Administrator" means the Assigned Counsel Administrator in a dual system county;

(j) "dual system counties" means counties which have elected to establish a separate, independent, coordinated assigned counsel program to augment the services provided by the state defender system; and

(k) "he," "him," and "his" shall include the terms "she," "her," and "hers."

SECTION 3 (State Defender Commission Established, Functions, Meetings)

(a) There is created a State Defender Commission to consist of nine (9) members who shall serve staggered terms. In selecting the Commission, the primary consideration shall be that of ensuring that the defenders are as independent of political and judicial influence as are lawyers in private practice.

(1) A majority of the Commission shall consist of practicing attorneys who have had substantial experience in the representation of persons accused of crime within the five year period immediately preceding the time that they are designated to serve on the Commission. Judges, prosecutors and law enforcement officials shall not serve on the Commission. One-third of the members of the Commission shall consist of represenatives of groups whose members derive a particular benefit from the proper functioning of the defender system.

(2) The State Defender Director shall, upon appointment, become an ex-officio member o fthe Commission without vote and shall participate in all meetings of the Commission save for during the course of discussions

relating to renewal of his term or to his removal.

(3) The terms of the original members of the Commission shall be as follows:

Three one year terms and until a successor is appointed and qualified;

Three two year terms and until a successor is appointed and qualified; and

Three three year terms and until a successor is appointed and qualified.

Thereafter, all terms shall be for three years and until a successor is appointed and qualified. The Chairperson shall, at the first meeting of the Commission, conduct a drawing by lot to determine the length of each original member's term. No member may serve more than two full consecutive three year terms. Vacancies in the membership of the Commission shall be filled in the same manner as original appointments. Appointments to fill vacancies occurring before the expiration of a term are for the remainder of the unexpired term.

(b) Commission members shall serve without compensation, but shall be reimbursed for actual expenses incurred while engaged in the duties of the Commission.

(c) The primary function of the Commission shall be the selection of the State Defender Director. The Commission shall also:

(1) Assist the State Defender Director in drawing up procedures for the selection of Deputies and staff assistants;

(2) Receive client complaints when not resolved by the defender agency, review office performance by requesting relevant data and statistics, and monitor the performance of the Director;

(3) Maintain a continuing dialogue with the Director in order to provide input and advice;

(4) Assist in ensuring the independence of the defender system by educating the public regarding constitutional requirements and the functions of the defenders;

(5) Serve as liaison between the legislature and the defender system upon request of the Director;

(6) Remove the Director from office in the event that good cause is shown;

(7) Review the budget request prepared by the Director, provide advice on the budget request before its submission, and provide support for the request before the legislature;

(8) Approve the fee schedule for payment of panel attorneys; and

(9) Determine matters affecting the compensation, vacations and employment benefits of the State Defender Director.

In no event shall the Commission or its members interfere with the discretion, judgment or advocacy of defenders in their handling of individual cases.

(d) The Commission shall meet on a regular basis and shall be presided over by a Chairperson elected by its members. A majority of Commission members shall constitute a quorum, and decisions shall require a vote of a majority of those present; *provided that*, selection of the Director shall require the vote of at least ⅔ of the entire Commission. Each member of the Commission shall have one vote, and voting by proxy shall be prohibited.

SECTION 4 (Qualifications of State Defender Director and Terms of Employment)

(a) The Commission shall appoint as Director only a person with the following qualifications: An attorney whose practice of law has clearly

demonstrated experience in the representation of persons accused of crime; who has been licensed to practice law in this State or, with the approval of the Board of Governors of this Sate's Bar Association, in another state, for at least five years; who has been engaged in the practice of criminal law during the entire five-year period immediately preceding his appointment; who has had extensive experience in administration of personnel; and who is dedicated to the goals of providing high quality representation for eligible persons and to improving the quality of defense services generally.

(b) The Director shall devote full time to the duties of the state defender system and shall not otherwise engage in the practice of law.

