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The Implementation and Impact of Indigent Defense Standards

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THE IMPLEMENTATION AND IMPACT OF INDIGENT DEFENSE STANDARDS

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THE IMPLEMENTATION AND IMPACT OF INDIGENT DEFENSE STANDARDS

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“Standards are the key to uniform quality in all essential governmental functions. In the indigent defense area, uniform application of standards at the state or national level is an important means of limiting arbitrary disparities in the quality of representation based solely on the location in which a prosecution is brought.”

– Redefining Leadership for Equal Justice: Final Report of National Symposium on Indigent Defense 2000, Office of Justice Programs, U.S. Department of Justice, at 14.

Executive Summary

All criminal defendants in the U.S. facing charges which might result in incarceration are constitutionally entitled to legal representation at government expense if they cannot afford to pay a private lawyer. Approximately four out of five defendants qualify for such government-funded representation. State and local governments spend billions of dollars, employing tens of thousands of public defense agency staff and other indigent defense providers, representing clients in as many as 10 million cases annually.

Starting with the work of two national commissions three decades ago, standards were developed to make indigent defense services more uniform, effective and efficient. Versions of these standards have been implemented to varying degrees in many state and local jurisdictions, and have been compiled, catalogued and condensed, but until now, their effectiveness has never been studied.

The present research was designed to examine the impact of indigent defense standards through two basic means: a 50-state survey, and more detailed verification and analysis of impacts, correlated with manner of implementation, in four geographically diverse jurisdictions using standards in four different ways. The research is intended to assist state and local governments, funding agencies, and indigent defense agencies, in assessing the need for standardization of this constitutionally mandated governmental service.

The research finds that the implementation of indigent defense standards can have numerous and varied impacts for both indigent defense and the criminal justice system, and that the impacts are overwhelmingly viewed as positive not only by indigent defense agencies, but by the judiciary, prosecutors, legislative authorities and funding agencies. The research also finds that the extent of the positive impacts is dependent upon the manner and extent of their enforcement.

Impacts

The research found that, depending on the extent of compliance, indigent defense standards can play a substantial role in –

- Keeping defender workloads manageable, which allows adequate preparation of cases, earlier entry and disposition, and avoidance of unnecessary jail costs pending appointment and disposition.
- Adequate defender-office staffing, including both attorneys and lower-cost non-attorney staff such as paralegals, social workers, investigators and law clerks, which enables assessment of clients' treatment needs and placement in appropriate programs designed to reduce recidivism and protect public safety.
- Maintaining adequate levels of defender-office funding and salaries, such as through some type of "parity" relationship with prosecution funding, which reduces staff turnover and its attendant costs.
- More uniform quality of public defense services, higher client satisfaction and acceptance of case outcomes, and reduced appeals and reversals.
- Reducing the risk of litigation over problems such as excessive workloads, lack of confidential meeting space, non-timely appointment, non-representation at critical stages of litigation, or non-continuous representation.
- Stratification of attorneys according to levels of skill, training and experience, to be matched to case categories of corresponding complexity and severity.
- Improved and more systematic supervision, evaluation and promotion of attorneys according to clearly articulated performance benchmarks.
- More uniform fiscal and management controls, although improvements in fiscal management and case tracking/time management are subject to resource investments in technology.
- Efficiencies resulting from the standardization of indigent defense practices and procedures, sharing and networking of technology and information systems (benefits which extend to courts and prosecution when the three entities are networked together), and pooling of buying power.
- Relieving the judiciary of responsibility for administering the process of selecting and compensating attorneys, reviewing expenses, and handling complaints from clients, families, prosecutors and other court participants.
- Improved coordination and planning capability among the courts, public defense, prosecution and other criminal justice agencies.
- Eliminating practices such as *ad hoc* judicial selection and compensation of defenders, clients being "handed off" from one attorney to another at different

stages of a case, attorneys accepting cases which they lack the time or qualifications to handle, and flat-fee or low-bid contracting.

Standards protecting the independence of public defense agencies from undue political or judicial interference, usually by means of establishing a multidisciplinary bipartisan oversight board, enable implementation of other standards. Satisfaction with defender independence is reported by judges, prosecutors, legislators and funding officials.

Standards regarding client financial eligibility are the most commonly adopted, but may have the least impact. It is more common that the judiciary, rather than public defense agencies, are responsible for client eligibility screening, and judges are more likely to conduct perfunctory screening and err on the side of finding eligibility.

There is virtually no “cross pollination” of indigent defense standards across jurisdictions, but national standards frequently provide a common model for state and local standards.

The highest level of support for new or updated types of standards is for those prescribing appropriate ratios of 1) defender attorneys to non-attorney staff and supervisors, 2) defender staffing and funding relative to prosecution staffing and funding, and 3) defender staffing and funding relative to the number of judgeships with criminal jurisdiction. Significant support was also expressed for the development of standards governing representation of the mentally ill, the defender role in adjudication partnerships, and mitigation-phase capital defense.

Manner of implementation

The research found that the degree of compliance with standards depends primarily on the manner and extent of their enforcement.

Voluntary standards: Standards which are purely voluntary – even well-established national standards, such as were applied to a large county public defender agency in *Riverside, California* through an external management audit – depend upon the good will of funding and oversight bodies, and are more likely to result in incremental reforms than sudden, broad-scale systemic change.

Funding conditioned upon standards compliance: Standards which are directly linked to funding support, such as *Indiana*’s system of state reimbursement of a portion of the public defense costs of a county which meets clear numerical requirements, produce more sudden “cliffs” of reform, while identically promulgated standards not linked to funding have negligible effect. The degree of funding support contingent upon compliance directly impacts the likelihood of compliance: compliance with *Indiana*’s standards went from 0% when there was no state reimbursement, to 14% of counties when the state reimbursement rate was set at 25%, to 54% when the rate was raised to 40%, and rose to 100% when the rate was set at 50% (the rate for capital cases).

Statutory statewide standards: Public defense systems with some or all state funding (as opposed to county funding) are generally more likely to adopt standards, and significantly more likely to adopt standards in the areas of independence, training and attorney performance. Use of standards by statewide public defense systems, like *Massachusetts'* long-standing system integrating both public defense and private attorney appointments, is more likely to produce uniformity of service quality, resource allocation, fiscal controls and other benefits.

Standards as contract requirements: The incorporation of standards into a contract for public defense services with a nonprofit organization or law firm can provide the same benefits as in a governmental agency providing public defense services. With a system like *Oregon's* use of state contracts with local service providers, this can allow more finely and frequently calibrated workload controls – assuming adequate case-tracking and time management systems.

Statutory codification of standards, coupled with the independence of the agency (as in both *Massachusetts* and *Oregon*), places plenary enforcement authority in the director of the state agency, as is the norm for other types of governmental agencies, and produces the highest degree of accountability and compliance with basic agency-management standards such as workload, performance, training, procedures, and service quality.

Funding: Virtually all standards-driven public defense systems are subject to the uncertainties of legislative appropriations, even though public defense services are constitutionally mandated “entitlements” which, if not provided by public defense agencies, must be provided – usually at significantly greater cost¹ – by individual private attorneys acting under court appointment. Even *Massachusetts'* comprehensive statewide system has difficulty maintaining adequate compensation levels, and *Indiana's* 40% state reimbursement system has dipped to 26% when budget constraints reduced the program's appropriations. Some jurisdictions have tied public defense funding directly to funding or staffing for prosecution or the courts.²

¹ Several states have compared their assigned counsel systems to a public defender agency model, and concluded that a staffed public defense agency is more cost-effective and efficient, due to factors such as increased familiarity with cases, centralization of administration costs, and specialization, such as in juvenile, domestic violence, and civil commitment cases. See West Virginia (“Final Report to the West Virginia Indigent Defense Task Force,” The Spangenberg Group, January 14, 2000, www.state.wv.us/wvpds/control.html; West Virginia Public Defender Services, Report of the Indigent Defense Task Force, January 2000, www.state.wv.us/wvpds/control.html); Florida (The Office of Program Policy Analysis and Government Accountability, “Justification Review: Administrative Commission, State Attorneys, Public Defenders”, Report No. 01-64, December 2001, www.aoc.state.nc.us/www/ids/Reports%20&%20Data/FY02%20PD_PAC%20CBA%20Report.pdf); and North Carolina (Report of the Commission on Indigent Services, March 2003, North Carolina General Assembly, www.aoc.state.nc.us/www/ids); “FY02 North Carolina Public Defender & Private Assigned Counsel Cost Analysis,” IDS Office, May 2002, www.aoc.state.nc.us/www/ids). The studies did not examine relative quality of defense services or compliance with standards.

² In Tennessee, a statute mandates that for each new judgeship created, the state public defense agency must receive funding for .75 FTEE attorney-plus-support staff. The state has also conducted a joint weighted caseload study so that courts, prosecution and public defense might collaboratively project their caseloads using shared assumptions and methodology. See note 62 and accompanying text, *supra*.

The goal of all standards, as noted by the Justice Department report referenced above, is to promote uniform quality in all essential government functions. The standards examined in this study have been able to achieve uniformity, with varying degrees of success, at the local or state level. However, the right to publicly funded indigent defense services in the U.S. is a single national right, conferred by the nation's single highest charter, the Constitution. This suggests that in indigent defense, more than many other disciplines, national uniformity is a critically important goal and function. As the Justice Department report observes:

The constitutional right to effective representation joins with the guarantee of equal justice to compel the nationwide implementation of indigent defense standards.³

The usual means of achieving national uniformity through standards in other important disciplines and facilities, such as medical care, hospitals, prisons and law schools, is a process of accreditation. A system of national accreditation does not exist in the public defense area, so it was not possible for this research to study it. The question of whether accreditation systems developed for other disciplines can be effectively adapted to the field of public defense, to move toward standards compliance which is not only more thorough, but more nationally uniform, is one remaining to be addressed.

³ *Redefining Leadership for Equal Justice*, at 14.

Introduction

One Spring night in 2001, an unidentified caller dialed 911 and hung up before words were exchanged. The police were routinely dispatched to the apartment where the call originated, and were greeted at the door by Mike B.¹ Mike had used methamphetamines an hour earlier, and appeared nervous. The police asked permission to enter to ensure that no actual emergency was in progress, and Mike consented. The officers saw drugs in plain view. Mike, and an acquaintance Mary who was also present, were arrested and charged with felonies.

To anyone familiar with the criminal justice system in the United States, cases like Mike's are commonplace. They frequently pass through the system with little thought or attention by defenders or other players.

Mike B. was fortunate. He lived in Eugene, Oregon. Unlike many other jurisdictions, Oregon has adopted standards to ensure that defense representation services are provided to people of limited means in a manner that is both cost-efficient and meets certain thresholds for quality. Oregon's indigent defense standards are enforced through inclusion in contracts with individual attorneys, private bar consortiums, or non-profit public defender agencies. The contracts do not simply specify a flat fee for a fixed number of cases. They also specify certain minimum conditions, derived from the standards, designed to ensure that the legal services furnished are of adequate quality to ensure low-income defendants a reasonably fair day in court. For example, they set experience levels required of attorneys to handle criminal matters of various degrees of complexity and severity, they set requirements for continuing legal training, and set limits on the number of cases an attorney can take in a year. In Mike's case, the Oregon standards were embodied in the team of qualified attorneys, investigators and legal assistants of the Public Defender Services of Lane County.

For Mike, it was the standard requiring early intervention in a case by an attorney that made a crucial difference and helped him get his life back on track. Section 7.1.4.1-2 of the public defender office's contract with the state requires the organization, like all Oregon contractors, to conduct initial interviews with in-custody clients within 24 hours of appointment, or 72 hours for out-of-custody defendants if possible.²

Mike's trained public defender, Ilisa Rooke-Ley, learned immediately during the initial interview that Mike is a developmentally delayed 38-year old man. An investigator in the

¹ For privacy reasons, the names of the individuals have been changed.

² PDSL's policy manual (sec 1.16) also supports this standard.

office determined that, at the time of his arrest, Mike had been under the supervision of either Senior & Disabled Services or Oregon Independent Living for all of his adult life. A legal assistant was dispatched to interview Mike's social workers. She learned that the social workers had found Mary, the other person arrested that night, and an associate of hers named Tom to be at the root of Mike's recent problems. Since becoming "friends" with Mary and Tom, Mike began showing signs of drug use. A suspicious number of television sets and VCR's began appearing at his apartment. The social workers had tried to keep Mary and Tom away from Mike – to the point of having the pair arrested for trespassing at his apartment. That action only served to make Mike distrusting of the social workers and their assistance.

To public defender Rooke-Ley, Mike was "kind and lovable" – a trusting person who could be easily swayed by people purporting to be his friends. From their investigation, the public defender team concluded, "Tom and Mary used Mike's affable nature and mental challenges to make him an unsuspecting cover for their crimes. They befriended him, drugged him and used his apartment to hide items they stole." The public defender interviewed Mike again, this time accompanied by a social worker, to explain to him the importance of ending all illicit drug use, and staying away from Tom and Mary. As his trust in his public defender team grew, Mike acknowledged that to stay clean he needed to stop seeing Mary and Tom, since they were the only people who ever gave him drugs.

With those promises, Mike's public defender went to the Deputy District Attorney handling the case. Mike's public defender knew that Lane County's drug court was not an option for Mike because of his limited ability to undergo the rigorous treatment requirements and schedule. After explaining Mike's disabilities and her view of the facts of the case, she requested that the prosecutor speak with Mike's social workers to verify the information. Through negotiations, the public defender and the District Attorney agreed that Mike was a candidate for the District Attorney's Deferred Adjudication Program. In Lane County, appropriate defendants are offered the chance to have their cases dismissed if they successfully complete conditions set out by the District Attorney. In this case, the State agreed to defer adjudication for one year on a count of possession of a controlled substance if Mike agreed to abstain from all drug use, submit himself to random drug testing and, perhaps most importantly, stay away from Mary and Tom.

Oregon's implementation of indigent defense standards has positively impacted Mike's life. More than two years into the program, he is living a clean and productive life. He moved into a semi-foster care program and is a volunteer for Adult and Senior Services. He calls his friends at the public defender office regularly to report on his progress. He has not seen Tom or Mary. He has not tested positive for drugs.

The standards have also impacted the greater Lane County community. Early diversion of people like Mike out of the criminal justice system eases congestion of court dockets, decreasing the inefficient use of time by judges, district attorneys, public defenders, bailiffs, clerks and other court officers and staff. Without such defendants being unnecessarily detained pre-trial or incarcerated post-trial, correctional resources are more precisely targeted to people who pose a real threat to public safety or are a flight risk.

And fair and commonsense outcomes, as in Mike's case, increase community acceptance of the criminal justice system and the integrity of its judgments.

Had Mike been arrested elsewhere in the United States, the result might not have satisfied all of these different interests. In Louisiana, he may have been detained in jail for weeks or months before an attorney was appointed to his case. In parts of New York, Mike may have been assigned an attorney with 1,600 other clients annually, in which case he would have met his lawyer for the first time on the day of his preliminary hearing, and had his case continued several times, wasting both adjudicative and correctional resources. In Alabama and many other states, he may have pled guilty to misdemeanor charges in exchange for time served, without counsel ever having been assigned or consulted, not understanding the impact a criminal record has on his employment, housing, eligibility for health or income-support benefits, or immigration status – all issues that may involve future court actions at public expense. In other jurisdictions, Mike may have been assigned to a real estate attorney, and been found guilty on felony charges and imprisoned simply because his attorney had no experience looking beneath the surface of a case such as Mike's. In any of these jurisdictions, Mike may have left dependents behind to move on to welfare rolls or may have been the subject of a petition to terminate his parental rights. His case may have been overturned on appeal for ineffective assistance of counsel and remanded to the lower courts for a new trial.

In Mike's case, success started with the standards, but also required a skilled and dedicated public defense team, an understanding district attorney's office, and a court system which treated Mike with dignity and respect. The standards simply made it possible for the public defender's office to provide more prompt representation, comprehensively examining and addressing not only the legal charges against Mike, but the challenges of his life which led to the charges and which, if unaddressed, would have made recidivism likely. By requiring public defense attorneys to carry reasonable caseloads, meet basic levels of qualifications, attend continuing legal training and meet with clients early, Oregon's standards allow indigent defense practitioners in Lane County to be coequal partners in an effective adjudicative system that respects defendants' constitutional right to the effective assistance of counsel.

Background

The vast majority of defendants facing criminal charges in the United States are indigent and receive publicly financed legal representation. In the nation's 100 largest counties, comprising 42% of the U.S. population and 52% of all arrests for Part I crimes, 82% of felony defendants were represented by public defenders or assigned counsel, according to

reports issued by the Bureau of Justice Assistance in 2000.³ Indigent defense providers in those jurisdictions handled approximately 4.2 million cases in the year 1999, at a total cost of \$1.2 billion, or about 3% of those counties' local criminal justice expenditures.

Public defense services in the U.S. are constitutionally mandated in any case which might result in a sentence of incarceration, under a line of U.S. Supreme Court cases commencing with *Gideon v. Wainwright* in 1963.⁴ Today, services are provided through three basic delivery models: staffed governmental public defender agencies; contracts with nongovernmental agencies, firms or lawyers to provide representation in some or all of a jurisdiction's criminal cases; and appointment of private lawyers one case at a time (commonly used in jurisdictions which do not have a public defender system, or in cases where the primary defense services provider has a conflict of interest, such as in the representation of codefendants).

In the BJS study of the nation's 100 largest counties, full-time staffed public defender agencies handled the large majority of cases (82%), employing more than 12,700 attorneys and other staff, and the remainder of cases were handled by over 30,700 private attorneys serving as appointed counsel, supplemented by more than 1,000 contracts with nongovernmental indigent defense providers.⁵ However, in less populous counties, reliance on individual assigned counsel is significantly more prevalent. Although the 100 largest counties contain approximately 42% of the U.S. population and rely primarily on institutional public defender agencies, there are more than 3,000 counties altogether in the U.S.,⁶ approximately half of which fill their indigent defense needs primarily through individual appointments of private attorneys.⁷

Caseloads vary widely. Although many jurisdictions limit indigent defense caseloads by statute, standard or practice (Table 13, *infra*), many others do not. Whereas standards generally limit public defender caseloads to 150 felonies per attorney per year, or 400 misdemeanors⁸ (so that, for example, where attorneys do both equally, the limit would be 275 cases altogether – 75 felonies plus 200 misdemeanors), the reality in many offices is

³ *Defense Counsel in Criminal Cases*, NCJ 179023; *Indigent Defense Services in Large Counties, 1999*, NCJ 184932.

⁴ 372 U.S. 335 (1963) (felony trials); *Douglas v. California*, 372 U.S. 353 (1963) (direct appeals); *Miranda v. Arizona*, 384 U.S. 436 (1966) (custodial interrogation); *In Re Gault*, 387 U.S. 1 (1967) (juvenile proceedings resulting in confinement); *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearings); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (misdemeanors involving possible imprisonment); and *Shelton v. Alabama*, 535 U.S. 654 (2002) (misdemeanors involving a suspended sentence).

⁵ Note 3 and accompanying text *supra*.

⁶ National Association of Counties,

www.naco.org/Content/NavigationMenu/About_Counties/County_Government/Default271.htm. Counties with populations under 50,000 accounted for nearly three-fourths of all county governments in 2000.

⁷ The most recent data on national prevalence of assigned counsel versus public defender systems date back to 1986 (*Criminal Defense for the Poor*, BJS, 1986, NCJ 112919, Table 3). They indicate that at that time, just over half (52%) of all counties relied primarily on assigned counsel, as compared with 37% relying primarily on public defender agencies (with the remaining 10 percent relying on contract systems). The data indicated that the assigned counsel proportion was trending downward (from 59% in 1982), as increasing numbers of jurisdictions implemented public defender agencies.

⁸ See "Indigent Defense Standards: Ten Fundamental Areas," 10. Attorney Caseload/Workload, *infra*.

far in excess of these limits. BJS research on the nation's 100 largest counties indicates that assistant public defenders in the nation's 100 largest counties have average caseloads over 530 annually.⁹ Situations where attorneys handle up to 2,000 cases per year, or 1,400 juvenile cases (seven times the national standard of 200) have been documented.¹⁰

As noted in an Office of Justice Programs report in 2000, "the extent to which States and localities are succeeding in fulfilling the promise of *Gideon* varies widely. Overall, despite progress in many jurisdictions, indigent defense in the United States today is in a chronic state of crisis."¹¹

This research is the result of a recommendation to the U.S. Attorney General by the Assistant Attorneys General for the Office of Justice Programs and the Office of Policy Development, and the Indigent Defense Working groups of OJP and DOJ. In a May 22, 1998 memo, they recommended "the Department should encourage grant applications from parties interested in studying the effect of standards on the delivery of indigent defense services."

This research recommendation builds on other OJP activities related to indigent defense standards. In mid-1999 and again in mid-2000, OJP convened national symposia on indigent defense, in which the utilization of uniform standards played a prominent role. The official report on the 1999 symposium states that indigent defense standards "are the most effective means of ensuring uniform quality of indigent defense services." Attorney General Janet Reno wrote that DOJ is "uniquely positioned" to play an important role in strengthening indigent defense, including "by encouraging the development and dissemination of minimum standards" – an effort which she described as "essential if our Nation is to fulfill our obligation under *Gideon v. Wainwright* to provide competent counsel to every criminal defendant charged with a serious crime."¹²

Echoing the 1999 report, the 2000 report (cited in this report's Summary Findings and Conclusions) states that standards "are key to uniform quality in all essential government functions." The report further explained:

In the indigent defense area, uniform application of standards at the state or national level is an important means of limiting arbitrary disparities in the quality of representation based solely on the location in which a prosecution is brought. The quality of justice that an innocent person receives should not vary unpredictably among neighboring counties. If two people are charged with identical offenses in adjoining jurisdictions, one should not get a public defender

⁹ Total 1999 indigent defense cases documented by BJS in 100 largest counties: 4,174,079, 82% of which were handled by public defender agencies, which employ collectively 6,364 assistant public defenders. *Indigent Defense in Large Counties, 1999*, note 3 *supra*.

¹⁰ *No Exceptions, Vol. 2: The Caseload Crisis* (American Bar Association, National Association of Criminal Defense Lawyers, National Legal Aid and Defender Association, June 2003) (www.noexceptions.org/pdf/june_pub.pdf).

¹¹ *Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations*, Office of Justice Programs, March 2000 (NCJ 181344) (hereinafter "Improving Criminal Justice Systems").

¹² *Id.* at x, xii and xv.

with an annual caseload of 700 while the other's has 150; one should not get an appointed private lawyer who is paid a quarter of what the other's lawyer is paid; one should not be denied resources for a DNA test, or an expert or an investigator, while the other gets them; one should not get a lawyer who is properly trained, experienced and supervised, while the other gets a neophyte. The constitutional right to effective representation joins with the guarantee of equal justice to compel the nationwide implementation of indigent defense standards.

For decades, the National Legal Aid and Defender Association (NLADA) and the American Bar Association (ABA) have played leadership roles in the development of national standards for indigent defense functions and systems.¹³ While such national standards are non-binding on state or local programs, they do serve as a model for enacting jurisdiction-specific standards, many of which are binding and enforceable by virtue of statutory codification, promulgation of state supreme court rule, adoption/citation in state supreme court opinion, conditionality upon state funding, or adoption by state indigent defense oversight commission or public defense agency.

Such state and national standards were gathered into the first-ever national *Compendium of Standards for Indigent Defense Systems* by the U.S. Department of Justice, with NLADA assistance, in 2000.¹⁴ This significant effort still left unanswered questions of the greatest interest to state and local policy makers and funding agencies considering whether and how to adopt indigent defense standards: What measurable impacts are likely to result from the adoption of standards? How will it affect important factors such as cost, quality of services, avoidance of litigation or overturned convictions, workload, staff turnover, accountability, or management efficiencies?

¹³ *Guidelines for Legal Defense Systems in the United States* (National Study Commission on Defense Services [staffed by NLADA; commissioned by the U.S. Department of Justice], 1976) (hereinafter "NSC"); *Ten Principles of a Public Defense Delivery System* (ABA, 2002), substantially similar to "Ten Commandments of Public Defense Delivery Systems," published in U.S. Department of Justice *Compendium of Standards for Indigent Defense Systems, infra n.5* (hereinafter "Ten Principles"); *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* (NLADA, 1988; ABA, 1989) (hereinafter "Death Penalty"); *Defender Training and Development Standards* (NLADA, 1997); *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995) (hereinafter "Performance Guidelines"); *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* (NLADA, 1984; ABA, 1985) (hereinafter "Contracting"); *Standards for the Administration of Assigned Counsel Systems* (NLADA, 1989) (hereinafter "Assigned Counsel Standards"); *Standards and Evaluation Design for Appellate Defender Offices* (NLADA, 1980); *Evaluation Design for Public Defender Offices* (NLADA, 1977); *Standards for Criminal Justice, Providing Defense Services* (ABA, 3rd ed., 1992) (hereinafter "ABA Defense Services"); *Standards for Criminal Justice: Defense Function* (ABA, 3rd ed., 1993) (hereinafter "ABA Defense Function"); *Report on Courts, Chapter 13: The Defense* (National Advisory Commission on Criminal Justice Standards and Goals, 1973) (hereinafter "NAC"); National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979).

¹⁴ This five-volume work (hereinafter "OJP Compendium") was posted on OJP's web site, www.ojp.usdoj.gov/indigentdefense/compendium/, and distributed in searchable CD-ROM format to thousands of state and local elected and appointed policy makers, funding agencies, judges, public defense agency leaders, and law libraries.

Also left unanswered was one other important question: In what ways do the current national standards need to be revised or updated to better serve the field and reflect the present-day realities of justice-system structures, funding mechanisms, constitutional requirements, and the evolving substantive and procedural demands of indigent criminal defense practice?

Methodology

This study examines the implementation and impact of indigent defense standards through a combination of a national survey and on-site field investigations. The study's approach was designed with the assistance of an advisory committee of chief public defenders and researchers.¹⁵

The advisory committee reviewed data from the National Survey of Indigent Defense Systems (NSIDS), conducted by the Bureau of Justice Statistics in 2000, a subset of five questions in the Survey relating to utilization of indigent defense standards.¹⁶ The data were regarded as inconclusive by BJS and were not published, but were shared with the advisory committee to produce an approximation of the extent of utilization of standards, the type of standards used, the implementing authority, and whether compliance is mandatory or tied to the availability of state funding. None of the questions explored the impact that standards have when they are implemented.

The present investigation was designed not to assess the prevalence of indigent defense standards, but to assess the various impacts detected in those jurisdictions which have made the choice to implement standards.

The advisory committee identified ten fundamental aspects of indigent defense that are the subject of standards, as to which compliance or noncompliance could be measured to assess practically the impact of implementing standards:

1. Independence from undue judicial or executive influence
2. Resource parity with the prosecution
3. Vertical representation
4. Attorney qualifications
5. Attorney training
6. Client financial eligibility determinations
7. Timeliness of appointment of counsel and contact with client
8. Confidential meeting with clients
9. Attorney performance
10. Attorney caseload/workload

¹⁵ See Acknowledgements, *infra*.

¹⁶ See Appendix 2.

These ten areas are similar to, but do not precisely track, the American Bar Association's *Ten Principles of a Public Defense Delivery System*,¹⁷ which were adopted by the ABA after the survey in the present study was prepared and mailed. The ABA's Ten Principles are in turn primarily a restatement of the key elements of all national standards promulgated by national bodies under the aegis of the U.S. Department of Justice, NLADA and the ABA during the preceding three decades.¹⁸

The advisory committee directed the design of a 14-page survey instrument,¹⁹ consisting of four parts:

- 1) general information regarding the respondent indigent defense agency, including number of staff, annual budget, and jurisdictional scope;
- 2) 10 pages asking roughly comparable questions regarding each of the 10 substantive areas of indigent defense standards, including whether the agency is governed by such standards, what is the source, whether compliance is mandatory, how compliance is enforced, and whether they are derived from national standards by the NLADA, ABA or other sources;
- 3) a table with the 10 substantive areas of standards across the horizontal axis and a list of possible impacts (e.g., reduced attorney turnover, improved cost savings/efficiencies) down the vertical axis, with directions to check all impacts that correlate with each standard; and

¹⁷ *Supra* note 13. The black-letter *Ten Principles* are:

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

The main differences from the ten fundamental areas of standards assessed by the present research are: 1) the ABA Principles combine two of the present study's areas of inquiry into one Principle: client financial eligibility determinations and timeliness of appointment are treated separately here, as survey areas 6 and 7, but are combined by the ABA under Principle 3; 2) ABA Principle 2 – that the indigent defense delivery system should generally consist of both a public defender office and some active participation by the private bar – was not addressed in the present survey, in light of the advisory committee's acknowledgement that virtually all of the offices receiving the survey would be institutional public defender offices in the NLADA and NCJRS databases; and 3) the order of the 10 issue areas is somewhat different. The full *Ten Principles*, with commentary and annotations, are attached as Appendix 6.

¹⁸ Enumerated in note 13, *supra*.

¹⁹ Appendix 1.

- 4) a list of overall questions, covering issues such as obstacles to implementation of the standards, adequacy of the standards and specific areas where a need for additional standards or revisions was perceived, and whether national standards were used in any way in addition to the state/local standards, such as in training or conducting an outside evaluation of the agency.

The survey was mailed in October 2001 to the directors of 169 public defender agencies and other leading indigent defense providers in all 50 states and U.S. territories. In the 22 states with a single statewide public defense agency, only one survey was mailed, and the response rate was 100 percent. In the states where public defense is primarily a county responsibility, surveys were mailed to a sample of indigent defense agencies, in order to obtain representative responses from jurisdictions of different sizes and rural/urban makeup. The survey-collection process was complicated and prolonged by the occurrence of the anthrax mail attacks shortly after the surveys were mailed out. The researchers followed up with emailed surveys, up to five rounds of follow-up phone calls, and phone interviews. In states with county-based systems but some type of statewide indigent defense backup center or association (e.g., California, Florida, Illinois, New York, Pennsylvania, South Carolina, Washington, and Michigan, where the state appellate defender serves as training and backup center for assigned counsel and local public defender programs), emphasis was placed on obtaining responses from leaders of such organizations with statewide perspective. In states with no known public defender agencies (e.g., Maine, North Dakota), surveys were directed to private lawyers known as leaders of the assigned-counsel or contract-counsel community. A total of 74 surveys were completed and processed, representing all 50 states and territories. Data were recorded on a Microsoft Access-based database and converted in Excel pivot tables.

Upon analysis of the survey responses, the advisory committee considered the second phase of the study: a more detailed investigation and verification of the reported impact of the utilization of standards, including any correlations between the manner of implementation (including enforcement mechanisms) and the extent of the impact of the standards. From respondents in the 50 states, four jurisdictions were selected, to obtain as broad a representation as possible of the different types of indigent defense systems, standards, and implementation mechanisms. A principle criterion was the availability of comparison measurements regarding the impact of the standards – e.g., viewing the same jurisdiction before and after standards implementation, or comparing it to a similar or contiguous jurisdiction. The four agencies were selected to reflect the maximum diversity in the following categories:

- ξ jurisdictional coverage (from fully integrated statewide system to autonomous county system),
- ξ type of delivery system (from public agency to nonprofit organizations operating under a contract),
- ξ source of standards (the agency itself, a state oversight board, inclusion in the contract for services, and national-organization standards),
- ξ manner of enforcement (internal within a state agency; tied to state reimbursement of county indigent defense costs; disqualification from contract renewal; and purely voluntary compliance), and

ξ geographic diversity (northeast, midwest, and west).

A protocol for preparing for and conducting the site visits was prepared, encompassing types of data to be collected and interview questions for public defense and funding agency officials.²⁰ Data collection and interviewing were conducted in each of the four jurisdictions, including analysis and independent verification of budget, staffing, salaries, and caseload data, examination of the law, culture and demographics of the jurisdiction, and interviews with defender officials and staff, funding officials, judges and prosecutors.

²⁰ Appendix 3.

Indigent Defense Standards: Ten Fundamental Areas

In February of 2002, The American Bar Association adopted *Ten Principles of a Public Defense Delivery System*, which “constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney.”²¹ The purpose of the *Ten Principles* is to distill the existing voluminous national standards pertaining to indigent defense systems down to their most basic elements, in a succinct form that busy officials and policymakers can readily review and apply. The *Ten Principles* provide a concise reference point for discussion of the ten areas of indigent defense standards investigated in this report.

1. Independence

The first of the ABA’s *Ten Principles* addresses the importance of independence in indigent defense representation. In the version of the *Ten Principles* published by the Justice Department, the reason for the primacy of the independence requirement is made explicit: to ensure that public defense services are “conflict-free.”²² The Principle provides that:

*The public defense function, including the selection, funding, and payment of defense counsel, is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.*²³

²¹ www.abanet.org/legalservices/downloads/sclaid/10principles.pdf. See note 17, *supra*; full text in Appendix 6. The *Ten Principles* are based on a paper by H. Scott Wallace, NLADA Director of Defender Legal Services, and James Neuhard, State Appellate Defender of Michigan and former NLADA President, published in December 2000 by the U.S. Department of Justice, in the OJP Compendium (*supra* note 14). Both versions are densely footnoted with references to all national standards issued over the previous three decades providing support for the black-letter principles stated.

²² *Id.*

²³ Annotations and footnotes omitted throughout.

As stated in the Office of Justice Programs Report, *Improving Criminal Justice Through Expanded Strategies and Innovative Collaborations: A Report of the National Symposium on Indigent Defense* (“Improving Criminal Justice”): “The ethical imperative of providing quality representation to clients should not be compromised by outside interference or political attacks.”²⁴ Courts should have no greater oversight role over lawyers for indigent defendants than they do for paying clients, the report states; oversight should be “by an independent board or commission, rather than directly by judicial, legislative or executive agencies or officials.”

Noting that prosecutors and privately retained counsel in the United States are independent, the National Study Commission on Defense Services concluded in 1976 that: “The mediator between two adversaries cannot be permitted to make policy for one of the adversaries.”²⁵

National standards address the need for independence in the context of all three basic models for delivering indigent defense services in the United States. Where private lawyers are assigned to one case at a time, the concern is with unilateral judicial power to select lawyers, and to reduce or deny the lawyer’s compensation (called an “ad hoc” system of assigned counsel, to signify the lack of standards-driven constraints upon judicial discretion²⁶). Where contracts with nonprofit public defense organizations or law offices are used, the concern focuses primarily on flat-fee contracts which pay a single lump sum for a block of cases regardless of how much work the attorney does. The concern is that this creates a direct financial conflict of interest with the client, in the sense that work or services beyond the bare minimum effectively reduces the attorney’s take-home compensation. Where a public defender system is used, the concern is with vesting the power to hire and fire the chief public defender in a single government official (such as the jurisdiction’s chief executive or chief judge), a concern which is compounded when that official must run for popular election.²⁷

²⁴ Note 11 *supra*, at x.

²⁵ NSC Report, at 220, citing National Advisory Commission on criminal Justice Standards and Goals (1973), commentary to Standard 13.9.

²⁶ *Ad hoc* systems of assigned counsel are distinguished from governmentally-administered, coordinated assigned counsel systems, which commonly utilize standards (*e.g.*, to organize attorneys into different lists according to their training and experience, to limit workload, to require training and supervision, and to afford reasonable compensation and expenses, see Assigned Counsel Standards, *supra* note 4), whether as a division of a state public defender agency (such as in Massachusetts and Wisconsin), or as a freestanding state agency (such as Colorado) or county agency (such as Pima County, Arizona and San Mateo County, California).

²⁷ The National Study Commission on Defense Services in 1976 expressed concern with the cost, distraction, and counterproductiveness of allowing the intrusion of electoral politics into a governmental function that should be focused exclusively on criminal law and administration. *Id.* at 217. These concerns are contradicted by responses from two states indicating that independence is actually enhanced when the public defender is elected. Chief public defenders in Florida and Tennessee stand for election, and responses indicate that their accountability directly to an electorate which appraises them solely in terms of their fitness to run a public defense agency, rather than accountability to a political leader whose fitness is measured more by what they have done to prosecute and incarcerate criminals, affords them greater latitude to pursue the professional mission of the office, subject to the same managerial and fiscal constraints expected of all public agency managers.

2. Resources

The eighth of the ABA's *Ten Principles* addresses the issue of resources for indigent defense, specifically in comparison with prosecution resources:

There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.... No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system. This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

Chief Justice Warren Burger wrote in 1972 that "society's goal should be 'that the system for providing the counsel and facilities for the defense should be as good as the system which society provides for the prosecution.'"²⁸

U.S. Attorney General Janet Reno stated in 1999 that, "If one leg of the system is weaker than the others, the whole system will ultimately falter." The Justice Department's 1999 report, *Improving Criminal Justice* concludes that:

Salary parity between prosecutors and defenders at all experience levels is an important means of reducing staff turnover and avoiding related recruitment/training costs and disruptions to the office and case processing. Concomitant with salary parity is the need to maintain comparable staffing and workloads – the innately linked notions of "equal pay" for "equal work." The concept of parity includes all related resource allocations, including support, investigative and expert services, physical facilities such as a law library, computers and proximity to the courthouse, as well as institutional issues such as access to federal grant programs and student loan forgiveness options.²⁹

3. Vertical representation

The seventh of the ABA's *Ten Principles* addresses the question of whether an indigent client may be represented by different attorneys at different stages of the proceeding

²⁸ *Argersinger v. Hamlin*, 407 U.S. 25, 43 (concurring opinion) (citing ABA Standards, *Providing Defense Services*).

²⁹ Note 11, *supra*, at x.

(“stage,” “zone” or “horizontal” representation), or should have the same attorney throughout, and provides that an effective public defense system requires that:

The same attorney continuously represents the client until completion of the case. Often referred to as “vertical representation,” the same attorney should continuously represent the client from initial assignment through the trial and sentencing. The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

Standards on this subject note that the reasons for public defender offices to use horizontal representation are usually related to saving money and time. Lawyers need only sit in one place all day long, receiving a stream of clients and files and then passing them on to another lawyer for the next stage, in the manner of an “assembly line.”³⁰ But standards uniformly and explicitly reject horizontal representation,³¹ for various reasons: it inhibits the establishment of an attorney-client relationship, fosters in attorneys a lack of accountability and responsibility for the outcome of a case, increases the likelihood of omissions of necessary work as the case passes between attorneys, and is both cost-ineffective and demoralizing to clients as they are reinterviewed by a parade of staff starting from scratch.³²

4. Attorney qualifications

The sixth of the ABA’s *Ten Principles* provides that:

Defense counsel’s ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.

This requirement derives from all attorneys’ ethical obligations to accept only those cases for which they know they have the knowledge and experience to offer zealous and quality representation.³³ This Principle integrates this duty together with various systemic interests, such as efficiency and the avoidance of attorney errors, reversals and retrials, findings of ineffective assistance of counsel, wrongful convictions and/or executions, and attendant malpractice liability. It then restates the duty as an obligation of the indigent defense system within which the attorney is engaged to provide legal representation services.

³⁰ NSC at 470.

³¹ ABA *Defense Services*, commentary to Standard 5-6.2, at 83.

³² NSC at 462-470, citing *Wallace v. Kern* (slip op., E.D.N.Y. May 10, 1973), at 30; *Moore v. U.S.* (432 F.2d 730, 736 (3rd Cir. 1970)); and *U.S. ex rel Thomas v. Zelker*, 332 F.Supp. 595, 599 (S.D.N.Y. 1971).

³³ See, e.g., ABA *Model Rules of Professional Conduct*, Rule 1.1; ABA *Defense Function*, Standard 4-1.6(a); NLADA *Performance Guidelines*, 1.3(a).

Typically, this requirement is implemented by dividing up attorneys into classifications according to their years and types of experience and training, which correspond to the level of complexity of cases, the severity of charges and potential punishments, and the degree of legal skills generally required. Attorneys can rise from one classification to the next by accumulating experience and training. Assigned counsel programs commonly maintain various different “lists” from which attorneys are selected according to the classification of the offense. Public defender programs place attorneys in different divisions of the office.

Since the complexity and demands of death penalty litigation are unique and high, attorney qualifications are a common element of standards for capital defense, whether through statute, state supreme court rule, or indigent defense system directive.³⁴

5. Attorney Training

The ninth of the ABA’s Ten Principles provides:

Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.

Standards requiring training are typically cast, like the discussion of attorney qualifications above, in terms of both quality of representation to clients and various systemic interests in maximizing efficiency and avoiding errors. Commentary to the ABA *Standards for Providing Defense Services* views attorney training as a “cost-saving device” because of the “cost of retrials based on trial errors by defense counsel or on counsel’s ineffectiveness.” The Preface to the NLADA *Defender Training and Development Standards* states that quality training makes staff members “more productive, efficient and effective.”³⁵ In adopting the *Ten Principles* in 2002, the ABA emphasized the particular importance of training with regard to indigent criminal defense by endorsing, for the first time in any area of legal practice, a requirement of *mandatory* continuing legal education.

Standards typically relate indigent defense training to the level of training available to prosecutors in the jurisdiction. As stated in the Attorney General’s Introduction to *Redefining Leadership for Equal Defense: Final Report of National Symposium on Indigent Defense 2000*, “public defenders need access to training resources to the same degree that Federal, State and local prosecutors have the same.”³⁶

³⁴ *OJP Compendium*, Vol. 3 (www.ojp.usdoj.gov/indigentdefense/compendium/standardsv3/v3b.htm#Top).