(c) The Director's term of office shall be four years and until the appointment and qualification of a successor. The Director's term shall be renewable in the discretion of the State Defender Commission. During the course of a term of office, the Director may be removed only for good cause shown after notice and a fair hearing before the Commission.

(d) The Director's compensation shall be set at a level which is commensurate with his qualifications and experience, and which recognizes the responsibility of the position. The Director's compensation shall be comparable with that paid to presiding State Supreme Court judges, shall be professionally appropriate when compared with that of the private bar, and shall in no event be less than that of the Attorney General of this State.

SECTION 5 (Duties of the State Defender Director)

Except in the case of pre-existing defense agencies, the planning and creation of state, local and regional defender offices shall be undertaken by the State Defender Director. The Director may, in his discretion, delegate the authority and duties vested in him to subordinate attorneys and employees serving under his supervision. The following authority and duties are vested in the Director:

(a) to appoint Deputy Defenders and to establish general policy and guidelines regarding the operation of local and regional offices and the handling of cases;

(b) to ensure that on-site evalutions of each defender office in the state, whether organized as part of the state defender system or as a preexisting entity, are conducted not less than once a year. The Director is authorized to contract with outside agencies where necessary for this purpose;

(c) to visit each defender office and preexisting assigned counsel program in the state on a frequent basis and review case files for purposes of ensuring full and competent representation;

(d) to provide initial training and continuing education for all defender staff and assigned counsel in the state, which training may be augmented by programs sponsored by institutes of continuing education;

(e) to establish such divisions, facilities and offices, and hire such professional, technical and other personnel as the Director deems necessary for the efficient operation and discharge of the duties of the state defender system, subject to existing appropriations;

(f) to apply for and accept any funds which may be offered or which may become available from government grants, private gifts, donations or bequests or from any other source to effectuate the purposes of this Act;

(g) to prepare annually a budget request which shall include all anticipated costs of the state defender system and to submit such request directly to the state legislature for appropriation;

(h) In the event that the budget allocation of the state defender system for the compensation of assigned counsel becomes exhausted, to re-

ceive additional funds from the state treasury to meet such contingency;

(i) to maintain one or more panels of attorneys who shall be available to serve on a case basis as needed; and to engage counsel from such panels as may be necessary to meet caseload demands, to avoid conflicts of interest, and to stimulate the continual professional development and interest of the private bar in the administration of justice; and furthermore, to compensate said counsel from the budget of the state defender system;

(j) to establish guidelines for the qualifications of panel attorneys so as to include all attorneys who display a willingness to participate in the program and manifest the ability to perform criminal defense work at a competent level;

(k) to establish guidelines for the assignment of panel attorneys by Deputy Defenders;

(l) at any stage, including appeal or post-conviction proceedings, to assign a replacement attorney when necessary or advisable to ensure effective representation;

(m) in his discretion, to contract with other agencies for the provision of all or a portion of this State's prisoner legal services;

(n) to accept services by volunteer workers or consultants at no compensation or at partial compensation and to reimburse them for their proper and necessary expenses;

(o) to prepare an annual report of the operations of the state defender system, including a statement of the number of persons represented, the crimes and other proceedings involved, the status of such cases, and the amount and categories of expenditures made by the defender system;

(p) to establish procedures for ensuring that staff attorneys maintain reasonable workload levels in order to provide a high quality of services;

(q) to establish the compensation of defenders and other personnel, subject to budgetary appropriations;

(r) to keep and maintain proper financial records with respect to the provision of defense services for use in calculating the direct and indirect costs of any and all aspects of the operation of the state defender system;

(s) to develop programs and administer activities in order to achieve the purposes of this Act; and

(t) at his discretion, to consult and cooperate with professional bodies and groups concerning the causes of criminal conduct, means for reducing the commission of crimes, the rehabilitation and correction of those convicted of crimes, and the overall improvement of the administration of justice and the criminal laws and procedures.