³⁵ www.nlada.org/Defender/Defender_Standards/Defender_Training_Standards.

³⁶ Office of Justice Programs, U.S. Department of Justice (www.ojp.usdoj.gov/indigentdefense/symposium.pdf) (hereinafter “*Redefining Leadership for Indigent Defense*,” at viii).

6. Client Eligibility

The third of the ABA's *Ten Principles* addresses the obligation of indigent defense systems to provide for prompt financial eligibility screening of defendants, toward the goal of early appointment of counsel:

Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention or request, and usually within 24 hours thereafter.

Standardized procedures for client eligibility screening serve the interest of uniformity and equality of treatment of defendants with limited resources. These interests are undermined when individual courts and jurisdictions are free to define financial eligibility as they see fit – e.g., ranging from “absolutely destitute” to “inability to obtain adequate representation without substantial hardship,” with factors such as employment or ability to post bond considered disqualifying in some jurisdictions but not in others. The National Study Commission on Defense Services suggested that this type of unequal application of the Sixth Amendment constitutes a violation of both due process and equal protection.³⁷

Although national standards direct that client eligibility determinations should be performed by public defense agencies,³⁸ various jurisdictions provide for determinations to be made by other entities, such as judges, court clerks, or probation or pretrial services officers. Regardless of *who* conducts the determinations, there remains another central focus of standards regarding financial eligibility determinations: *when* they are made. The promptness of the eligibility determination delimits the speed with which counsel may commence representation of the client (see *Timeliness of Appointment and Contact*, below). This in turn influences important pretrial rights, including those of a constitutional dimension, and the duration of pretrial and pre-appointment detention.

7. Timeliness of Appointment and Contact

This area of standards is encompassed under the same third of the ABA *Ten Principles* as the area of client eligibility determinations.

Requirements of prompt appointment of counsel are based on the constitutional requirement that the right to counsel attaches at “critical stages” that occur before trial, such as custodial interrogations,³⁹ lineups,⁴⁰ and preliminary hearings.⁴¹ In 1991, the

³⁷ NSC commentary at 72-74.

³⁸ NSC, Guideline 1.6. Cf. ABA *Defense Services*, Standard 5-7.3 (determinations may be made by either defense entities or by “a neutral screening agency” or the court.

³⁹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴⁰ *Kirby v. Illinois*, 406 U.S. 682 (1972).

⁴¹ *Coleman v. Alabama*, 399 U.S. 1 (1970).

Supreme Court ruled that one critical stage – the probable cause determination, often conducted at arraignment – is constitutionally required to be conducted within 48 hours of arrest.⁴² Most standards take these requirements beyond the constitutional minimum requirement, to be triggered by detention or request, even though formal charges may not have been filed, in order to encourage early interviews, investigation, and resolution of cases, and avoid discrimination between the outcomes of cases involving indigent and non-indigent defendants.⁴³

8. Confidential Meeting With Client

The fourth of the ABA’s *Ten Principles* provides that in an effective public defense delivery system –

Defense counsel is provided sufficient time and a confidential space with which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses and other places where defendants must confer with counsel.

As the Principle itself states, the purpose is “to ensure confidential communications” between attorney and client. This effectuates the individual attorney’s professional ethical obligation to preserve attorney-client confidences,⁴⁴ the breach of which is punishable by bar disciplinary action. It also effectuates the responsibility of the jurisdiction and the indigent defense system to provide a structure in which confidentiality may be preserved⁴⁵ – perhaps nowhere more important than in indigent criminal defense, where liberty and even life are at stake, and client mistrust of the public defender as a paid agent of the state is high.⁴⁶

9. Attorney Performance

The tenth of the ABA’s *Ten Principles* frames standards regarding the duties of attorneys in individual cases in terms of the indigent defense system’s obligation to ensure that attorneys are monitored for compliance with such standards:

Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned

⁴² *County of Riverside v. McLaughlin*, 500 U.S. 44.

⁴³ *ABA Defense Services*, commentary to Standard 5-6.1, at 78-79.

⁴⁴ *ABA Model Rules of Professional Conduct*, Rule 1.6; *Model Code of Professional Responsibility*, DR 4-101; *ABA Defense Function*, Standard 4-3.1; *NLADA Performance Guidelines*, 2.2.

⁴⁵ *NSC*, Guideline 5.10

⁴⁶ *Id.*, and commentary at p. 460.

counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency [citing the ABA's Defense Function Standards and NLADA's Performance Guidelines for Criminal Defense Representation].

Such standards, reflecting decades of research and development at both the national and state level, are an effort to raise the requirement of effective assistance of counsel above the minimal constitutional floor which was set by the Supreme Court in *Strickland v. Washington*,⁴⁷ under which courts have tolerated attorneys who have been asleep, drunk or under the influence of drugs or mental illness, conducted no preparation, or had no familiarity or experience with criminal law – even in death penalty cases.⁴⁸ Performance standards prescribe the basic duties of individual attorneys at various stages of individual cases, such as interviewing the client, conducting investigation and discovery, motion practice, trial preparation, sentencing, and post-conviction matters.

The breadth of the desire to raise the bar above the *Strickland* level is reflected in the extent of performance standards adopted around the states, consuming one entire volume of the OJP *Compendium of Standards for Indigent Defense Systems*.⁴⁹

10. Attorney Caseload/Workload

The fifth of the ABA's *Ten Principles* provides:

Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded,⁵⁰ but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.

Regulating an attorney's workload is one of the simplest, most common and direct safeguards against overloaded public defense attorneys and deficient defense

⁴⁷ 466 U.S. 668 (1984).

⁴⁸ See, e.g., cases collected in Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 Yale L.J. 1835 (1994).

⁴⁹ *Supra* note 14; www.ojp.usdoj.gov/indigentdefense/compendium/standardsv2/welcome.html.

⁵⁰ Numerical caseload limits are specified in NAC Standard 13.12 (maximum cases per year: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals), and other national standards state that caseloads should "reflect" (NSC Guideline 5.1) or "under no circumstances exceed" (*Contracting*, Guideline III-6) these numerical limits. The workload demands of capital cases are unique: the duty to investigate, prepare and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea. *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998).

representation for low-income people facing criminal charges. The National Advisory Commission on Criminal Justice Standards and Goals first developed numerical caseload limits in 1973⁵¹ under the auspices of the U.S. Department of Justice, which, with slight modifications in some jurisdictions, have been widely adopted and proven quite durable in the intervening three decades.⁵² They have been refined, but not supplanted, by a growing body of methodology and experience in many jurisdictions for assessing “workload.” Generally, “caseload” is a measurement only of the number of cases of different types – e.g., felony, misdemeanor or juvenile – that an attorney can be expected to handle competently in a year, and “workload” represents an effort to calibrate such numbers more finely, by assigning a number of “units of work” or “weight” to cases depending on a combination of factors such as the severity of the charges and sanctions, the laws and practices of the jurisdiction, and the type of disposition, e.g., guilty plea versus trial.⁵³

Workload limits have been reinforced in recent years by a growing number of systemic challenges to underfunded indigent defense systems, where courts do not wait for the conclusion of a case, but rule before trial that a defender’s caseloads will inevitably preclude the furnishing of adequate defense representation.⁵⁴ Many other cases have been resolved by way of settlement.

⁵¹ *Id.*

⁵² See *Indigent Defense Caseloads and Common Sense: An Update* (NLADA, 1992), surveying state and local replication and adaptation of the NAC caseload limits.

⁵³ See *Case Weighting Systems: A handbook for Budget Preparation* (NLADA, 1985); *Keeping Defender Workloads Manageable*, Bureau of Justice Assistance, U.S. Department of Justice, Indigent Defense Series #4 (Spangenberg Group, 2001) (www.ncjrs.org/pdffiles1/bja/185632.pdf).

⁵⁴ See, e.g., *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981), *cert. den.* 454 U.S. 1142 (1982); *State v. Robinson*, 123 N.H. 665, 465 A.2d 1214 (1983) *Corenevsky v. Superior Court*, 36 Cal.3d 307, 682 P.2d 360 (1984); *State v. Smith*, 140 Ariz. 355, 681 P.2d 1374 (1984); *State v. Hanger*, 146 Ariz. 473, 706 P.2d 1240 (1985); *People v. Knight*, 194 Cal. App. 337, 239 Cal. Rptr. 413 (1987); *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987); *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), *cert den.* 495 U.S. 957 (1989); *Hatten v. State*, 561 So.2d 562 (Fla. 1990); *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit*, 561 So.2d 1130 (Fla. 1990); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990); *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991); *City of Mount Vernon v. Weston*, 68 Wash. App. 411, 844 P.2d 438 (1993); *State v. Peart*, 621 So.2d 780 (La. 1993); *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996).

Survey Analysis

Seventy-four survey responses were received from state, county and local indigent defense providers in all fifty states regarding their experience with implementation of indigent defense standards.

As referenced above, under Methodology, the present investigation did not seek to determine the extent of utilization of indigent defense standards nationwide. It was designed instead to examine the effects of implementing standards – including the manner of implementation of standards, the impacts of implementation, and any correlation between manner and impact. To reduce the likelihood that any system utilizing standards anywhere in the country might be omitted, follow-up contacts were made in all initially nonreporting states, to obtain survey responses from the officials or bar leaders in those states most likely to be knowledgeable about indigent defense systems and the utilization of standards.

The three tables below display the breakdown of survey respondents by funding structure,⁵⁵ organizational structure and jurisdiction population:

| | | |
|--------------------|----|------|
| 100% County-Funded | 30 | 41% |
| 100% State-Funded | 32 | 43% |
| Mixed Funding | 12 | 16% |
| Total | 74 | 100% |

| | | |
|---------------------------|----|------|
| Government Agency | 64 | 86% |
| Non-Profit Under Contract | 7 | 9% |
| Private Law Firm | 3 | 4% |
| Total | 74 | 100% |

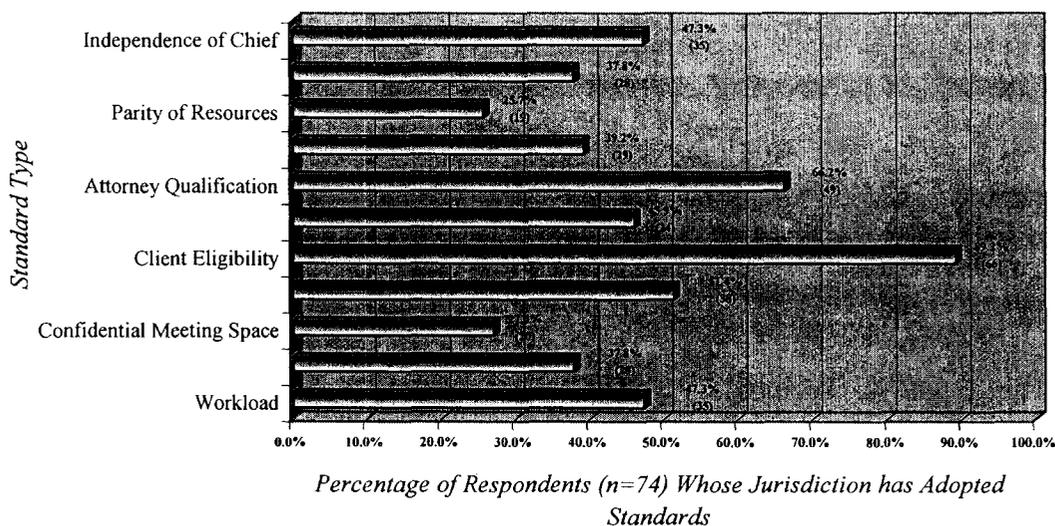
| | | |
|---------------------|----|------|
| Over 1 Million | 32 | 43% |
| 500,000 - 1 Million | 16 | 22% |
| 100,000 - 500,000 | 16 | 22% |
| 50,000 - 100,000 | 6 | 8% |
| Under 50,000 | 4 | 5% |
| Total | 74 | 100% |

⁵⁵ Indigent defense services are funded 100% by state government in 22 of the 50 states. Despite state funding, indigent defense services are organized at the county level in many of these states and the quality and type of services can vary greatly. Because this made it important to survey several county programs within these states, there are more than 22 respondents from 100% state funded systems.

The large majority of respondents to the present survey were governmental public defense agencies (86%, Table 2), and a negligible proportion (3%) were private law offices. The great majority of those governmental-agency respondents reported utilization of some form of indigent defense standards (92% reported using client-eligibility standards, Table 9). Since the survey was explicitly designed to examine the impact of standards when used, rather than to examine whether standards were or were not used, survey respondents were weighted through self-selection toward jurisdictions using standards. This indicates that jurisdictions with governmental indigent defense agencies are significantly more likely to use standards than jurisdictions with *ad hoc* assigned counsel systems.⁵⁶

The predominance of high-population jurisdictions in Table 3 does not necessarily connote a higher response rate from high-density urban jurisdictions, because “jurisdiction” can be any geographic size. Many of the most rural states (e.g., Alaska, Colorado, Wyoming, New Hampshire, Vermont, Kentucky, Minnesota, New Mexico, Oklahoma) have a single statewide public defender system, in which the “jurisdiction” comprises the entire state. Similarly, some county systems can be high-density urban and others can be low-density rural (e.g., two neighboring counties in California: Los Angeles County, with the highest population in the nation, and Riverside County, with less than one-sixth the population spread out over geographically the largest county in the nation⁵⁷).

Table 4: Percentage of Respondents with Jurisdictional Standards



⁵⁶ For discussion of *ad hoc* assigned counsel, see *supra* note 15. The extensive BJS National Survey of Indigent Defense Systems in 2000 (note 16 and Appendix 2) had indicated limited adoption of standards across all types of indigent defense systems: for example, only 26% of the 103 responding county systems reported implementation of standards limiting defender caseloads, and the highest level of implementation was 55%, for standards governing attorney qualifications.

⁵⁷ *Indigent Defense Services in Large Counties, 1999*, *supra* note 3, Appendix Table.

Most jurisdictions did not report standards comprehensively covering the ten categories that were the subject of the survey (Table 4⁵⁸). Public defense systems with some or all state funding (as opposed to county funding) reported greater utilization of standards in most areas, and significantly greater utilization of standards in certain areas such as independence (30% in county systems, versus 59% in state-funded systems), training (37% county, 50% state) and attorney performance (30% state, 50% county). The most prevalent standard reported was “client eligibility” (89% overall), reflecting a dominant interest in cost containment, by limiting access to publicly funded criminal defense representation services according to some type of formula regarding the defendant’s ability to pay for legal representation.

The second most common area of standards relates to “attorney qualifications” (66%), followed by “timeliness of appointment” standards (reported by 51% of respondents). In the area of independence, jurisdictions were more likely to have a standard protecting the chief public defender from undue political or judicial interference (47%), than one protecting individual attorneys in their representation of clients (38%).

A Closer Look at Workload Standards

Forty-seven percent of respondents indicated that their indigent defense program is governed by limits on attorneys’ caseload or workload. Of these, 54% reported unspecified limits, or a “reasonableness” limit, and 40% reported numerical limits specifying either the maximum allowable number of cases or workload units. Below is a breakdown of the type of workload standard implemented in the jurisdictions that have workload standards.

| Table 5. Workload by Type | Total | | Numerical Limits | | Non-numerical Limits | | Other | |
|---------------------------|-----------|------------|------------------|------------|----------------------|------------|----------|-----------|
| | # | % | # | % | # | % | # | % |
| 100% County-Funded | 12 | 40% | 4 | 13% | 7 | 23% | 1 | 3% |
| 100% State-Funded | 15 | 47% | 5 | 16% | 9 | 28% | 1 | 3% |
| Mixed Funding | 8 | 67% | 5 | 42% | 3 | 25% | 0 | 0% |
| Government Agency | 31 | 48% | 12 | 19% | 17 | 27% | 2 | 3% |
| Non-Profit Under Contract | 3 | 43% | 2 | 29% | 1 | 14% | 0 | 0% |
| Private Law Firm | 1 | 33% | 0 | 0% | 1 | 33% | 0 | 0% |
| Over 1 Million | 13 | 41% | 4 | 13% | 8 | 25% | 1 | 3% |
| 500,000 - 1 Million | 9 | 56% | 5 | 31% | 3 | 19% | 1 | 6% |
| 100,000 - 500,000 | 10 | 63% | 4 | 25% | 6 | 38% | 0 | 0% |
| 50,000 - 100,000 | 2 | 33% | 0 | 0% | 2 | 33% | 0 | 0% |
| Under 50,000 | 1 | 25% | 1 | 25% | 0 | 0% | 0 | 0% |
| TOTAL | 35 | 47% | 14 | 19% | 19 | 26% | 2 | 3% |

⁵⁸ More detailed demographic breakdown of responses to these survey questions in Appendix 4.

Assessing Impact

The overwhelming majority of respondents who reported standards and indicated an impact reported that the impact was positive.

Of the jurisdictions with standards relating to independence, the most common impact reported was that the agency's independence resulted in inclusion in criminal justice coordinating and planning bodies (37.1%). Other noted impacts were a direct improvement in the quality of services provided to clients (31.4%), improvement in agency management and accountability due to involvement of a knowledgeable oversight board (20%), and improved attorney training (14.3%).

Of the respondents reporting standards relating to resource parity between prosecution and indigent defense, almost two-thirds (63.2%) indicated that the parity related to salaries, with much smaller proportions reporting that their parity standards related to workload measurements or "other" types of resources utilized by both prosecution and public defense agencies.⁵⁹

Two types of standards were principally credited with producing improvements in attorney training. The most significant association was with standards requiring and defining adequate training (44.1%). A lesser proportion (26.3%) attributed improved training to standards requiring adequate defense resources. The implication is that it is an agency's articulated commitment to the importance of training, rather than dollars alone, which leads to improved training.

In-house training is more likely to be positively influenced by standards than external training (i.e., staff attending training outside the office provided by local, state or national organizations). Though attorney-training standards were reported to positively influence both types of training equally (44.1%), a significantly greater positive impact on in-house training was reported for standards requiring parity of resources (26.3% positive impact on in-house versus 15.8% on external training) and independence of the indigent defense provider (14.3% positive impact on in-house training versus 2.9% on external training).

The types of standards contributing most strongly to improved quality of public defense services to clients were roughly tied, between attorney performance standards (53.6% of the jurisdictions with such standards reported that they had resulted in quality improvement) and attorney training standards (52.9%). Again, standards relating to resources for the agency played a less dominant, but significant, role (42.1%). Almost all

⁵⁹ The extent to which parity actually exists is possible to measure with precision only with respect to subcategories such as salary and workload. Overall resource parity between prosecution and indigent defense agencies is far harder to measure. As noted by BJS in attempting to compare state court prosecutor budgets and indigent criminal defense expenditures in *Indigent Defense Services in Large Counties, 1999* (*supra* note 3, at 3): "Some categories of expenses are typically borne by indigent defense but not by local prosecution agencies, thus hindering direct comparisons (e.g., expenditures of prosecutors' offices may not include investigative resources provided by law enforcement agencies, forensic laboratory work or expert witnesses, office space or technology, and training)." See, e.g., discussion of Resources/parity under Vanderburgh County, Indiana, *infra*.

the other types of standards were reported to play a significant role in improving the quality of defense services, such as standards providing for a confidential meeting space and adequate time for client interviews (40%), minimum qualifications of experience for attorneys to handle various types of cases (32.7%), independence of the indigent defense provider (31.4%), caseload or workload limits (31.4%), and standards governing timeliness of appointment (28.9%) and continuous (“vertical”) representation of clients by the same lawyer throughout the case (27.6%).

Only one type of standard was not viewed by a significant number of respondents as having a positive impact on quality of representation: standards regarding financial eligibility of defendants for publicly funded defense representation (only 4.5% reported a positive impact on quality of representation). The more significant impacts reported for this type of standards, which limit access to legal services by setting thresholds of assets and income, are more costs savings (16.7%) and reduced attorney workload (10.6%).

A range of standards were reported to have positively influenced the supervision of staff attorneys and the management of the office. Performance standards were the type most commonly reported to have resulted in improved attorney supervision and office management, by four out of ten respondents (39.3%). The tenth of the ABA’s *Ten Principles* directs that performance standards should be the vehicle for supervising and conducting periodic evaluations of staff attorneys’ work quality and efficiency. Many offices accordingly use such standards in writing job descriptions, setting benchmarks for ongoing supervision and evaluation, determining promotions and pay adjustments, and otherwise effectively managing an agency’s human resources.

Positive impacts on attorney supervision and office management were also linked to training standards, by one in five respondents (20.6%). A similar proportion reported that attorney supervision and office management had been positively influenced by standards limiting attorney workload or caseload (20%), and by standards requiring that the same attorney represent the client continuously throughout the case (“vertical representation”) (17.2%).

The types of standards most strongly linked to reduced staff turnover and improved morale were standards relating to adequacy of resources (52.6% of those with such standards reporting such impact). Other significant factors in reducing turnover were attorney training (38.2%) and workload limits (25.7%). One additional significant factor less directly related to working conditions was independence: one out of five respondents with standards protecting the independence of the defender agency from undue political or judicial interference reported that the standards had directly resulted in less staff turnover, suggesting that significant numbers of attorneys attach sufficient importance to the ethical requirement of independent, conflict-free professional representation to clients that they are willing switch jobs to find it.

Of the jurisdictions reporting workload standards, 37% (13 of 35) reported that the standards had the effect of actually reducing workload. The lowest level of association between the existence of workload standards and the reporting of an actual effect of

controlling workload was in jurisdictions where the standards were not in numerical form and were not enforced (22%, or 2 of 9). Where the workload standards contained numerical caseload or workload limits⁶⁰ (14 of 35 jurisdictions), the likelihood of the standards having the actual effect of controlling workload increased to 57% (8 of 14).

In two categories of impacts – improved cost-savings and efficiencies, and improved fiscal management and case tracking/reporting – the area of standards reported to have had the greatest influence was standards relating to adequacy of defense resources (21.1% of those with such standards reporting both impacts). This likely reflects the role of computer systems – including the attendant expense of purchasing and maintaining them, with associated staffing and training costs – as an investment toward effective and accountable fiscal controls and time management. Cost savings and efficiencies were also reported to have resulted from not only client financial eligibility standards (16.7%), but also from attorney qualification standards (12.2%).

Increases in the number of clients referred to treatment was an impact most often linked with standards relating to the adequacy of defender resources (26.3% of respondents with such standards reporting such an impact), followed closely by attorney performance standards (21.4%). All national performance standards specify an attorney's duty to fully investigate the client's history of treatable disorders and to prepare a sentencing or diversion plan which would address those treatment needs safely in the community. The most common means of preparing such treatment plans is through the use of non-attorney staff, such as social workers or paralegals, whose presence in an agency's staff is largely a function of the adequacy of the agency's resources.

One final category of impact is significant in how seldom it was reported. Relatively small proportions of respondents in all categories of standards (none more than 10.3%) reported that they had received inquiries from other jurisdictions seeking to replicate their utilization of standards. This lack of "cross pollination" of standards, together with the confusing and dense array of types of standards and modes of implementation, helps account for the limited and uneven utilization of indigent defense standards around the country.

A table indicating the percentage of the 74 respondents who reported particular impacts of each of the ten categories of standards is displayed on the following page.

⁶⁰ The remainder utilize "unspecified" non-numerical limits – e.g., agency shall not accept "excessive" caseloads (*NSC*, Guideline 5.1), or caseloads which "interfere with the rendering of quality representation or lead to the breach of professional obligations" (*ABA Defense Services*, Standard 5-5.3).

Table 6. IMPACT OF STANDARDS

| | Independence | Resources | Vertical Representation | Qualifications | Attorney Training | Client Eligibility | Timeliness of Appointment | Confidential Meeting | Performance | Caseload/ Workload |
|---|--------------|-----------|-------------------------|----------------|-------------------|--------------------|---------------------------|----------------------|-------------|--------------------|
| Reduced attorney workload | 11.4% | 10.5% | 10.3% | 12.2% | 5.9% | 10.6% | 0.0% | 0.0% | 14.3% | 37.1% |
| More staff | 0.0% | 31.6% | 3.4% | 2.0% | 2.9% | 1.5% | 0.0% | 0.0% | 3.6% | 37.1% |
| Less turnover, better morale | 20.0% | 52.6% | 20.7% | 8.2% | 38.2% | 0.0% | 0.0% | 0.0% | 14.3% | 25.7% |
| Parity with Prosecutors: | 0.0% | 63.2% | 0.0% | 10.2% | 0.0% | 0.0% | 0.0% | 0.0% | 14.3% | 5.7% |
| | 5.7% | 26.3% | 3.4% | 8.2% | 2.9% | 1.5% | 5.3% | 10.0% | 7.1% | 8.6% |
| Other | 8.6% | 26.3% | 0.0% | 8.2% | 2.9% | 0.0% | 0.0% | 0.0% | 3.6% | 5.7% |
| Inclusion in criminal justice coordinating and planning bodies | 37.1% | 26.3% | 3.4% | 2.0% | 2.9% | 1.5% | 5.3% | 10.0% | 3.6% | 2.9% |
| Improved physical resources | 2.9% | 21.1% | 0.0% | 2.0% | 0.0% | 1.5% | 0.0% | 10.0% | 7.1% | 5.7% |
| Independence | 48.6% | 5.3% | 10.3% | 2.0% | 2.9% | 0.0% | 2.6% | 5.0% | 3.6% | 0.0% |
| Improved agency management/ accountability due to involvement of knowledgeable oversight board | 20.0% | 10.5% | 0.0% | 4.1% | 0.0% | 4.5% | 0.0% | 0.0% | 3.6% | 8.6% |
| Improved attorney supervision/ management | 11.4% | 10.5% | 17.2% | 8.2% | 20.6% | 3.0% | 0.0% | 0.0% | 39.3% | 20.0% |
| Changes in service delivery | 5.7% | 21.1% | 20.7% | 6.1% | 0.0% | 1.5% | 5.3% | 0.0% | 7.1% | 5.7% |
| Improved training: | 14.3% | 26.3% | 3.4% | 12.2% | 44.1% | 1.5% | 0.0% | 0.0% | 17.9% | 0.0% |
| | 2.9% | 15.8% | 0.0% | 14.3% | 44.1% | 1.5% | 0.0% | 0.0% | 7.1% | 0.0% |
| Improved Quality of service to clients | 31.4% | 42.1% | 27.6% | 32.7% | 52.9% | 4.5% | 28.9% | 40.0% | 53.6% | 31.4% |
| More clients referred to treatment | 0.0% | 26.3% | 10.3% | 6.1% | 14.7% | 0.0% | 7.9% | 0.0% | 21.4% | 5.7% |
| Cost savings/efficiencies | 2.9% | 21.1% | 10.3% | 12.2% | 8.8% | 16.7% | 5.3% | 0.0% | 14.3% | 11.4% |
| Improved fiscal management/case-tracking/reporting | 5.7% | 21.1% | 0.0% | 2.0% | 2.9% | 3.0% | 0.0% | 0.0% | 3.6% | 11.4% |
| Citation by court in 6th amendment ruling | 5.7% | 0.0% | 3.4% | 2.0% | 2.9% | 0.0% | 0.0% | 0.0% | 7.1% | 2.9% |
| Citation by legislative or executive body in acting on funding or staffing increases or program changes | 0.0% | 10.5% | 6.9% | 0.0% | 2.9% | 0.0% | 2.6% | 5.0% | 0.0% | 2.9% |
| Inquiries from other jurisdictions seeking to replicate your utilization of standards | 5.7% | 5.3% | 10.3% | 6.1% | 2.9% | 6.1% | 0.0% | 0.0% | 7.1% | 2.9% |
| Other effect | 0.0% | 0.0% | 0.0% | 2.0% | 0.0% | 3.0% | 0.0% | 0.0% | 0.0% | 0.0% |
| No effect whatsoever | 2.9% | 0.0% | 6.9% | 6.1% | 5.9% | 4.5% | 7.9% | 10.0% | 3.6% | 0.0% |
| Negative impacts | 0.0% | 0.0% | 0.0% | 2.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 2.9% |
| % of Respondents with Standards & Indicating a Positive Impact | 97.1% | 100.0% | 93.1% | 91.8% | 94.1% | 95.5% | 92.1% | 90.0% | 96.4% | 97.1% |

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Adequacy of Standards

Many national standards and the state and local ones based on them were written in the 1970's and 1980's in the wake of the *Gideon v. Wainwright* ruling establishing the constitutional right to counsel in 1963. Respondents were asked to assess the adequacy of these standards written up to 30 years ago, in light of changes in criminal law and practice.

Overall, 64% of all respondents answered that the national standards are “in need of expansion or updating.”⁶¹ Larger agencies, and those with state funding, were significantly more likely to perceive a need for expansion or updating. Twenty-two percent believe that the current standards are “adequately reflective of the current demands of their indigent defense system.”

The breakdown by funding, structure and population is below.

Table 7

| Adequacy of existing standards | Adequate | | Needs Update | | Blank | |
|--------------------------------|-----------|------------|--------------|------------|-----------|------------|
| | # | % | # | % | # | % |
| 100% County-Funded | 8 | 27% | 15 | 50% | 7 | 23% |
| 100% State-Funded | 5 | 16% | 23 | 72% | 4 | 13% |
| Mixed Funding | 3 | 25% | 9 | 75% | 0 | 0% |
| Government Agency | 13 | 20% | 42 | 66% | 9 | 14% |
| Non-Profit Under Contract | 3 | 43% | 3 | 43% | 1 | 14% |
| Private Law Firm | 0 | 0% | 2 | 67% | 1 | 33% |
| Over 1 Million | 5 | 16% | 22 | 69% | 5 | 16% |
| 500,000 - 1 Million | 5 | 31% | 11 | 69% | 0 | 0% |
| 100,000 - 500,000 | 3 | 19% | 10 | 63% | 3 | 19% |
| 50,000 - 100,000 | 1 | 17% | 2 | 33% | 3 | 50% |
| Under 50,000 | 2 | 50% | 2 | 50% | 0 | 0% |
| TOTAL | 16 | 22% | 47 | 64% | 11 | 15% |

A follow-up question was asked about which type of workload standards would be most relevant and useful in the respondent's jurisdiction if the caseload standards were to be revised or updated. The most common response (41%) was “Numerical *Workload* Standards” (i.e., caseload numbers adjusted by the “weight” of different types of cases and dispositions). Most of the remaining respondents were split between “Numerical *Caseload* Standards” (27%), and preferring a “reasonableness” standard instead of any numerical limitation (28%).

⁶¹ See also *Blue Ribbon Advisory Committee on Indigent Defense Services, Final Report* (NLADA, 1996, funded by a grant from the Bureau of Justice Assistance, U.S. Department of Justice, www.nlada.org/Defender/Defender_Standards/Blue_Ribbon) (laying out a five-point national agenda for indigent defense improvement, including the updating of national standards, and increased use of management audits and technical assistance to measure compliance with standards and guide improvements; the report also urged BJA to fund a project to explore the possibility of a voluntary system of accreditation of public defense agencies as an additional means of promoting adherence to standards).

| Table 8. Desired type of workload standards | Numerical Caseload | | Numerical Workload | | No Numerical Limits | | Blank | |
|---|--------------------|------------|--------------------|------------|---------------------|------------|----------|-----------|
| | # | % | # | % | # | % | # | % |
| | 100% County-Funded | 4 | 13% | 13 | 43% | 10 | 33% | 3 |
| 100% State-Funded | 11 | 34% | 14 | 44% | 7 | 22% | 0 | 0% |
| Mixed Funding | 5 | 42% | 3 | 25% | 4 | 33% | 0 | 0% |
| Government Agency | 17 | 27% | 25 | 39% | 19 | 30% | 2 | 3% |
| Non-Profit Under Contract | 1 | 14% | 3 | 43% | 2 | 29% | 1 | 14% |
| Private Law Firm | 2 | 67% | 1 | 33% | 0 | 0% | 0 | 0% |
| Over 1 Million | 9 | 28% | 15 | 47% | 7 | 22% | 1 | 3% |
| 500,000 - 1 Million | 2 | 13% | 8 | 50% | 6 | 38% | 0 | 0% |
| 100,000 - 500,000 | 4 | 25% | 6 | 38% | 5 | 31% | 1 | 6% |
| 50,000 - 100,000 | 4 | 67% | 1 | 17% | 1 | 17% | 0 | 0% |
| Under 50,000 | 1 | 25% | 0 | 0% | 2 | 50% | 1 | 25% |
| TOTAL | 20 | 27% | 30 | 41% | 21 | 28% | 3 | 4% |

When asked what other areas should be covered, or better covered, by standards, nearly 80% of all respondents expressed a desire for some type of standards by which defender agency staff could be objectively calculated by reference either to external or internal workload drivers. Two-thirds expressed a desire for a series of staffing ratios for internal application in a defender agency, to calculate the appropriate minimum number of non-attorney staff by reference to the number of attorneys, including a recommended ratio of attorneys to support staff, attorneys to investigators, attorneys to social workers, or attorneys to supervisors. More than half wished to see standards developed expressing an appropriate minimum ratio of defender agency staffing to prosecution agency staffing, and 38% recommended standards correlating defender agency staffing to the number of judgeships handling criminal cases in the jurisdiction. The predominant desire for internal staffing ratios reflects the predominant difficulty of documenting the need for support staff to the satisfaction of funding agencies. The high level of interest in externally-related staffing formulae reflects an understanding and concern that defender agency workload and staffing needs are driven by the staffing and work capacity of other key entities in the criminal justice system, and a desire for some form of joint or collaborative planning.⁶²

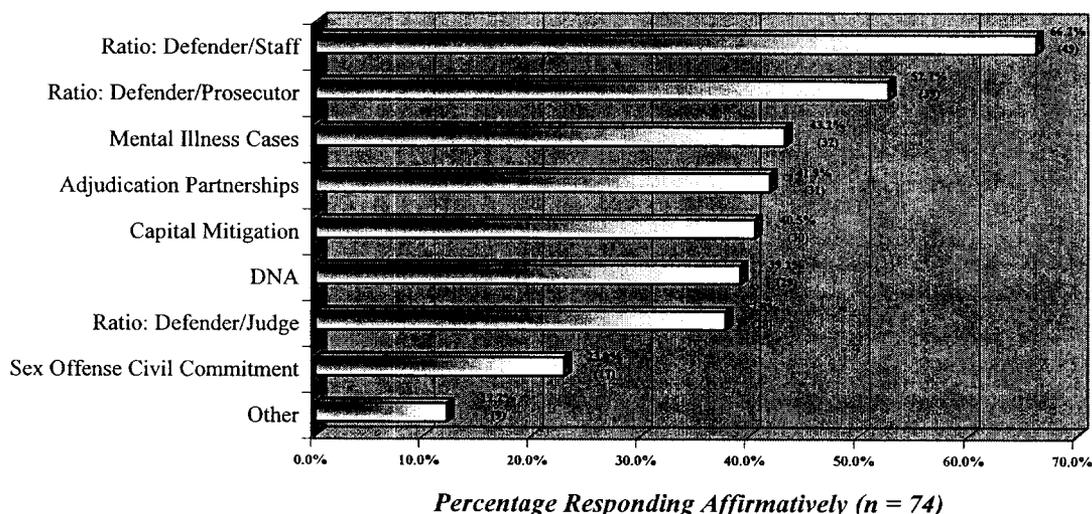
Approximately two-fifths of all respondents recommended that national standards be expanded to cover the following areas: representation of mentally ill clients (43%); the appropriate defender role in “adjudication partnerships” or “problem-solving courts” (42%); mitigation duties in capital cases (41%);⁶³ and special duties regarding DNA or

⁶² The concept of joint planning for workload, staffing and budgeting among courts, prosecution and indigent defense was pioneered in Tennessee, and profiled in two U.S. Department of Justice reports in 2000 and 2001. See *Improving Criminal Justice Systems*, supra note 11, at 30; and *Redefining Leadership for Equal Justice*, supra note 36, at 31.

⁶³ This project was completed after the present survey was conducted. In February 2003, the American Bar Association, with participation by NLADA, updated the *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* (NLADA, 1988; ABA, 1989), to reflect changes in constitutional jurisprudence and capital defense practice in the intervening dozen years, including specifying the need for and the role of mitigation specialists. See www.abanet.org/deathpenalty/guidelines.pdf.

other emerging forensic technologies (39%). Nearly a quarter of all respondents recommended that national standards cover cases involving civil commitment of sex offenders, a new non-criminal, or quasi-criminal, area of practice for many defender agencies in recent years.⁶⁴ Nine respondents offered one or more other areas they would like to see covered by national standards, including data collection, case-tracking, and expansion of performance guidelines to cover case types such as termination of parental rights, juvenile dependency, extradition, forfeitures, juvenile transfers to adult court, complex misdemeanor and felony cases, and sentencing hearings.

Table 9. "What Other Areas Should be Covered by Standards?"



⁶⁴ A small but growing number of indigent defense agencies currently provide representation in such cases, which are ostensibly “civil” rather than criminal.

Four Methods of Implementing Standards, and the Effect Upon the Impact of the Standards

VANDEBURGH COUNTY, INDIANA: State Funding Conditioned Upon Compliance with Standards

Indiana has a strong home-rule tradition, favoring local autonomy over state control in many matters. Indigent defense has always been organized at the county level, and has been provided primarily by part-time “public defenders,” generally operating under a contract with the local judiciary. The likelihood of Indiana ever adopting a fully integrated statewide public defender system like Massachusetts (examined *infra*) – that is, a single state agency with plenary responsibility, including implementation of standards, for local district offices – is reported to be quite remote.

Vanderburgh County has a population of 170,000, 60 percent of whom live in the city of Evansville. The county is the seventh largest in the state, and the city is the third largest. The proportion of criminal defendants found to qualify for appointed indigent defense services is approximately 55 percent. County governance is bifurcated between an authorizing body, the three-member County Commission, and a seven-member funding body, the County Council.

Indiana’s indigent defense standards⁶⁵ are written at the state level, by an independent commission, and compliance by the counties is purely voluntary. Counties that choose to comply, however, are eligible to have a portion of their indigent defense costs reimbursed by the state. A state statute authorizes the reimbursement from state funds of 40 percent of the indigent defense expenditures of counties that meet certain standards.⁶⁶ The statute authorizes the standards to be promulgated, within statutory parameters, by a state Commission.⁶⁷ A county which wishes to be considered for reimbursement is statutorily required to establish a local County Public Defender Board of at least three members, whose responsibilities include writing a comprehensive plan for indigent defense in the

⁶⁵ *Standards for Indigent Defense Services in Non-Capital Cases, with commentary*, Indiana Public Defender Commission, effective Jan. 1, 1995, as amended October 28, 1998.

⁶⁶ IC 33-9-11-4(b); 33-9-15-10.5(b).

⁶⁷ IC 33-9-13-3.

county, appointing a county public defender, overseeing the office and its budget, and submitting requests for state reimbursement.⁶⁸

The 40 percent reimbursement figure applies only in non-capital felony and juvenile cases. Misdemeanor cases are not eligible for reimbursement. State reimbursement is available in capital cases, with two differences: the standards are issued by the state Supreme Court (as Rule 24 of the state's Rules of Criminal Procedure⁶⁹), rather than the state Public Defender Commission, under similar statutory authority; and the reimbursement rate is raised to 50 percent.⁷⁰

In the late 1990's, one of the members of the County Commission (the authorizing body) served also on the Indiana Public Defender Commission. She became concerned about the high number of reversals of criminal cases statewide for ineffective assistance of counsel, and learned about the availability of state reimbursement in return for compliance with state standards designed to improve the quality of indigent defense services. At the same time, there was a jail overcrowding crisis in the County, and a special committee was established to decide whether to fund the construction of a new jail. The County Commission determined that all criminal justice agencies, including prosecution and public defenders, played a role in the crisis, and sought increased accountability from every agency.

The County Commission voted to create the County Public Defender Board – the first step toward standards compliance and reimbursement – in 1999, and the Board hired a full-time Chief Public Defender in October of 2000. The first full year of operation of the new office was 2001.

Vanderburgh County was selected for the present research in consultation with the director of the Indiana Public Defender Council because its relatively recent implementation of the state's indigent defense standards would maximize the opportunity for before-and-after comparisons, through both data and interviews with key officials familiar with operations under both types of systems.

Independence

The County Public Defender Board required to be established as a precondition to receiving reimbursement must consist of at least three members appointed in a process designed to ensure that no single arm of the local government shall have control over the indigent defense function. Under the state statute, one member of the board is to be appointed by the County Executive, and the other two members are to be appointed by the judges of the county, with several caveats. They may not both be from the same

⁶⁸ IC 33-9-15-6; IC 33-9-15-10.5. Counties with populations under 12,000 are exempted from the requirement to establish a County Public Defender Board.

⁶⁹ www.in.gov/judiciary/rules/criminal/index.html#r24. The Supreme Court's standards are, however, derived from standards originally issued by the Commission.

⁷⁰ IC 33-9-14-4(a); 33-9-14-5. The monitoring and reimbursement functions are conducted by the Public Defender Commission.

political party; they may not be a judge or court employee, nor a government attorney or law enforcement officer; and they must have a record of demonstrated interest in high quality legal representation for indigent persons. The state standards discuss the board requirement specifically in terms of the importance of independence of the indigent defense function.

Impact: According to the Indiana Public Defense Council, every county that has applied for reimbursement has established such a board. No county that has not applied for reimbursement has established a board. Vanderburgh County established its board specifically in order to take the first step to qualify for state reimbursement.