SECTION 6 (Defender System Structure, Preexisting Agencies, Funding Authority)

(a) The state defender system shall be centrally administered by the State Defender Director, and shall provide services by means of city, county, district or multi-county defender offices to every jurisdiction in this State. All defenders, with the exception of members of assigned counsel panels, shall be full-time staff, prohibited from engaging in the private practice of law. No defender office shall be served by fewer that two full-time attorneys.

(b) The Director may contract with preexisting qualified full-time defender offices and preexisting coordinated assigned counsel programs for all or part of a local jurisdiction's indigent caseload; *provided that*, such systems maintain standards set by the Director for defense services in this State. In the event that the preexisting program meets such standards, it shall be eligible to receive adequate funding from the budget of the state defender

system and to utilize back-up services provided by said system. However, should the pre-existing defender or coordinated assigned counsel program fail to comply with said standards, it shall have 120 days from the date of notification in which to comply. In the event that the program fails to comply within the given period, the State Defender Director shall establish a local office of the state defender system which shall replace the preexisting program.

(c) A complete budget for the state defender system shall be provided through an annual appropriation subject to approval by the state legislature. The budget request for the state defender system shall be submitted directly to the state legislature by the Director and shall not be subject to diminution or alteration by any branch of government other than the appropriating authority. Following the granting of an appropriation for the state defender system, the Director shall have the sole authority to reallocate line items within said budgetary appropriation.

SECTION 7 (Assigned Counsel Programs Apart from State Defender Director's Panels, Assigned Counsel Administrator, Governing Board, Client Choice of Program, Pilot Defender Agencies)

(a) Should any county or group of counties in the state determine that, because of inherent conflicts of interest or for other valid reason, assigned counsel cases should be administered independently of the state defender system, such jurisdiction may establish a coordinated assigned counsel program which may handle a portion of the jurisdiction's eligible caseload, thereby establishing a dual defender and assigned counsel system.

(b) In such dual system counties, the cases of clients seeking representation by the assigned counsel program shall be assigned to attorneys by the Assigned Counsel Administrator. The Administrator shall devote full-time to the duties of the assigned counsel program and shall not otherwise engage in the practice of law. The Administrator shall select and monitor the panel of attorneys to be appointed under the assigned counsel program.

(c) In dual system counties, funds for the assigned counsel program shall be provided by the county or counties served. In all other counties, the assigned counsel panel shall be administered by the State Defender Dirctor and funds therefor shall be included in the budget of the state defender system.

(d) In dual system counties, the Administrator of the assigned counsel program shal be selected locally by a governing board which includes members of the local bar association and representatives of the local client community. Judges, prosecutors and law enforcement officials shall not serve on the governing board.

(e) Eligible persons in dual system counties shall have the option of electing to be represented by either the local office of the state defender system or the assigned counsel program. However, cases handled by the assigned counsel program shall include those cases involving a conflict of interest with the state defender system.

(f) This Act shall in no way prohibit the establishment in this State of pilot local defender agencies designed to test national standards or to experiment with innovative approaches to providing legal defense services for the poor.

SECTION 8 (Scope of Services, Time of Entry, Procedures for Ensuring Early Representation)

(a) Effective representation shall be provided to all eligible persons in:

(1) any governmental fact-finding proceeding the purpose of which is to establish a person's culpability or status which might result in the loss of

liberty or in a legal disability of a criminal or punitive nature; and

(2) any proceeding to take affirmative remedial action relative to the scope of services set forth in sub-section (a)(1) of this Section.

(b) Such representation shall include, but shall not be limited to, the following matters: felonies, misdemeanors, juvenile delinquency proceedings, mental commitment proceedings, probation revocation proceedings, parole release and revocation proceedings, criminal extradition proceedings, all possible appeals, and post-conviction hearings, including proceedings at the trial and appellate levels. However, after the first appeal the defender shall not be required to pursue appeals or post-conviction remedies which, in his opinion, are of a frivolous nature.

(c) Representation shall be available as soon as the person is arrested or detained or when the person reasonably believes that a process will commence resulting in a loss of liberty or in a legal disability of a criminal or punitive nature, and shall continue through the exhaustion of remedies.