In interviews, judges reported a high degree of satisfaction with making indigent defense independent from the judiciary, citing a wide range of benefits. They are relieved of the responsibility for negotiating contracts with attorneys, and of the administrative and budgetary responsibilities for reviewing and processing payments. They are not the focal point for client complaints, and are relieved of responsibility for attorney malfeasance. They have gained a single central administrator with whom to communicate about any defense-related issues or concerns. They report significant improvement in the quality of defense services, including improved discovery, depositions, motion practice and appellate practice. They see the improved quality of defense representation as enhancing confidence in the fairness and integrity of the criminal justice system on the part both of the public and of defendants – which produces more cooperative defendants and expedited case dispositions.

Resources/Parity

State Standard G provides that compensation for both salaried and contractual public defenders should be “substantially comparable” to similar positions with the prosecutor’s office, including all reasonable office and incidental expenses. The state Commission has interpreted this to require that the chief public defender’s salary be at least 90 percent of the chief prosecutor’s salary. The hourly rate for assigned counsel is required to be not less than \$60 per hour, plus reasonable expenses paid monthly upon counsel’s request.

Impact: The County is in substantial compliance in terms of public defender and assigned counsel compensation. However, direct salary comparability between prosecutors and public defenders is difficult to measure with precision because of differences in the structure of the two agencies. Prosecutors are generally full-time, and defenders are primarily part-time. Salary increases are governed by different timetables and standards. Chief prosecutors and public defenders in a single county may have widely disparate years of experience, and be required to cover different numbers of courts. Statewide, the Commission monitors salary comparability through salary surveys. The salary of Vanderburgh County’s chief public defender (one of only two full-time employees in the office) meets the state Commission’s 90 percent requirement. However, a new study by the Indiana Public Defender Council finds wide disparities in

indigent defense compensation among the 50 counties complying with the state standards and receiving reimbursement, with annual compensation as low as \$23,000 for some part-time contract chief defenders.

The County's Comprehensive Plan for Indigent Defense Services sets an assigned counsel rate of \$75 per hour. This rate is used for private counsel assigned to take cases that the public defender cannot take, due to a conflict (a rare situation, as discussed under Attorney Performance, below) or where felony public defenders have reached their maximum caseload in a given quarter (which happens with some regularity).

Overall resources for prosecution are significantly higher than for indigent defense. 2001 county expenditures for prosecution were \$1,468,000, augmented from other sources: e.g., the District Attorney's and Chief Deputy's salaries, set by statute and paid by the state (the county contributes \$5,000); office rent paid from a separate county account (the Public Defender Office's rent and office overhead come out of its county appropriation, and total \$127,000); six full-time prosecutors funded by federal grants (for drug crimes, gun crimes, and Violence Against Women); and investigative and forensic services furnished by state police, sheriff, and crime lab services. The Public Defender Office total gross expenditures for 2001, as noted above (before the state reimbursement), were \$1,388,000.

Workload

Specific numerical caseload limits are prescribed per attorney per year in various types of cases. Standard J sets a limit, for example, of no more than 150 felonies, 200 Class D felonies, or 25 appeals. For part-time (50%) attorneys, these numbers are halved. The numbers are further reduced if the attorneys do not have "adequate support staff" (see below). The limits set are derived from the 1973 report of the National Advisory Commission on Criminal Justice Standards and Goals, a national body established by the U.S. Department of Justice to implement the recommendation of the President's Crime Commission in 1968 that standards should be developed governing every component of the criminal justice system. If the numerical limits are exceeded, Standard K requires the Chief Public Defender to inform the appropriate judges and refuse to accept additional appointments.

If a county does not provide "adequate support staff"⁷¹ for its public defenders, the mandatory caseload limits are set at a lower level, since the duties that would be performed by support staff must be performed by the attorney, reducing the attorney's time available for other cases. Without "adequate support staff, the caseload limits decrease –

- ξ for felonies, from 150 to 120;
- ξ for Class D felonies, from 200 to 150;

⁷¹ "Adequate support staff" is precisely defined, to require one paralegal, one investigator and one secretary for every four full-time attorneys; and one law clerk for every two appellate attorneys.

- ξ for appeals, from 25 to 20;
- ξ for misdemeanors, from 400 to 300;
- ξ for juvenile delinquency proceedings, from 250 to 200; and
- ξ for “other” cases (probation violations, contempt, or extradition), from 400 to 300.

Prior to implementation of the standards in Vanderburgh County, annual felony caseloads were approximately double what is permitted under the standards; i.e., caseloads of 130-140 per *part-time* attorney were common, compared with the current maximum of 120 for a *full-time* attorney without adequate support staff. Judges reported that the attorneys were “grossly overworked.”

Impact: The caseload standards are strictly adhered to in Vanderburgh County. The Public Defender and county officials understand that the state Commission monitors caseload data closely and that exceeding the limits will jeopardize the state reimbursement. Under the County’s comprehensive plan for indigent defense services, the Public Defender is instructed to decline cases in excess of the felony caseload standards.

Juvenile and misdemeanor caseloads, however, are not in compliance. With respect to the juvenile caseload standards (no more than 200 cases per year, with “adequate support staff”), the state Commission has reached a practical judgment that for some counties, the cost of bringing their juvenile divisions into immediate compliance would so far exceed the value of the state reimbursement, that strict enforcement by the Commission might cause counties to withdraw altogether, possibly sacrificing the progress already made in felony caseload compliance. For this reason, the Commission has severed juvenile compliance from felony compliance, and allows counties to “phase in” the juvenile standards without losing reimbursement for felony compliance. No time limit has been set for “phase-in,” however, and the largest county in the state – Marion County (Indianapolis) – has been in noncompliance for at least five years.

For misdemeanor cases, though the Commission has issued caseload standards (no more than 400 cases per year, or 300 without adequate support staff, or 150 for part-time attorneys without adequate support staff), state reimbursement is, by statute, not authorized. All three of the County’s part-time misdemeanor public defenders, with no support staff, exceeded the state standards in 2001, by a margin of up to 97 percent.

The caseload limits have resulted in increased public defense personnel. Felony attorney staffing increased from 11 half-time (contract) positions to 16 half-time (salaried) positions, plus two full-time positions: the Chief Public Defender (who carries a 50 percent caseload in addition to his management duties) and an appellate attorney. The number of juvenile attorneys remained the same (two), as did the number of misdemeanor attorneys (three).

Staffing and related increases have increased indigent defense expenditures, from approximately \$900,000 in 2000, to \$1,362,246 in 2001. The increase was offset by the state reimbursement of \$413,000, for a net 2001 cost to the County of \$949,246. Thus, the total net increase in indigent defense expenditures for the County was less than \$50,000. Members of the County Public Defender Board project that this increase is further offset by savings in jail costs directly attributable to earlier entry by attorneys and reduced pretrial detention – though no study has been conducted to quantify these cost savings.

Since the staffing requirements are integrated into the state caseload standards, and the County has determined that the costs of the required support staff are less than the costs of maintaining the lower caseload standards (and having attorneys performing duties which would otherwise be performed at lesser cost by non-legal staff), the County strictly adheres to the staffing requirements in order to obtain the higher attorney caseload limits. Previously, the county provided a nominal \$100 per month for secretarial support for each of the five attorneys in the felony division of Superior Court, but not for attorneys handling Circuit Court, misdemeanor or juvenile cases, and no funding at all for paralegals, investigators or law clerks.

Attorney qualifications

State Standard E establishes minimum qualifications for attorneys according to five different classifications of types or seriousness of offense, such as murder, Class A, B or C felony, or juvenile cases.

Impact: The County appears to be in compliance. The chief public defender submits a roster of his attorneys to the Commission in each reimbursement cycle, classifying each of them according to their level of qualification. The County's Comprehensive Plan for Indigent Defense Services requires the application of the same criteria specified in the state standards.

Training

State Standard M requires that training be provided to all attorneys and non-attorney staff, at least equal to that provided to prosecutors and judges in Indiana.

Impact: This standard is not monitored county-by-county, since training for public defenders, prosecutors and judges are all provided at the state level – for defenders, by the Indiana Public Defender Council. In 2001 and 2002, this has included a two-day on-site trial skills training, 11 attorneys and one paralegal attending various seminars, and six of the felony public defenders participating in a 16-week mentoring program provided on-site by the Council's Senior Attorney. The County provided

no money for public defender training prior to implementation of the standards; the 2002 budget includes a \$6,000 line item for public defender training. Public defender training does appear comply with the standard.

Client Eligibility

State Standard C sets forth various factors to be weighed in determining indigency, such as income, expenses, liquid assets, and the cost of retaining private counsel, and prohibits denial of counsel merely because a person is employed or is able to post bond. Standard N requires payment of expert, investigative and other necessary services for defendants represented by *retained* counsel, if the defendant is unable to pay for such services.

Impact: The County's Comprehensive Plan for Indigent Defense Services provides that the presiding judicial officer "shall" make eligibility determinations pursuant to the state standards. Though eligibility determinations are autonomously performed by judges, and are not within the control of either public defenders or county officials, there are no indications of any breaches of the standards' prohibitions. Nor, however, is there any indication that judges conduct anything more than a perfunctory inquiry, with no investigation into the defendant's actual resources under the list of factors specified in the standard. In any event, the state standards are expressly based on a state Supreme Court ruling,⁷⁴ so compliance with governing case law cannot be distinguished from compliance with the standards.

Attorney Performance

Performance Guidelines for Criminal Defense Representation, substantially identical to the national guidelines issued in 1995 by the National Legal Aid and Defender Association, were adopted by the Indiana Public Defender Council (a training, research and support center established by statute,⁷⁵ but not given the Commission's power to issue mandatory standards). The Guidelines prescribe the necessary duties of attorneys in individual cases, such as interviewing the client, conducting investigation and discovery, filing motions and preparing for sentencing. They have been published and distributed to all public defenders in the state, as a "convenient reference" for attorneys rather than as mandatory requirements, and are used by the Council in its training and on-site mentoring programs around the counties.

Impact: All public defender attorneys in the County have been provided with a copy of the Performance Guidelines. Although there is no monitoring of compliance and the Guidelines are not specifically used in setting performance benchmarks or in conducting attorney evaluations, the chief public defender believes that his attorneys "by and large" adhere to the Guidelines. The lack of compliance mechanisms is evident in one specific area: conflict of interest. Whereas the Guidelines prohibit

⁷⁴ *Moore v. State*, 401 N.E. 2d 676 (1980).

⁷⁵ IC 33-9-12.

codefendants being represented by attorneys in the same office (dictated by the American Bar Association Code of Professional Responsibility⁷⁶), the County allows it, with the principal safeguard being that the attorneys are expected to keep the files for those cases in their own private law offices. The reason for this departure from the recommended conflicts policy is a concern about inadequate numbers of attorneys in the County who do not work for the Office and are available and willing to accept criminal appointments.

The Council does integrate the Guidelines into all of its statewide training and local mentoring programs, such as the 16-week on-site mentoring program referenced above under Training.

Special Standards for Death Penalty Representation

Because of the unique and extensive demands of death penalty cases, Indiana has adopted special standards for death penalty cases covering four of the areas addressed in the present research and the ABA *Ten Principles*. Compliance with the death penalty standards contained in Criminal Procedure Rule 24 entitles counties to receive state reimbursement for 50 percent of their capital defense costs. The four principal requirements of Rule 24 are:

Workload: One capital case is equated to 40 felonies. No attorney may receive a capital appointment if he or she has more than 20 open felony cases.

Attorney qualifications: Rule 24 requires appointment of two attorneys for an indigent capital defendant, and specifies minimum experience requirements for counsel.

Resources: Salaried capital public defenders must be paid salary and benefits equivalent to their prosecutorial counterparts. Counsel appointed in capital cases must be compensated at not less than \$90 per hour, an amount that may be increased biennially for inflation by the State Court Administrator. Counsel must be provided funding for reasonable and necessary investigative, expert and other services.

Training: Attorneys are required to complete, every two years, at least 12 hours of capital-defense-specific training approved by the Indiana Public Defender Commission.

The capital standards have been enforced through a decision of the Indiana Supreme Court. In *Prowell v. State*,⁵⁸ in 2001, the court found an attorney in a capital case in noncompliance with the capital standards (the trial representation in question occurred before the opening of the Public Defender Office). The court reversed the defendant's

⁷⁶ *Performance Guidelines for Criminal Defense Representation*, Indiana Public Defender Council, September 2000, Guideline 1.3, footnote 21 and accompanying text.

⁷⁸ January 1, 1990.

conviction (for other reasons), and the reimbursement payment to the county (Vanderburgh County, as it happens) was reduced by \$30,000, to correspond to the state's 50 percent share of the defense costs for that case.

Impact: Compliance with the capital standards embodied in Rule 24 is 100 percent statewide. Findings of ineffective assistance in capital cases were reduced by almost two-thirds after implementation of the standards and reimbursement. The reversal rate was approximately 57 percent before implementation of reimbursement for Rule 24 compliance⁷⁸ (24 percent on direct appeal, and 33 percent on post-conviction review, state and federal combined), primarily for failure to present mitigating evidence, dropping to 22 percent since implementation (15 percent on direct appeal, and 7 percent on post-conviction review).

Conclusion: Compliance appears not only to be directly related to the availability of state reimbursement, but has increased directly in relation to the rate of state reimbursement provided. When the noncapital standards were originally adopted by the Commission in 1989, compliance was voluntary, and no counties were known to be in compliance. When state reimbursement was authorized for the first time in 1993, at a rate of 25 percent, 13 counties came into compliance and filed for reimbursement. Since the rate was raised to 40 percent in 1997, an additional 37 counties have qualified for reimbursement – for a current total of 50 of Indiana's 92 counties that have opted in. Specifically, the standards that are directly tied to reimbursement are adhered to. Those that are not, are not complied with.

Many of the impacts of indigent defense standards in Vanderburgh County are not tied to any single standard, but reflect the combined effect of the adoption of the package of standards which are tied to funding: the establishment of an independent local public defense oversight board, the hiring of a full-time chief public defender who reports to the board and operates a full-time staffed office near the courthouse, and the implementation of caseload limits and minimum support staff levels. Among these collective impacts:

Faster case processing: Judges cited the benefit of being able to set cases for trial sooner (due to attorneys' reduced workloads), and obtaining earlier dispositions (with better preparation, attorneys are making a quicker assessment of the case and equipping their clients to accept a negotiated plea before trial). Although the trial rate has approximately doubled, the average case-pending time for criminal cases has increased only slightly, from 185 to 195 days, and the rate of dismissals has increased.

Lower jail costs: Judges reported that the public defender's earlier entry into cases improved preparation and earlier dispositions reduce jail time pretrial. The Public Defender's full participation as a member of the Criminal Justice Advisory Council, a body responsible for developing solutions to jail crowding, was reported by judges to be responsible for improved procedures to expedite bail – such as the decision to hire two new presentence investigators, who were able to reduce the time required to conduct a presentence investigation from 40 days to 20 days.

Uniformity and efficiency of compensation: Instead of each judge having his or her own fee system and payment procedures, a single set of compensation practices is established and uniformly applied.

Single-point accountability: Any person with a concern about public defense services has a single point of contact to air a grievance. The County's Chief Public Defender receives calls from judges, members of the County Public Defender Board, and approximately 4-5 letters and calls each week from clients and family members. County officials and judges identified single-point accountability as a primary benefit from their perspective. The chief judge of the Circuit court appreciated the ability to solve justice administration problems by meeting with only two people: the Public Defender and the District Attorney.

More effective and efficient management: The President of the County Council (the funding body) cited improved organization and management, and fiscal controls, as primary benefits. One member of the Public Defender Board described a "180 degree turn" on quality, support, investigation, research, and time spent on cases. He said he learned that the public defender office needs to be managed, just like a law firm, including cohesive planning and oversight of the office and support personnel. Another member described a case where the defender learned about an alibi witness in the middle of a trial, and called the office, where others were able to locate the witness and obtain a subpoena. Ultimately, the defendant was acquitted, and members of the Board found it unlikely that the attorney would have timely located the witness and produced such an outcome before the creation of the Public Defender Office.

Improved efficiency: The establishment of a single central public defender office, next to the courthouse, reduces attorney "down time" and allows pooling of necessary support services. Although housing only full-time employees (the Chief Public Defender and the appellate attorney, plus support staff, paralegals and investigators), the Office contains a law library, four research carrels, computer stations, and a conference room, and serves as a convenient hub for assistant public defenders between court responsibilities. Lexis/Nexis online legal research is available to all attorneys free, with a nominal one-time sign-up cost of \$25. Though this discount is negotiated by and available through the state's Public Defender Council, and not directly contingent upon compliance with the Commission's standards, many defense attorneys did not take advantage of it prior to the County opting in to the standards. Once the County opted in and the office of the Public Defender was established, he became the conduit for a range of services previously underutilized by the various disconnected individual lawyers. Council services include brief banks, motion banks, and a hotline for call-up research, reducing attorneys' time for research and preparation.

Judges' improved degree of sophistication with technology: The creation of a single Public Defender Office enabled a single point of

online access to court docket sheets. Both judges and defenders report that these docket sheets, plus e-mail communication about scheduling and filing, have enabled a shift in the courts' mode of operation away from paper, toward electronic transactions, with significant benefits in terms of speed and coordination.

Improved attorney support and supervision: A significant benefit of the convenient central office is the ability of attorneys to brainstorm cases with each other frequently, including the Chief Public Defender and other more experienced attorneys. He has instituted a policy of case review with assistant public defenders, encouraging each of them to bring in a case once a month for discussion and coaching by 4-5 experienced attorneys.

Improved quality of justice: Though county officials calculate that opting in to the standards has cost marginally more than the amount of the state reimbursement, they see the shortfall as outweighed by the non-monetary benefits. The President of the County Council attached substantial value to the zealous defense representation that has been made possible by the independence of the Public Defender Office and more manageable caseloads, saying that it reflects well on the County's intention of "standing up for those who need help, and for the community."

Elimination of flat-fee contracting: Before the implementation of standards and establishment of the Public Defender Office, contracts between judges and public defense attorneys were for a flat fee, regardless of the number of cases arising during the period of the contract. There was no separate fund for investigators or support services; requests for such expenditures were made to the judge, one case at a time. Approval varied by judge, and investigators were rarely used. The move away from the all-contract flat-fee system is consistent with state and national standards, including those of the ABA and NLADA. The standards uniformly prohibit flat-fee contracts for indigent defense, because of the inherent conflict of interest between the attorney's financial interest in minimizing the amount of time, investigation and preparation expended in each case, and the client's right to the effective assistance of counsel.⁷⁹

State funding, which is the backbone of the effective implementation of indigent defense standards in Indiana, also exposes the standards' greatest vulnerability. The state Public Defense Fund, from which the reimbursements to counties are paid, is dependent on appropriations. If the Fund cannot manage to pay the full 40 percent to all qualifying counties, each county's reimbursement is reduced pro rata. For a six-month period in 2001, appropriations were inadequate and the reimbursement rate dropped to 26 percent.

⁷⁹ Indiana state Standard L. *Ten Principles of a Public Defense Delivery System*, American Bar Association, Principle 8 (February 2002) (www.abanet.org/legalservices/downloads/sclaid/10principles.pdf), fn. 25, citing ABA *Defense Services*, Standards 5-3.1, 5-3.2 and 5-3.3; NSC, Guideline 2.6; and *Contracting*, Guidelines III-6, III-12 and *passim*.

The rate has since returned to 40 percent, and projections for 2002 are that full reimbursement will be sustained.

The Commission's budget proposals project that the number of counties opting in will increase from 50 to 60 counties by 2004 (a budget increase from \$7 million to \$8 million), and to all 92 counties by 2005 (a budget increase to \$11 million). However, this scenario, and the future implementation of standards in Indiana, is subject to the uncertainty of appropriations. The state legislature, facing budget pressures, will be challenged not just to maintain the current level of appropriations, but also to increase it, to match the increasing number of counties participating. Counties that have not yet opted in will be watching to see whether the full 40 percent can be maintained before committing to reforms. Even counties that have already opted in may be tempted to drop out if the reimbursement rate cannot be sustained. Thus, Indiana presents the curious situation of autonomous county governments creating their own public defense agencies, but the ongoing adherence to standards of quality in those agencies is primarily dependent on separate state funding decisions.

RIVERSIDE COUNTY, CALIFORNIA: Voluntary National Standards Applied Through An Outside Audit

Each of California's 58 counties is responsible for organizing and funding indigent defense services at the trial-level,⁸⁰ including developing, instituting and enforcing standards if they choose.⁸¹ Each county may opt for a public defender office, contract counsel, an assigned counsel program, or some combination thereof. Riverside County has established a public defender office as the primary delivery system. The Chief Public Defender serves at the will of the Board of Supervisors. The County has not formally adopted indigent defense standards, but has undertaken a process of applying national indigent defense standards through an independent outside audit of management and systemic deficiencies in the County Public Defender Office.

Geographically, Riverside County is the fourth largest county in California. In terms of population, it has been the fastest growing county in the state, increasing by more than 240% between 1980 and 2000.⁸² The rapid population explosion coincided with a substantial increase in the number of cases entering the criminal justice system, and concomitant strains on the workload, funding and management capacities of the Public Defender Office.

In 1987, an extensive management audit of the Public Defender Office raised questions about the leadership capabilities of the management team, attorney-client relationships, staffing levels, computerized management systems, funding levels, parity levels with the District Attorney's office, and other issues. Despite the thoroughness of the report, little improvement was made over the next decade. In 1999, the Board of Supervisors retained the services of NLADA to conduct another comprehensive management evaluation. The 1999 audit report identified 19 areas and office functions where improvements were dictated by national standards and sound public agency management principles. A year and a half later, the County asked NLADA to conduct a follow-up audit, assessing the degree of progress in each of the 19 areas. Both evaluations were performed by a team of experienced chief public defenders and evaluators from around the nation (seven for the first audit, and four for the second).⁸³ Though the NLADA report raised many of the

⁸⁰ Direct appeals cases are handled by the state-funded State Public Defender. Additionally, the California Habeas Resource Center represents indigent defendants in state and federal habeas corpus proceedings in capital cases.

⁸¹ Although limited numbers of indigent defense guidelines have been promulgated by the California Public Defender Association and the State Bar, they are non-binding on counties.

⁸² U.S. Census Bureau data indicates that the population of Riverside County grew from 663,166 in 1980 to 1,170,413 in 1990 (increase of 76.48%). The population of Riverside County increased by another 32% in the subsequent decade (up to 1,635,888).

⁸³ Access to chief public defenders with evaluation experience throughout the United States is made possible through the American Council of Chief Defenders (ACCD), a leadership council of NLADA.

same issues as the 1987 audit, the use of national standards to justify recommendations was seen on the local level as critical to implementing needed change.

Resources/Parity

The original NLADA report identified a variety of functions and areas where lack of resource parity with the District Attorney's office was creating problems in areas such as attorney workload and court coverage, supervision, technology, and support staff including investigators and clerical. The audit found that salaries of the Public Defender and his senior managers were not at parity with those of the District Attorney and his senior managers due in large part to the fact that separate collective bargaining representatives negotiate for the District Attorney and the Public Defender. The audit recommended that the County and the Public Defender Office, in cooperation with the District Attorney and the courts, undertake a study to determine an appropriate ratio of staffing, budget and resources between the District Attorney and Public Defender.

Impact: The Riverside County Executive conducted a study of seven comparable California counties to determine criminal justice expenditures. That study found that the ratio of public defenders' salaries to those of prosecutors in Riverside County, at 43 percent, is the lowest among the seven counties, and substantially lower than the 61 percent average of the seven counties.

The County Board of Supervisors advised the public defender that it is committed to increasing the Office's funding and staffing levels. In fiscal year 2002, the Office was allotted 15 new staff positions, with a net increase of just over \$2.1 million (compared to a net increase in county funding for the District Attorney of just over \$1.6 million). Out of 40 lawyers requested in the wake of the first NLADA audit, the Office has received approximately 21.

The County has also funded improvements in the Office's physical facilities, with additional space, new furniture, and a training facility. The County conducted another comparison study of public defender investigator salaries, which led to increases in investigator salaries. Another study is planned in early 2003, which is expected to lead to a requirement that public defender investigators have a law enforcement background, which will require pay parity with prosecution investigators.

Training

The 1987 management audit report found that in-house training of the Public Defender Office was "grossly inadequate," and recommended that the Public Defender direct the training supervisor to "prepare a training program for public defenders and to request state and/or federal funds if available." By the time of the NLADA 1999 audit, this

recommendation was still not implemented.⁸⁴ The Office did hold brief, informal monthly sessions on various topics, but offered no comprehensive litigation-skills training, no new-lawyer orientation, and no staff-transition training (e.g., from misdemeanor to felony to supervisor). Even the Office's willingness to reimburse attorney's for the registration fees of attending outside training events offered by state or national organizations was undermined by the preclusion of reimbursement for travel or accommodations.

Impact: The Office has appointed a full-time training coordinator, who has no other responsibilities. The training coordinator has encouraged staff participation in designing training curricula via both staff meetings and one-on-one interviews. Initial training efforts have been segmented by job function, and in-house training has begun in the area of technology applications. The Office has established a computer lab, where training is provided in subjects like computerized research. The Office has launched an intranet site, which gives every attorney in the office access to Lexis/Nexis, a motion bank, video and audio training programs (through the California Public Defender Association web site), the Office's policies and procedures, and other educational and administrative tools.

The Office has acquired a former courtroom, still equipped with bench, bar and jury box, which is used as a mock courtroom for training, and trial-skills training curricula are being developed to leverage its use. In the same building, the Office has set aside space for a dedicated computer-training center.

In terms of outside training, the Office seeks scholarships for some attorneys to attend the California Public Defenders Association Trial Skills Institute. Management training is provided at the County's Management Supervisory Academy, and by private contractors and NLADA, and executive teams are trained at the Anderson School at the University of California Riverside campus. If an Office attorney is directed to attend a training program requiring an overnight stay, the Office now pays for half of the hotel cost.

Attorney Performance

The NLADA audit found that the Office lacked a meaningful performance evaluation system for attorneys and other employees, and recommended that performance standards based upon NLADA's *Performance Guidelines for Criminal Defense Representation* be developed along with behaviorally based measures necessary to distinguish between levels of performance and enhance reliability between raters. To institute such a system, it was recommended that more supervisors, with reduced caseloads, were necessary to be available to review cases, assist in developing approaches to each case, observe in court,

⁸⁴ Except for several years beginning in 1989 when the office had a training academy funded by the Honda Corporation, the office has had neither a supervisor responsible exclusively for training, nor a fully developed training program.

and provide feedback and suggestions to the supervisee. The audit recommended a ratio of full-time supervisors to staff lawyers, pursuant to national standards, of no more than one supervisor to ten lawyers.⁸⁵

Impact: The Office has established nine Supervising Attorney positions (without caseloads, except as a vehicle to train or mentor attorneys), and has fully achieved the recommended staffing ratio recommended in the Evaluation Report. A dedicated supervisor performance evaluation system has been established. The Office is working with an individual with an academic professional to assist in developing approaches to evaluating attorney trial performance. The previous system of perfunctory evaluation or self-evaluation, with promotions based on seniority, was replaced with more formalized and frequent processes. Supervisors now meet with attorney-supervisees at least quarterly, and conduct an annual performance evaluation. On a weekly basis, the misdemeanor chief meets with his attorneys both individually and as a group.

In response to the NLADA audit's recommendations for procedures to reduce staff attorneys' excessive and unregulated rates of continuances and declarations of conflict of interest the past, and extremely low trial rate⁸⁶ (all driven by workload pressures), the Public Defender instituted various procedures. Staff attorneys were directed to follow the ethical requirement that it is the client's decision whether to go to trial or plead guilty; attorneys are not permitted to pressure clients to plead guilty, but only to give them advice and options. Experienced supervisory attorneys have responsibility and authority for case management. Declarations of conflict of interest, and some continuances on older cases, must be approved by a supervisor. The number of trials, though still lower than national averages, has increased substantially, including an increase in favorable case outcomes, which the Public Defender formally recognizes through a new "Golden Spike" award, publicized in the office newsletter and presented at an annual awards banquet.

Client satisfaction and acceptance of case outcomes has increased, though the Public Defender indicates there is still much room for improvement. He reports receiving fewer complaint letters from clients, and even a few thank-you letters. To improve community relations and increase community acceptance of the integrity of criminal justice dispositions involving the Office, the Office has embarked on a community education campaign, including "adopting" a high school, making staff members available to read to preschoolers and address community groups (such as Kiwanis), and launching a public web site.⁸⁷

Timeliness of Appointment and Contact

⁸⁵ NSC, Guideline 4.1.

⁸⁶ From January 1, 1997 through May 31, 2001, the Office's attorneys averaged one trial per attorney per year.

⁸⁷ www.publicdef.co.riverside.ca.us.

The 1987 audit report found that the Public Defender does not represent clients at misdemeanor arraignments, and should enter such cases and counsel clients early, to produce better decisions by clients and save time in later court proceedings. The 1999 NLADA audit found that the Public Defender still was not providing representation to some 12,000 defendants per year, at felony or misdemeanor arraignments in Municipal Court, when important legal decisions are made, including the setting of bond and uncounselled guilty pleas.⁸⁸ The audit recommended that budget and staffing limitations cannot negate the constitutional entitlement to counsel at critical stages of all cases entailing a risk of incarceration, including misdemeanors.⁸⁹

Impact: A modest increase in staffing and the shifting of certain attorney assignments and responsibilities has allowed the Office to initiate representation at virtually all felony arraignments and misdemeanor custody arraignments in Riverside, and to a lesser extent in Public Defender branch offices. Staffing is still not adequate to allow universal representation of non-custody defendants at misdemeanor arraignments. The nine additional attorney positions approved in the Office's 2000-2001 budget were roughly one-quarter of the number requested based on the audit recommendations. A recent ruling by the state Supreme Court raises the risk that any continuing shortfall in providing representation at arraignment may expose the Office and the County to legal liability.⁹⁰

Attorneys for indigent in-custody defendants are now appointed at arraignment, which is held within 48 hours of arrest.⁹¹ The Office attempts to begin representation of indigent defendants in high profile cases as soon as it learns of the case (e.g. through media reports). On the first day after appointment, the Office reviews the case for conflicts and assigns it to an attorney. Client interviews, previously conducted by an investigator or other staff members in violation of national standards,⁹² are now conducted by attorneys. Attorneys are required to interview in-custody clients at the jail within 48 hours of appointment (assignment within the office usually occurs 2-3 days after arrest), and are required to interview in-custody clients at the jail prior to every court appearance. The Office periodically checks jail logs to verify that clients are being interviewed as required.

Vertical Representation

⁸⁸ From October 1, 1998 to September 30, 1999, that there were 14,365 guilty pleas at misdemeanor arraignments, of which 12,350 were made without benefit of counsel.

⁸⁹ *Argersinger v. Hamlin*, *supra* n.12.

⁹⁰ *Barner v. Leeds*, 24 Cal. 4th 676 (2000) (public defenders are not entitled to immunity as government employees under California Government Code §820.2 when sued by clients for malpractice, and owe the same duty of care to their clients as do private attorneys). *See also*, *Wiley v. County of San Diego* (1998) 19 Cal. 4th 532.

⁹¹ Up to three-quarters of felony defendants are in custody at arraignment, while only 2-3% of misdemeanor defendants are in custody at arraignment (the County is under a court-ordered cap on its jail population).

⁹² NLADA *Performance Guidelines*, Guideline 2.2.

Instead of continuous or vertical representation, the practice of having separate lawyers for felony preliminary hearings and felony trials was pervasive throughout the Riverside County system at the time of the 1999 NLADA audit.⁹³ In felony cases, no public defender at all was assigned to represent the client at initial arraignment in municipal court, except for homicide or other special case. Five attorneys handled all preliminary hearings, and the supervisor of the felony trial division personally handled all felony arraignments in the Superior Court. She would assign the surviving cases to the 17 lawyers who do felony trials. This meant that, at a minimum, the client received representation from three different lawyers, and if a lawyer were to be added at the first arraignment, there would be four lawyers. The 1999 NLADA audit recommended vertical representation in felony cases.

Impact: The Office still lacks staffing to allow vertical representation in all cases. A planned change in the processing of cases which originate at another court in the southwestern part of the County – i.e., keeping them in the originating court instead of transferring them to the Riverside City courts – will allow these cases to be handled vertically.

Workload

The felony division in Riverside consists of 17 trial lawyers and one supervisor. In 1998-99, the Office was assigned to 9,851 felony cases, more than double the per-attorney caseload limits allowed under national standards.⁹⁴ Workload concerns were exacerbated by the lack of a proper supervisory structure for the felony trial division. In Riverside, the felony supervisor had a substantial arraignment caseload as well as supervisory responsibility for 17 lawyers.

Impact: Caseloads still exceed national standards, but are now lower than the statewide norm.

New Office policies require attorneys to dispose of most cases within 120 days. (Previously, because of high workload, it was not uncommon for attorneys to neglect cases for longer periods.) Under the new policy, if a case is more than 120 days old, approval from a supervisor is required before the case can be continued.

Another new Office policy encourages attorneys who believe their workloads do not permit them to provide quality representation to discuss the issue with their supervisors and, if they are not satisfied with the supervisor's response, with the Public Defender himself. The Public Defender has declined to invoke national standards requiring him to

⁹³ The only cases handled "vertically" were murder, child molestation, rape, and "three strikes" cases subject to life imprisonment.

⁹⁴ The average annual caseload for felony trial lawyers in Riverside is 277. Adding violations of felony probation as approximately half a case adds another 58 cases to each lawyer for a total of 335, compared to national standards for felonies of 150.

declare the Office unavailable to take excess cases,⁹⁵ preferring to rely on gradual improvements in staffing and workload.

Conclusions: Though independent standards-based audits can be an important part of improving an indigent defense system, they lack the enforcement mechanisms that formal state or local standards have when codified or adopted by Court Rule or case law. Despite sympathy for the aims of the national standards, local funding restricts the ability of jurisdictions to come into compliance quickly. Riverside County has pursued a gradual plan for meeting minimum national thresholds for quality and cost-effectiveness.

⁹⁵ *NSC*, Guideline 5.1, 5.3; *ABA Defense Services*, Standards 5-5.3; *ABA Defense Function*, Standard 4-1.3(e); *NAC*, Standard 13.12.

OREGON: Standards Implemented Via Contracting for Services

Oregon is the only state that relies on contracts for defense services as its primary indigent defense delivery system. The system is entirely state-funded and administered, and is in the process of transitioning to a more streamlined centralized structure. The present review was conducted before the transition to the new system in October 2003; where the implementation of standards is expected to be affected by the new structure, it is discussed herein. This chapter examines the statewide system, with a focus on how it affects the delivery of legal services in the field, in one of the 11 non-profit defense service organizations operating under a contract with the state.

Under the “old” system, responsibility for indigent defense was divided between two departments in state government. A division of the State Court Administrator’s office⁹⁶ was responsible for all statewide, trial-level indigent defense services.⁹⁷ It provided no direct representation, but rather contracted for those services throughout the state. Appellate representation was provided by the state Office of the Public Defender.

The new system consolidates these responsibilities under a new legislatively-created Oregon Public Defender Services Commission.⁹⁸ This new independent oversight commission has authority to establish and maintain a public defense system that ensures the quality, effectiveness, efficiency and accountability of defense services consistent with Oregon and national standards. This includes adopting rules regulating financial eligibility for indigent defense services, professional qualifications of attorneys, and procedures for the contracting of public defense services. The Commission is responsible for creating an Office of Public Defense Service to execute day-to-day management of the statewide system. It has oversight of the appellate defense system, and is responsible for pre-authorizing and approving payments on requests for experts and services provided by the private bar.

Under both the old system and the new, all indigent defense services at the trial level are organized at the county level, with 100 percent of the funding provided by the state through a series of contracts with private attorneys, consortia of private attorneys, or

⁹⁶ The Indigent Defense Services Division.

⁹⁷ It also had responsibility for providing services in the following cases: children and parents in dependency and termination-of-parental rights cases, juvenile delinquency proceedings, post-conviction relief, habeas corpus, and civil commitment. These responsibilities are also transferred to the new commission.

⁹⁸ The Oregon Public Defender Services Commission’s first meeting was in August 2001. Between July 2002 and October 2003, there was a transition period in which the commission began oversight of certain indigent defense responsibilities, including oversight of the direct services division.

private non-profit defender agencies.⁹⁹ The contracts are the enforcement mechanism to ensure that state standards are met. For instance, a non-profit public defender agency is required by contract to “maintain an appropriate and reasonable number of attorneys and support staff to perform its contract obligations.” If a defender agency cannot meet this requirement, the contract will not be renewed.

Independence

The impetus for creating a new independent commission came from a legislative study commission established at the request of the Judicial Department in 1999.¹⁰⁰ Despite the proliferation of contracts, many Oregon counties must rely on the private bar to take conflict cases under an appointment system. The legislative study commission found that the direct involvement of judges in authorizing assigned counsel compensation and expert witness fees, and other case-related expenses, was in direct conflict with national standards relating to both independence and adequacy of representation. The study commission referenced the lack of uniformity throughout the state regarding payment of appointed attorneys when left to the discretion of individual judges, and found that this system produces inefficiencies, with some attorneys having to wait over six weeks for payment.

The legislative study commission found that although the demand for indigent defense services was substantially impacted by factors outside of the control of service providers and administrators (e.g., number of arrests, district attorney charging practices), the officials responsible for the oversight of the old system were not able to secure adequate funding to keep pace with each change in such external factors. The study commission found that the primary reason for such indigent defense funding shortfalls was direct competition with other priorities of the judicial branch.

Oregon’s new state commission is an independent governing board. It was created to separate indigent defense services from the other budgetary responsibilities of the State Court Administrator in the Judicial Department. It has the permanence of an agency created by state statute. It consists of seven members, all appointed by order of the Chief Justice, who serves as a non-voting, *ex-officio* member. Diversity of membership is required, including at least two non-lawyers, one criminal defense lawyer whose practice does not serve primarily indigent defendants, and one former Oregon state prosecutor. No current judge, prosecuting attorney, or law enforcement officer is eligible to serve. Members serve four-year staggered terms, to maximize continuity. Though the new

⁹⁹ The Office of Public Defense Service contracts with ten non-profit organizations to provide primary indigent defense services in 11 of the state’s 36 counties. Twenty-four counties are served through either consortium contractors or individual law firm/private attorney contracts. In one county, indigent defense services are provided through an assigned counsel plan. In this county, and for conflict representation in other counties, attorneys are paid an hourly rate by the Office. All individual private attorneys must apply to the Office and receive certification in order to receive appointments.

¹⁰⁰ The Legislative study commission was the thirteenth study of indigent defense services in as many years. Among the most influential studies was the Oregon State Bar’s Indigent Defense Task Force report in 1994. The number one recommendation in that report was to house indigent defense services under an independent commission.

commission technically still falls under the judicial branch, it has plenary responsibility for effectively advocating for adequate indigent defense funding from the legislature.¹⁰¹

The contracts entered into by the state commission with local indigent defense service providers contain safeguards protecting the independence of the provider agency as well as individual attorneys furnishing defense representation. First, since all of the contracts are overseen at the state level, local judges cannot control the appointment of specific lawyers to their courtrooms. Secondly, the contract provides that the state shall have no right to observe attorney/client consultations or to review privileged or any work product. Moreover, each of the ten non-profit public defender agencies providing services in 11 counties is required to be governed by a Board of Trustees, under state laws defining the operation of non-profit entities generally.

Impact – State-Level: The independence of the new state commission – a product of its legislative charter, diverse membership and staggered terms – allows it to set fiscal priorities, including creating new or strengthening existing standards. The new system removes judges from the process entirely.

The centralization of all indigent defense services under an independent commission is expected to bring other efficiencies to the system as well. The new state commission provides a unified indigent defense voice in state government, responsible for comprehensive longer-term planning, coordinated resource allocation, and expert assessment of the correlations between indigent defense workloads and policies and practices elsewhere in the criminal justice system. For example, Oregon has a relatively broad right to counsel, including the right to representation for both parents and children in dependency and termination of parental rights cases. Despite increased efforts to divert these cases from the courts (e.g., by increasing social services and community-based outreach to families), the number of cases and the demand for representation has still outstripped indigent defense capacity. The new state commission's responsibilities include assessing and preparing for the impact of such legislative initiatives affecting the delivery of defender services.¹⁰²

Independence will also allow the commission to raise the priority of, and promote uniformity in, two issue areas addressed by standards examined in this report: training and salary parity. Though the Oregon State Bar has established mandatory continuing legal education requirements requiring all active members to complete 45 hours of accredited CLE activity every three years, no defender-specific training requirements or training

¹⁰¹ "Adequate funding and quality services go hand in hand," concluded the *Operational Review of Oregon's Public Defense System*, prepared on behalf of the Public Defender Services Commission by Aldrich, Kilbride & Tatone, LLP (May 2002), at 11.

¹⁰² Commissions in other states have been instrumental in formulating approaches to systemic challenges affecting defender workload, e.g., by developing plans for the decriminalization of low-level offenses (accomplished in Minnesota, pending in Massachusetts).

standards were implemented under the old administration.¹⁰³ The lack of discipline-specific training requirements has produced varying levels of training among indigent defense contractors around the state. Training is not separately funded under the contracts, producing wide disparities in the extent and quality of training among indigent defense programs. The new commission will determine the best way to institute mandatory training requirements.