(d) In commencing representation, the defender system shall:

(1) respond to all inquiries made by, or on behalf of, any eligible person whether or not such person is in the custody of law enforcement officials;

(2) establish the capability to provide emergency representation on a 24-hour basis;

(3) implement systematic precedures, including daily checks of all detention facilities, to ensure that prompt representation is available to all persons eligible for services;

(4) provide adequate facilities for interviewing prospective clients who have not been arrested or who are free on pre-trial release;

(5) prepare, distribute and make available by posting in conspicuous places in all police stations, courthouses and detention facilities a brochure that describes in simple, cogent language or languages the rights of eligible persons and the nature and availability of defense services, including the telephone number(s) and address(es) of the local defender office and, where applicable, of the assigned counsel program; and

(6) publicize its services in the media.

(e) Upon initial contact with a prospective client, defenders shall offer specific advice as to relevant constitutional or statutory rights, elicit matters of defense, and direct investigators to commence fact investigations, collect information relative to pre-trial release, and make a preliminary determination of eligibility for publicly provided defense services.

(f) In the event that the defender interviews a prospective client and determines that said person is ineligible for publicly provided representation, the attorney shall decline the case and, in accordance with appropriate procedure, assist the person in obtaining private counsel. However, the defender shall continue to render services which are necessary to protect the person's interests until private counsel is retained.

(g) Personnel of any law enforcement authority having custody of any person shall determine whether such person has an attorney upon taking the person into custody. If the person has no attorney, the law enforcement authority shall:

(1) clearly inform the person of the right to be represented by an attorney at public expense if he is unable to afford the cost of representation; and

(2) immediately contact the local defender office or assigned counsel program and notify it of the name and location of the needy person.

SECTION 9 (Financial Eligibility, How Determined, Partial Eligibility)

(a) An eligible person is one who is unable, without substantial financial hardship to himself or his dependents, to obtain effective representation. The determination of eligibility shall be made by computing the amount of the person's liquid assets and subtracting therefrom the amount needed for the payment of current obligations and for the support of the person and his dependents. The person shall be deemed eligible for representation at public expense if the remaining assets are insufficient to cover the anticipated costs of counsel at prevailing rates charged by competent criminal defense counsel in the jurisdiction, including the cost of such investigatory, expert or other services necessary for effective representation. The accused's own assessment of his financial ability to obtain effective representation shall be accorded great weight.

(b) Liquid assets include cash in hand, stocks and bonds, bank accounts, and any other property which can be readily converted to cash. The person's home, car, household furnishings, clothing, and any property which is by law exempt from attachment or execution shall not be considered in determining eligibility. Representation shall not be denied to any person merely because of his friends or relatives have resources adequate to retain counsel or because he has posted or is capable of posting bond.

(c) Financial eligibility determinations shall be made by the defender office or assigned counsel program. Determinations of ineligibility shall be subject to review by a court at the request of the prospective client. Any information or statements used for the initial determination shall be considered privileged under the attorney-client relationship.

(d) A decision of ineligibility which is affirmed by a judge shall be reviewable by means of an expedited interlocutory appeal. The person shall be informed of his right to appeal, and if he desires to exercise it, the clerk of the court shall perfect the appeal. The record on appeal shall include all evidence presented to the court on the issue of eligibility and the judge's findings of fact and conclusions of law denying eligibility.

(e) If the accused is determined to be eligible for defense services in accordance with approved financial eligibility criteria and procedures, and if, at the time that the determination is made, he is able to provide a limited cash contribution toward the cost of his defense without imposing a substantial financial hardship upon himself or his dependents, such contribution shall be required as a condition of continued representation at public expense.

(1) The defender office or assigned counsel program shall determine the amount to be contributed under this Section, but such contribution shall be paid directly into the state treasury in the case of the defender office and into the county treasury in the case of an assigned counsel program in a dual system county. The contribution shall be made in a single lump sum payment at the time that eligibility is determined.