Similarly, the commission plans to address salary parity as a means of making uniform statewide improvements in the recruitment and retention of qualified attorneys. The salary levels of public defenders statewide are approximately 30-35% of that of prosecutors. Compensation of court-appointed private attorneys has not risen since 1991.¹⁰⁴

Impact – County-Level: In Lane County, the bylaws and articles of incorporation of the non-profit contractor, Public Defender Services of Lane County, provide for a seven-member board, six of whom are appointed by the President of the Lane County Bar Association, and the seventh is elected from the public-at-large by the other six appointees. As with the state commission, no current judges or prosecuting attorneys may serve. The Board consists of some of the most highly respected private attorneys in the county. It reviews budget plans and serves in an advisory capacity to the Executive Director on prioritizing needs. At times, the Board Chairman intervenes to resolve issues arising from the local judiciary and the Executive Director, but a good working relationship between the courts and the public defender office makes this a rare necessity.

The independence afforded by the board has given the public defender office its own separate identity in the criminal justice community, which in turn has led other agencies to value the office's inclusion in important collaborative processes affecting the criminal justice system. Staff and the executive director serve on a number of state and local criminal justice policy boards, the State Board of Governors, bar association initiatives, community outreach programs, and teach at local college law clinics. In the view of the Presiding Judge of the County's Criminal Courts (a former state legislator): "Independence from the judiciary is critical for the defense function. By advocating for the best interests of their clients rather than advocating for what may put a defender in a judge's good graces, defense providers protect the rights of the accused and assist in the efficient working of the criminal justice system. We are lucky in Lane County to have well-qualified attorneys advocating on both sides of the aisle to ensure the people of Lane County that aims of justice are being

¹⁰³ The Oregon Criminal Defense Lawyers Association (OCDLA) has become the leader in providing training in the state, offering at least five seminars per year exclusively for criminal defense lawyers. The Criminal Defense Bar Section of the Lane County Bar also present monthly speakers dealing with practical problems of criminal defense work and are CLE accredited.

¹⁰⁴ Oregon's rates are currently at \$40 per hour, compared with \$71 per hour national average overhead costs for running a law office (*see* n.98 and accompanying text *infra*), and rates recently raised to \$90 per hour in the federal system, Alabama and New York.

served, for victims and defendants alike, to assure our citizens that justice is being served in a fair as well as efficient manner.”

The state contract system which allows local defense attorneys and organizations to maintain a certain degree of autonomy also appears to have fostered local innovation. For example, the Lane County public defender office has adopted a management philosophy emphasizing experience and commitment to indigent defense as preeminent qualities for staff at all levels. The Office’s Executive Director instills this philosophy by utilizing a collaborative, participatory decision-making approach to management, and offers benefits commensurate with staff experience levels, contributing to high employee satisfaction and low turnover. He created an “of counsel” position, to allow a well-respected, retired public defense lawyer to act in an emeritus capacity to the organization. Staff members enjoy having such an attorney with whom to discuss strategies and approaches to their cases, and the agency benefits from having an experienced attorney to take difficult cases as needed.

This element of local autonomy and local innovation has also impacted the training area. When an overhaul of the office’s computer system revealed wide gaps in technological proficiency among staff, the office established a “Public Defender University.” A needs assessment was conducted to determine the type and level of computer training required by staff. More experienced staff signed up to be trainers for less experienced staff, and experts from the local community college were engaged for more specialized expertise. Classes were held over a six-week period on such topics as Westlaw legal research, maximizing efficiency through e-mail, Internet resources, and spreadsheets. The “University” is in the process of expanding its curriculum, to include refresher courses on other technologies, Spanish language instruction, federal crime lab processes, and the use of Microsoft PowerPoint in the courtroom. The inclusion of all staff in both the design and the training itself bridges the types of divisions between attorney and non-attorney staff which are experienced in traditional defender offices elsewhere.

Other effects of independence at the local level are difficult to identify, since there has never been a time when the Office was not an independent agency. The executive director (with the organization since its inception in 1977) reports that there has never been a challenge to the agency’s independence.

Attorney Qualifications

The office of the State Court Administrator is statutorily required to establish eligibility standards for attorneys handling indigent defense cases.¹⁰⁵ It has never implemented a mechanism to monitor compliance, although the new state commission is considering adopting some type of monitoring and enforcement processes. Current contracts do

¹⁰⁵ ORS 151.430 (3).

require contracting non-profits to provide information on the extent of attorney supervision on request.

The qualification standards contained in the Lane County contract are based on the national standards promulgated by the ABA and NLADA, and are stratified in various levels of cases, including misdemeanor, minor felonies, major felonies, murder cases and capital murder cases.

Impact: Before the creation of the Lane County public defender office in 1977, it was reported that young attorneys who had just passed the bar would sit in arraignment courts hoping to get indigent defense appointments from the bench, to build their practice by gaining experience. These novice attorneys were then often appointed to felony cases without proper training or oversight. They were ill equipped to provide ethically adequate representation and to face qualified prosecutors, and often slowed the court dockets asking for continuances.

The qualification standards now allow young attorneys the opportunity to work in a team environment, including close supervision and mentoring relationships, allowing them to build their job skills before taking serious cases. The Lane County public defender office begins the enforcement of the qualification standards through the employment application process, focusing primarily on hiring attorneys that have some prior criminal defense experience. New hires are assigned a mentor to act as a personal supervisor over their workload. Mentors discuss matters such as case preparation and negotiation tactics with the attorneys under their charge, and perform in-court observations and act as second chair in cases. Where attorneys are hired directly out of law school, they are started on misdemeanor cases until such time as the state standards are complied with and office's management is comfortable with the attorney's performance level (see Attorney Performance section for specific evaluation procedure). The establishment of attorney qualification standards has served to professionalize the defense function statewide, according to state indigent defense officials. Consideration is being given to linking the attorney qualification standards to standards requiring indigent-defense-specific training.

Client Eligibility

By statute, financial eligibility for appointment of publicly funded defense counsel in Oregon depends on whether retaining private counsel would produce a "substantial hardship" to the defendant or the defendant's family.¹⁰⁷ This standard is implemented by the staff of the local criminal courts under specific court-generated guidelines. An applicant is required to fill out a financial statement, including monthly income and

¹⁰⁷ ORS 135.050 and ORS 151.485 establish the financial eligibility criteria of a person seeking a state-paid attorney in a criminal matter.

assets. Oregon's criminal courts set a presumptive indigency threshold for court-appointed counsel at 130 percent of the federal poverty guideline. A defendant whose income and assets exceed the presumptive cutoff level may still receive a state-paid attorney if the prevailing cost of a private attorney for a specific category of offense exceeds his ability to pay. For instance, if the prevailing private rate for a felony drug case is \$10,000, a defendant may qualify for a public defender if his available assets are below \$10,000 despite exceeding the 130 percent federal poverty guideline.

Impact: In Lane County, most defendants are eligible for court-appointed attorneys under the current guidelines. Judges reportedly overrule decisions of the verifiers in marginal cases and appoint attorneys, to ensure that convictions meet constitutional muster.

Attorney Performance, Including Timeliness of Appointment, Confidentiality & Vertical Representation

Oregon's indigent defense contracts define "representation" as providing a legal service that does not fall below the minimum professional standards and canon of ethics of the Supreme Court of Oregon, the Oregon State Bar, the American Bar Association, and any applicable case law and court rules that define the duties of counsel to their clients. The Lane County public defender office has developed an Office Policy manual that uses the required performance guidelines as a basis for performance evaluations. It establishes evaluation criteria for all employees, and specific performance guidelines for attorneys, investigators and support staff.

Other contract provisions --

- ξ Define "adequate representation" to require "continuous legal and support staff services," – i.e., vertical representation – a requirement which is further enforced through the office's internal policy manual.
- ξ Require early attorney entry in cases.
- ξ Broadly protect client confidentiality, specifying the types of organizations and individuals to whom confidences may not be disclosed without the express permission of the client and the attorney. The office enforces this provision by an internal policy requiring disciplinary action for a breach of confidentiality.

Impact: The Lane County performance standards mirror and reinforce the state-level standards. Together, they promote uniformity of quality without precluding individual innovation in case resolution. Attorneys are encouraged to, and do, seek creative ways to resolve matters through alternative sentencing, deferred adjudication programs, appropriate diversion-based programs, and qualified treatment programs. When a case does go to trial, the litigation performance guidelines are consistently complied with. There has never been a successful claim of ineffective assistance of counsel in the office's quarter-century history.

Confidential space for attorney-client meetings is provided in each essential venue: in the agency office, in court, and at the jail.

The impact of vertical representation and early entry is reflected in the case of Mike B. described in the introduction to this report. The practice of early entry in Lane County leads to earlier disposition, and improved overall court efficiency. As observed by the County's District Attorney: "Delay is a disservice to everyone involved in the criminal justice system – victims, family members, juries, defendants and court officers. Having qualified defense attorneys involved in the early stages of a case not only adds to the efficiency of the court, but it also adds to the court's overall effectiveness in dispensing justice – especially in juvenile cases. Children have a different perception of time than adults. When my child does wrong, I don't write a letter six weeks later – I address the problem at the earliest possible moment while the incident is still fresh in his mind. Justice must similarly be dispensed with all deliberate speed to effectively alter bad behavior. Good defense attorneys, who know all of the relevant case law and do not need to reinvent the wheel with every new assignment, allow for such fair and timely resolutions."

Workload

The contract requires Public Defender Services of Lane County to "maintain an appropriate and reasonable number of attorneys and support staff to perform its contract obligations." The contract and an appendix to it set a precise total number of cases to be handled by the contractor during the contract term, with specific numbers of cases allocated among numerous categories of cases, each of which generally requires different amounts of work.¹⁰⁸ The contract also specifies the number of staff projected during the contract term. Thus, instead of the common per-attorney-per-year formulation of numerical caseload limits, the Lane County system reflects overall numerical caseload limits for all staff in the office combined. And instead of pure caseload limits, the allocation of case numbers among different categories of cases according to the number of hours commonly required for each type of case, essentially constitutes a case "weighting" system, i.e., measuring "workload" rather than caseload, and allowing more sophisticated planning for the office's actual work and staffing needs. The workload model is preferred by national standards such as the ABA's *Ten Principles* ("National caseload standards should in no event be exceeded," provides Principle 5, "but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement).

¹⁰⁸ In fiscal year 2000-2001, the agency's workload was estimated at a total of 12,668 cases, or 6,334 cases for each six-month period. An appendix to the contract delineates the estimated caseload by case type – e.g., four murder cases in the year; 4,752 felonies; 1,992 non-DUI misdemeanors; 504 DUI misdemeanors; 2,760 violations of parole; 216 contempt, mental health or other civil matters; 720 appeals; 192 juvenile dependency proceedings; 1,032 dependency review hearings; 264 juvenile probation violations; and 16 cases representing parents in termination-of-parental-rights proceedings. Each type of case has a presumptive dollar value attached to it, based on the presumptive number of hours of work required – for example, \$15,000 for a non-capital first-degree murder case, or \$2,200 for representation of a parent in a termination-of-parental-rights proceeding.

Every six months, there is a budget review process with state funding officials, in which extra funding may be negotiated for extra work performed – for example, for cases which required more than the usual amount of time of type of services.

The senior level experience of the office’s staff also acts as a check on caseloads. If the number and severity of cases begins to conflict with staff’s ability to manage cases, the attorney staff will inform the Executive Director of their concerns. An overloaded attorney’s new assignments will then be limited until such time as he or she can once again take cases.

Special litigation expenses are processed separately, to avoid the common problem in flat-fee contracts, where each dollar spent on litigation expenses such as experts or investigators essentially comes out of the compensation of the attorneys, creating a financial disincentive and conflict with the client’s interest. Under the Lane County contract, expenses for reasonable and necessary litigation expenses such as experts, medical or psychiatric evaluations, interpreters, or forensic testing, are processed through separate requests to the state – the independent state commission from July 2002 onward, and the State Court Administrator’s office previously. The office has its own investigators on staff.

Impact: The office monitors its intake and can project the degree of compliance with its estimated workload on a week-by-week basis. It notifies the court promptly if workloads are being exceeded and additional appointments must be declined. If, for example, the office meets its workload level on Wednesday, the balance of all new assignments for the week go to the private bar. This flexibility allows the office to consistently maintain a uniform quality of service and manageable workloads even during periods of lower-than-normal staff levels due to turnover, sickness or other authorized leave.

The use of per-office rather than per-attorney caseload limits constitutes a delegation of the enforcement of workload limits to the office’s Executive Director. If one attorney becomes overloaded, but another attorney can handle the overage, the Executive Director reallocates the workload among staff, triggering declination only when the entire office has exceeded its workload capability.

Since workload projections calculated in each contract assume the required minimum hours of training, staff participation in training and professional development does not necessitate work-overload.

The case of Mike B. in this report’s introduction – the defense team’s ability to investigate his mental health issues and their impact on the case’s legal issues, to locate appropriate foster care, to make the case for deferred adjudication, to keep Mike off drugs, to avoid unnecessary jail costs, and above all, to avert an injustice – is a prime example of the benefits of attorney workload limits.

Conclusion: Despite the well-documented shortcomings and inherent conflicts of interest in low-bid or flat-fee contracts,¹⁰⁹ the example of Oregon indicates that contract systems can meet the thresholds of the ABA's *Ten Principles* if they are not based on cost alone, set minimum standards for quality representation, and separately fund expenses such as experts, investigators or forensic laboratory testing.

To help jurisdictions implement contract systems in a way that meets national standards relating to contracting for public defense services, NLADA developed a "Model Contract For Public Defense Services" in 2000, with funding from the Bureau of Justice Assistance in the U.S. Department of Justice. Its purpose, as described in a *BJA Bulletin*,¹¹⁰ is "to assist counties and states interested in contracting for indigent defense services, to identify and address all related issues regarding cost, accountability, workload, and quality of services," noting that flat-rate contracts have led to "problems of overloaded attorneys and conflicts of interest [which] have led courts to invalidate low-bid contracts, including ordering increased funding or lower caseloads."

The Oregon indigent defense system meets the majority of the ABA's Ten Principles. With the new commission taking over the entire system, further progress appears likely in the areas of training and resource parity.

¹⁰⁹ See *Contracting for Indigent Defense Services*, produced by The Spangenberg Group for the U.S. Department of Justice, Bureau of Justice Assistance, April 2000.

¹¹⁰ *Criminal Courts Technical Assistance Project*, February 2001, NCJ 185780, Office of Justice Programs, U.S. Department of Justice, at 4 (www.ncjrs.org/pdffiles1/bja/185780.pdf).

MASSACHUSETTS: Statutory Standards

Massachusetts is the only state where a majority of the indigent defense standards are statutorily required and imposed statewide. A statute directs the statewide public defense agency to write, monitor and enforce standards in a variety of areas, covering both public defender offices and private assigned counsel.

The statewide agency tasked with oversight of legal representation of indigent persons is the Committee for Public Counsel Services (CPCS).¹¹¹ The 15 members of the CPSC are appointed to three-year terms by the justices of the state's highest court, giving "appropriate consideration" to nominations by various organizations and constituencies, including the Massachusetts Bar Association, county bar associations, the Boston Bar Association, the Massachusetts Black Lawyers' Association, Women's Bar Association, and the Massachusetts Association of Women Lawyers.

Most indigent defense services in the state are provided under the supervision of CPCS' assigned counsel plan. CPCS contracts with 12 local bar advocate programs to monitor and provide supervision to the private bar accepting cases at the local level. Assignment of cases is based solely on scheduled court days staffed on a rotational basis, to reduce the risk of undue judicial influence in the selection of attorneys. CPCS also has a public defender division with approximately 130 staff attorneys handling Superior Court cases through 13 regional offices.

The applicable statute¹¹² directs that CPCS shall "establish standards and guidelines for the training, qualification and removal of counsel in the public and private counsel divisions who accept its appointments, and shall provide pre-service and in-service training for both private counsel who accept assignments and salaried public counsel." CPCS must further establish standards for both the public and private divisions related to—

- ξ continuous ("vertical") representation through both the pre-trial and trial stages, whenever possible;
- ξ mandatory training in the fundamentals of criminal trial practice, unless the attorney has a level of ability which makes such training unnecessary;
- ξ caseload limits;
- ξ access to investigative services, social services or social service referrals, expert witnesses, clerical assistance, interview facilities, and a law library and model forms; and
- ξ adequate supervision provided by experienced attorneys.

¹¹¹ Established in 1984, under Chapter 211D, Massachusetts General Laws.

¹¹² *Id.*, Section 4.

The statute directs that CPCS shall “monitor and evaluate compliance with the standards and the performance of counsel in its divisions in order to insure competent representation of defendants in all courts of the commonwealth and shall establish a procedure for the review and disposition of client complaints.” CPCS implements the standards through office-generated policy manuals and guidelines.

Independence

Massachusetts’ standards are inextricably linked to one another and codified as a whole, so the impact of standards in each of the present study’s ten substantive areas cannot be assessed separately. By virtue of the statutory assignment to an independent commission of the authority to develop and enforce standards, independence is the standard from which all others flow, and hence the single most important standard affecting indigent defense in Massachusetts.

Qualification, Performance, Training and Workload

At the local level, where private bar counsel provide most indigent defense services, attorneys accepting cases must first be certified by CPCS to take cases. To accept District Court cases (misdemeanors and concurrent felonies), attorneys must apply and be accepted into one of the bar county advocate programs¹¹³ and attend a five-day state-administered CLE seminar offered several times throughout the year.

Attorneys seeking assignment to cases at the Superior Court level must be individually approved by the Chief Counsel of CPCS, whose decision is informed by the recommendation of a Certified Advisory Board composed of eminent private attorneys from each geographical location. To be certified for these more serious cases, attorneys must have tried at least six criminal jury trials within the last five years or have other comparable experience. Proof of qualification, including names of cases, indictment numbers and charges, names of judges and prosecutors, dates, and a description of the services provided must be included in the application. Recommendations from three criminal defense practitioners familiar with the applicant’s work are also required. Though no formal training is required for certification, eight hours of CLE per fiscal year are required in order to maintain certification.¹¹⁴ Certification is only valid for a term of four to five years, after which all attorneys must be reevaluated.

First and second degree murder cases require proof of five years of criminal litigation experience, familiarity with Massachusetts criminal courts, service as lead counsel in at least ten jury trials of a serious and complex nature over the preceding five years, at least five of which have been life felony indictments resulting in a verdict, decision or hung jury. As with Superior Court certification, applicants must submit information along with recommendations of three criminal defense lawyers.

¹¹³ No attorney may be a member of more than two county programs, unless she is certified as bilingual.

¹¹⁴ The Commonwealth of Massachusetts has no compulsory CLE requirements.

All newly certified attorneys must participate in a mandatory program of mentoring and supervision overseen by the Bar Advocacy Programs. For attorneys seeking appointments to children and family law matters, for example, counsel must meet with their mentor prior to any new assignments and bring writing samples to help the mentor develop a skills profile. The mentor and mentee are required to meet at least four times per year. The mentor is instructed to follow CPCS' performance guidelines (below) in assessing the attorney's ability. Participation in the program is mandatory for an attorney's first eighteen months, and may continue longer at the discretion of the mentor.

By being certified, an attorney agrees to abide by the set of rigorous performance guidelines that set out attorney responsibilities at every stage of the case, for each specific type of case the attorney is qualified to handle. Assigned counsel attorneys are also bound by numerical caseload limits: an attorney may handle no more than 200 Superior Court criminal cases per year, 400 District Court criminal cases, 300 delinquency cases, 200 Children and family law cases, or 200 Mental health cases. An attorney may bill no more than 10 billable hours in a day (unless this limit is waived by CPCS) nor more than 1,800 hours annually.¹¹⁵

Enforcement of the performance requirements is provided by each of the County Bar Advocate programs. Performance reviews may result in a referral to the financial auditing unit at CPCS. The contract between the advocacy program and CPCS requires that the Contractor shall assure that zealous advocacy consistent with CPCS' published performance guidelines is provided in all cases. To fulfill this requirement, each program must employ supervisors to evaluate appointed counsel, provide assistance and training, and to investigate complaints. Written guidelines require that all attorneys receive careful supervision and guidance.

A similar combination of qualifications standards, performance standards and training has been instituted on the staffed public defender side of CPCS. Each year's class of new public defender attorneys begins their employment at CPCS with four weeks of in-house training conducted each September by faculty members of CPCS' Training Unit from around the state. For each four-week course, more than fifty staff Public Defender Division attorneys, investigators and social workers assist in the training of the new lawyers.¹¹⁶ The new-lawyer training program combines in-depth lectures on Massachusetts' substantive and procedural criminal law, with intensive mock trial skills exercises. Because public defender division staff handles almost exclusively Superior Court cases, new attorneys are given a limited caseload after training and given close supervision. Attorneys generally do not try cases within the first six months of their employment. In January, the entering class returns for a fifth week of training. Six

¹¹⁵ A full-time attorney (i.e., a 40-hour work week) with two weeks vacation and observing federal holidays will work 1,850 hours in a year.