(2) The amount of contribution to be made under this Section shall be in accordance with perdetermined standards and administered in an objective manner; *provided, however,* that the amount of the contribution shall not exceed the lesser of ten (10) percent of the total maximum amount which would be payable for the representation in question or a sum equal to the fee generally paid to assigned counsel for one trial day in a comparable case.

SECTION 10 (Assigned Counsel Fees, Budgetary Allocations, Defender System Salaries, Personnel and Facilities)

(a) No attorney serving as assigned counsel in this State may receive

any fee for his services in addition to that provided in this Section.

(b) Fees paid to assigned counsel shall be consistent with prevailing rates received by retained counsel for similar services. Attorneys shall be compensated on the basis of effort, skill and time actually, properly and reasonably expended. A fee schedule shall be prepared and periodically revised by the State Defender Director and approved by the State Defender Commission and, in the case of local assigned counsel programs in dual system counties, such schedule shall be prepared by the Assigned Counsel Administrator subject to approval by the program's governing board. Said fee schedule shall establish separate in-court and out-of-court rates with stated maxima for felonies, misdemeanors, juvenile delinquency proceedings, appeals and other matters.

(c) In the event of lengthy or complex litigation, the maxima may be exceeded upon approval of the Deputy Defender or the Assigned Counsel Administrator.

(d) In dual system counties, the governing board of the local assigned counsel program, or a committee of attorneys appointed by said board, shall review appeals from denial of compensation in excess of stated maxima by the Assigned Counsel Administrator. In all other counties or multi-county regions, a local advisory committee shall be established to review appeals from denial of additional compensation by the Deputy Defender. Attorneys participating in assigned counsel panels shall be excluded from serving on such boards or committees.

(e) The budgetary allocation of the state defender system for payment of assigned counsel and the budget for any assigned counsel program in a dual system county shall include the cost of investigatory, expert and other support services as well as necessary expenses including, but not limited to, travel expenses.

(f) The budget of the state defender system shall include funds for personnel, professional quality offices, libraries and equipment comparable to those of private law firrms. Facilities and resources shall be, at a minimum, comparable to those provided for other components of the justice system. Said budget shall include a reasonable sum for the procurement of experts and consultants, ordering of minutes and transcripts on an expedited basis, and for the procurement of other necessary services.

(g) The personnel of the state defender system shall include attorneys, secretarial and clerical personnel, investigators, social workers, paraprofessionals and law students. In addition, where deemed necessary or advisable, the staff may be augmented with professional business management personnel. Supervising attorneys shall be included in the defender system budget at the rate of one full-time supervisor for each ten staff attorneys or one part-time supervisor for each five staff attorneys.

(h) The starting levels of compensation for defender system staff attorneys shall be sufficient to attract qualified personnel. Salary levels thereafter shall be no less than those of assistant prosecutors and shall be professionally appropriate when analyzed or compared with the compensation of the private bar.

(i) The salaries of support personnel shall be comparable to those paid by the private bar and related positions in the private sector and no less than salaries for similar positions in the court system and prosecution offices.

(j) In no event shall defender offices or assigned counsel programs be required to utilize office space in governmental buildings or to utilize the State's experts or facilities for the evaluation of evidence. Private facilities shall be

furnished to defenders in courthouses, detention centers and correctional facilities for client interviews.

SECTION 11(Personnel Policies)

(a) The State Defender Director and staff shall be exempt from the classified service of this State and shall be hired solely on the basis of merit.

(b) Removal of defender staff attorneys shall be only for cause except for an initial period during which they shall serve at the pleasure of the Director.

(c) Deputies and defender staff attorneys shall devote full-time to their duties and shall not engage in the private practice of law.

APPENDIX C
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	Highly Useful	Of Some Use	Not Useful
Modifying existing projects	[ ]	[ ]	[ ]
Training personnel	[ ]	[ ]	[ ]
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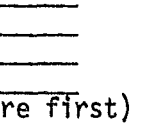

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