¹¹⁶ The CPCS Training Unit also provides ongoing training to all staff attorneys throughout the year, including semi-annual statewide training conferences, intermediate and advanced week-long jury skills courses, a quarterly training bulletin summarizing recent appellate decisions, and focused day-long training programs.

¹¹⁸ 1999 Altman Weil Survey of Law Firm Economics (www.altmanweil.com/publications/surveys/slfe99/financials.htm).

months later, attorneys are instructed to bring an actual case that they are working on for a sixth week of training.

For attorneys already on staff, all lawyers attend CPCS' annual conference in which seminars are presented on a variety of topics. A separate public-defender-specific conference is held every Fall to discuss implications of new laws, like Massachusetts' registry for sex offenders. The Training Unit also produces a quarterly newsletter disseminated to staff.

Quality is assessed through a formal evaluation program based on the written performance guidelines. Expectations are different for new and senior attorneys, and CPCS has developed different performance evaluation forms for each classification of tenure. Performance evaluations are not connected to salary, to allow supervisors to critique or commend performance without regard to an attorney's income. Instead, CPCS use performance evaluations to classify attorneys to handle various types of cases, with promotion to the next most serious or complex level of cases being a reward for quality performance. Attorneys are not allowed to handle cases beyond their capability.

To provide hands-on oversight, supervisors are given a reduced caseload. Supervisors are given training in how to evaluate staff, and their ability to assess performance fairly is a subject of their own performance review by management. Performance standards (derived from national standards) give both staff attorneys and supervisors clear guidance as to the performance measurements to be applied in the supervision process. Supervisors are also given flexibility to determine staff attorneys' individual workload levels in consultation with the attorney and the Deputy Chief Counsel for the Public Defense Division.

Client Eligibility, Vertical Representation, Timeliness of Appointment & Confidential Meeting Space

By statute, CPCS is responsible for drafting eligibility criteria to be approved by the state Supreme Judicial Court. Eligibility has been set at 150 percent of the federal poverty guidelines. Because there is a wide gap between those guidelines and the amount of money needed to retain a private lawyer without undue hardship, the legislature has also created "marginally indigent" classification that allows a defendant to retain the services of a CPCS attorney for a set fee. Eligibility screening is performed by the Department of Probation to determine whether a defendant is "marginally indigent." The Court sets the amount, on a case-by-case basis, that a marginally indigent defendant is required to pay. Litigation has established that a client who does not pay his counsel fee cannot be deprived of his assigned attorney as a result. Indigency screening is performed by the Department of Probation.

Based on long tradition in the state, the statute creating CPCS requires that vertical representation be practiced whenever possible. The Massachusetts Defenders Commission (a private non-profit agency with staff public defenders created in 1960) provided the majority of representation in serious felony cases prior to the formation of

CPCS, and adopted vertical representation as a standard practice in the early 1970's. However, vertical representation was not always followed on the private bar side in less serious cases; judges would often appoint an attorney to "fill in" for another attorney for various hearings if the principal attorney was unavailable for a court hearing, which sometimes led attorneys to resist because of the deleterious impact on both the attorney's preparation and the client's right to counsel, putting themselves at risk of contempt of court and the system at risk of time-consuming litigation. Vertical representation is now well established and accepted by the judiciary by virtue of its statutory codification.

Litigation did result from the statutory standards in another area. A lawsuit was brought by CPCS to enforce confidential meeting space for attorney-client interviews in the holding areas of the district courts for Lynn and Dorchester, based on the CPCS-generated performance guidelines requiring counsel to meet their clients in areas that protect the confidentiality of attorney-client communications.

Resources/Parity

Prior to 1984, a myriad of agencies were responsible for indigent defense services, and received funding through the courts. The County Bar Advocate Program handled the majority of misdemeanor cases through the Eastern and Central parts of the state, except Suffolk County (Boston), where private attorneys were appointed from court supervised panels. Judges also appointed in the Western part of the state. The Massachusetts Defenders Commission provided services in most serious criminal cases, except in a section of Boston where the Roxbury Defenders Committee provided representation.

Salary parity is addressed in section 13 of the CPCS statute: "The Chief Counsel shall be paid a salary comparable to the salary paid to a district attorney.... All other legal staff of the public counsel division shall be paid at salaries comparable to the salary paid to an attorney employed in a district attorney's office."

For private assigned counsel, the statute provides that CPCS "shall establish rates of compensation payable, subject to appropriation, to all counsel who are appointed or assigned to represent indigents within the private counsel division." The legislature has set a statutory rate of \$39 per hour (\$54 in murder cases, and \$30 in District Court cases not requiring Superior Court certification), and CPCS has used its authority to adjust rates to higher levels. In 1994, CPCS voted to raise the rates to \$50 per hour (\$65 for Superior Court and \$85 for murder cases), and is planning to vote to raise them again in the Fall of 2002, to \$60 (\$80 for Superior Court, and \$100 for murder cases) based, as the CPCS Executive Director notes, upon "eight years of inflation and the \$90 federal rate."

Impact: The statute's use of the term "comparable salary," as opposed to the "same salary," has produced mixed results. Public defenders do generally receive salary increases in the year after prosecutors receive increases, but in lesser amounts. The fact that CPCS staff attorneys handle only the more serious Superior Court cases, while prosecutors handle all levels of charges, suggests that the obverse should be true. In addition, prosecution pay is relatively low in Massachusetts, because the

high number of law schools in Massachusetts produces high numbers of young attorneys willing to gain experience in district attorneys' offices before moving on to other job opportunities; the result is that CPCS staff public defenders remain among the lowest paid public defenders in the country.

Hourly rates for private assigned counsel remain at \$39, despite the CPCS's efforts to raise them to keep pace with inflation (the average per-attorney overhead cost of operating, equipping and staffing a law office nationally works out to \$71 per hour¹¹⁸). The reason is that CPCS's statutory authority to raise rates is "subject to appropriation," and the agency has had difficulty obtaining any funding increase from the legislature; out of the past five years, it has received no funding increase, and actually suffered a decrease in the most recent appropriations cycle, for fiscal year 2003.

Under the old system of low rates plus judicial control, especially related to oversight of payments, it was difficult to keep qualified, well-trained attorneys willing to take indigent defense cases. CPCS's assertion of control over certification, assignments and payments has contributed to improvements in quality, and the agency now receives more than adequate numbers of requests for certification in most of its practice areas. However, CPCS is concerned that the difficulty of practice, combined with extremely low hourly rates, is driving attorneys away from serious felony, juvenile delinquency and sex offender registration cases, and that legislative appropriations for significant rate increases are required soon to ensure sufficient numbers of qualified attorneys to take these cases.

As with Oregon, the independence and autonomy of CPCS has brought the flexibility to innovate. The Youth Advocacy Program (YAP) is a nationally recognized model for delivering holistic representation to children in criminal, delinquency and dependency cases, as well as other disciplinary actions. YAP also provides education and training to children and their families, and others, to address issues that lead to recidivism. YAP includes in its mission a focus on "the problem of the disproportionate confinement of children of color in Massachusetts." Similar innovative programs have been established at CPCS related to Mental Health, Children And Family Law, and Registered Sex Offenders.

Other impacts of the creation of CPCS include:

Improved agency management/accountability due to involvement of knowledgeable oversight board and improved supervision: CPSC's 15 diverse and expert members oversee the entire system of quality, monitoring and accountability on both the public defender and assigned counsel sides.

Inclusion in criminal justice system coordinating and planning bodies: The creation of an independent CPCS has enhanced the view in

the community and among other criminal justice agencies that indigent defense is a separate, co-equal function with a valuable perspective to be included in criminal justice planning and oversight efforts. The Chief Counsel and his staff affect public policy through legislative advocacy, op-ed pieces, and other public education forums.

Improved quality of services to clients, including more clients referred to treatment: Improvements such as early entry, adequate preparation, prompt disposition, appropriate referrals to community-based sanctions and treatment programs, are attributable to the combined effect of all of the standards, including workload, attorney performance, vertical representation, and independence.

Reduced attorney workload: This is principally due to caseload and workload standards. Prior to CPCS, caseloads were not monitored and attorneys were expected to take any case assigned to them by a judge.

Better staff morale and less turnover: Many standards were cited by CPCS representatives for this impact, including independence, vertical representation, training, performance, and workload. Training and support were reported by some interviewees to be as important as salary levels in improving staff morale and reducing turnover. Manageable caseloads and the ability to make an impact on clients' lives, and their families and communities, were noted as important to good morale among both the private and public divisions. The principle factor contributing to turnover problems remains compensation levels, exacerbated by rapidly increasing levels of student loan debt among younger attorneys (a staff survey in 2000 revealed common debt levels in the range of \$60,000 to more than \$100,000).

Conclusion: Statutory codification of standards is a model that can have wide-ranging effects on the quality and cost-effectiveness of an indigent defense system. Any changes must be legislatively accomplished, protecting against attack by any single official or politically elected leader. The statute's requirement that the standards must be enforceable is critically important to their effectiveness in matters such as controlling caseloads, maintaining adequate quality of representation, and supervising, evaluating and training attorneys. In terms of the system for appointing private attorneys, the enforcement of the standards has led to one of the most comprehensive and effective supervision and mentoring systems in the country. Though compensation for both staff public defender attorneys and private assigned counsel remain low, CPCS's authority to set and enforce standards allows them to avoid deleteriously impacting the quality of representation while the quest for more sustainable compensation levels continues.

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National Survey of Implementation of Indigent Defense Standards

October, 2001



H. Scott Wallace
Director of Defender Legal Services

Jo-Ann Wallace
Chief Counsel, Defender Legal Services

Clinton Lyons
President and CEO

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Survey of Indigent Defense Standards Implementation

This survey instrument is designed to elicit comprehensive nationwide information about the extent of utilization of indigent defense standards. The project is funded by the National Institute of Justice in the U.S. Department of Justice, and results will be nationally disseminated. The project report will be valuable to state and local policymakers and indigent defense programs in deciding whether and how to utilize indigent defense standards.

If your indigent defense program is subject to no standards whatsoever, it is still important for you to complete and return this survey, to provide a complete picture of nationwide utilization of standards; please complete Part I: General Information, and answer the first question under each subject area (each is on a separate page) under PART II-A.

Whenever the term "standards" is used, it is meant to include any standards or guidelines, whether state or local in their application, **including those which have been promulgated in the form of legislation** (e.g., a statutory requirement that defenders must have a certain amount of experience or training in order to be appointed to a certain type of case, or a statute providing for the appointment of the state public defender by an independent commission), **or a rule adopted by the state's highest court.**

Part II asks questions about 10 particular types of indigent defense standards and their impacts. Part III asks overall questions about the use of standards.

The estimated average time to complete this survey could range from 5 to 30 minutes, depending on the extent of standards utilization in your jurisdiction. Please return it in the enclosed postage-paid, pre-addressed envelope (to **NLADA Standards Survey, 1625 K Street, NW, Suite 800, Washington DC 20006**) by October 22, 2001 Thank your for your time!

PART I: General Information

1. Name _____
2. Title _____
3. Program name _____
4. Address _____
5. Phone _____
6. E-mail _____
7. Approximate number of attorneys _____
8. Non-attorney staff _____
9. Approximate annual budget of your program \$ _____
10. What is the nature of your indigent defense program? (check all that apply)
 - Statewide indigent defense agency
 - Local program receiving funding from and/or accountable to statewide indigent defense commission or other state body
 - Local program with no state funding or control
 - Law firm operating under a contract with a county or other unit of local government
 - Nonprofit organization operating under a contract
 - Assigned counsel program
 - Appellate program
 - Capital program
 - Juvenile program

This document is a research report submitted to the U.S. Department of Justice. This report has not been published by the Department. Opinions or points of view expressed are those of the author(s) and do not necessarily reflect the official position or policies of the U.S. Department of Justice.

PART II-A: Particular Areas of Applicable Standards

1. Independence

- A. Is your indigent defense program governed by standards providing for the independence –
___ of the system or the chief public defender from undue political or judicial interference
___ of individual attorneys in the representation of clients

If you checked neither of the above boxes, proceed to the next page.

B. Source

How were these standards or guidelines generated and made applicable to your program? (check all that apply)

- ___ State statute
- ___ State supreme court, by rule
- ___ State supreme court, by caselaw
- ___ State commission with responsibility for indigent defense
- ___ Local government – Executive branch
- ___ Local government – Legislative branch
- ___ Local government – Judicial branch
- ___ State bar association
- ___ Local bar association
- ___ State public defense agency
- ___ Local public defense agency
- ___ [If yours is a contract program] Incorporation in a contract for public defense services
- ___ Other (describe)

- C. **Compliance** with the standards is – ___ Mandatory ___ Voluntary

D. **Enforcement:** If you checked “Mandatory” above, by whom are the standards enforced?

- ___ Indigent defense oversight commission
- ___ Courts
- ___ Bar association
- ___ Public defense agency itself
- ___ Outside independent audit
- ___ Other (specify)

How are they enforced? (Describe)

E. **National standards:** Are the standards based upon or derived from national standards such as those developed by NLADA or the ABA? ___ Yes ___ No ___ Don't know

If your use of any national standards has had a positive impact, please make a copy of the blank table in PART II-B at this time, for use in responding to Question C-3 in Part III.

2. Resources

A. Is your indigent defense program governed by standards providing for parity of resources with the prosecution (whether in salaries, other resources, or workload), or defining adequate staffing and resources (e.g., experts and investigators) by other means?

Yes No

If you checked no, proceed to the next page.

B. Source

How were these standards or guidelines generated and made applicable to your program? (check all that apply)

- State statute
- State supreme court, by rule
- State supreme court, by caselaw
- State commission with responsibility for indigent defense
- Local government – Executive branch
- Local government – Legislative branch
- Local government – Judicial branch
- State bar association
- Local bar association
- State public defense agency
- Local public defense agency
- [If yours is a contract program] Incorporation in a contract for public defense services
- Other (describe)

C. **Compliance** with the standards is – Mandatory Voluntary

D. **Enforcement:** If you checked “Mandatory” above, by whom are the standards enforced?

- Indigent defense oversight commission
- Courts
- Primary funding/appropriations entity
- Public defense agency itself
- Outside independent audit
- Other (specify)

How are they enforced? (Describe)

E. **National standards:** Are the standards based upon or derived from national standards such as those developed by NLADA or the ABA? Yes No Don't know

3. Vertical representation

A. Is your indigent defense program governed by standards requiring continuous representation by the same lawyer throughout various phases of a case?

Yes No

If you checked no, proceed to the next page.

B. Source

How were these standards or guidelines generated and made applicable to your program? (check all that apply)

- State statute
- State supreme court, by rule
- State supreme court, by caselaw
- State commission with responsibility for indigent defense
- Local government – Executive branch
- Local government – Legislative branch
- Local government – Judicial branch
- State bar association
- Local bar association
- State public defense agency
- Local public defense agency
- [If yours is a contract program] Incorporation in a contract for public defense services
- Other (describe)

C. **Compliance** with the standards is – Mandatory Voluntary

D. **Enforcement:** If you checked “Mandatory” above, by whom are the standards enforced?

- Indigent defense oversight commission
- Courts
- Bar association
- Public defense agency itself
- Outside independent audit
- Other (specify)

How are they enforced? (Describe)

E. **National standards:** Are the standards based upon or derived from national standards such as those developed by NLADA or the ABA? Yes No Don't know

4. Attorney Qualifications

A. Is your indigent defense program governed by standards setting requirements of experience for attorneys to handle certain types of cases?

Yes No

If you checked no, proceed to the next page.

B. Source

How were these standards or guidelines generated and made applicable to your program? (check all that apply)

- State statute
- State supreme court, by rule
- State supreme court, by caselaw
- State commission with responsibility for indigent defense
- Local government – Executive branch
- Local government – Legislative branch
- Local government – Judicial branch
- State bar association
- Local bar association
- State public defense agency
- Local public defense agency
- [If yours is a contract program] Incorporation in a contract for public defense services
- Other (describe)

C. **Compliance** with the standards is – Mandatory Voluntary

D. **Enforcement:** If you checked “Mandatory” above, check any of the following enforcement mechanisms that apply:

- Attorneys cannot be assigned to a case for which they lack the requisite qualifications
- Separate lists are maintained of private lawyers by level of experience, and appointments to represent indigent defendants can be made only from the appropriate list
- Governmental funding is conditioned upon compliance with standards
- Judicial citation of standards in Sixth Amendment rulings
- Staff attorneys are regularly supervised and evaluated, and disciplined for noncompliance
- Different enforcement mechanisms for different types of cases (e.g., capital v. noncapital)
(please describe on separate sheet)

E. **National standards:** Are the standards based upon or derived from national standards such as those developed by NLADA or the ABA? Yes No Don't know

5. Attorney training

A. Is your indigent defense program governed by standards setting requirements of training of attorneys, in areas specific to the practice of indigent defense (i.e., other than statewide MCLE requirements that can be satisfied by non-criminal training)?

Yes No

If you checked no, proceed to the next page.

B. Source

How were these standards or guidelines generated and made applicable to your program? (check all that apply)

- State statute
- State supreme court, by rule
- State supreme court, by caselaw
- State commission with responsibility for indigent defense
- Local government – Executive branch
- Local government – Legislative branch
- Local government – Judicial branch
- State bar association
- Local bar association
- State public defense agency
- Local public defense agency
- [If yours is a contract program] Incorporation in a contract for public defense services
- Other (describe)

C. **Compliance** with the standards is – Mandatory Voluntary

D. **Enforcement:** If you checked “Mandatory” above, check any of the following enforcement mechanisms that apply:

- Attorneys cannot be assigned to a case for which they have not received the requisite training
- Mandatory attendance at in-house training events
- Separate lists are maintained of private lawyers by level of training (and/or experience), and appointments to represent indigent defendants can be made only from the appropriate list
- Governmental funding is conditioned upon compliance with standards
- Judicial citation of standards in Sixth Amendment rulings
- Staff attorneys are regularly supervised and evaluated, and disciplined for noncompliance
- Different enforcement mechanisms for different types of cases (e.g., capital v. noncapital)
(please describe on separate sheet)

E. **National standards:** Are the standards based upon or derived from national standards such as those developed by NLADA or the ABA? Yes No Don't know

6. Client Eligibility

A. Is the appointment of clients to be represented by your indigent defense program governed by standards of financial eligibility (including partial eligibility, with a requirement for client contribution or fee)?

Yes No

If you checked no, proceed to the next page.

B. Source

How were these standards or guidelines generated and made applicable to your program? (check all that apply)

- State statute
- State supreme court, by rule
- State supreme court, by caselaw
- State commission with responsibility for indigent defense
- Local government – Executive branch
- Local government – Legislative branch
- Local government – Judicial branch
- State bar association
- Local bar association
- State public defense agency
- Local public defense agency
- [If yours is a contract program] Incorporation in a contract for public defense services
- Other (describe)

C. **Compliance** with the standards is – Mandatory Voluntary

D. **Enforcement:** If you checked “Mandatory” above, by whom are the standards enforced?

- Judges
- Clerk of court
- Pretrial services
- Probation
- Public defense agency itself
- Other (specify)

How are they enforced (including procedures for correcting an incorrect determination of eligibility, after representation has been undertaken)? (Describe)

E. **National standards:** Are the standards based upon or derived from national standards such as those developed by NLADA or the ABA? Yes No Don't know

7. Timeliness of Appointment and Contact

A. Is your indigent defense program governed by standards setting time limits within which counsel for indigent defendants must be appointed, or within which counsel must first meet with and interview the client?

Yes No

If you checked no, proceed to the next page.

B. Source

How were these standards or guidelines generated and made applicable to your program? (check all that apply)

- State statute
- State supreme court, by rule
- State supreme court, by caselaw
- State commission with responsibility for indigent defense
- Local government – Executive branch
- Local government – Legislative branch
- Local government – Judicial branch
- State bar association
- Local bar association
- State public defense agency
- Local public defense agency
- [If yours is a contract program] Incorporation in a contract for public defense services
- Other (describe)

C. **Compliance** with the standards is – Mandatory Voluntary

D. **Enforcement:** If you checked “Mandatory” above, by whom are the standards enforced?

- Indigent defense oversight commission
- Courts
- Bar association
- Public defense agency itself
- Outside independent audit
- Other (specify)

How are they enforced? (Describe)

E. **National standards:** Are the standards based upon or derived from national standards such as those developed by NLADA or the ABA? Yes No Don't know

8. Confidential Meeting With Client

A. Is your indigent defense program governed by standards requiring a confidential meeting space for client interviews (e.g., at courthouse or jail), and adequate time to meet with the client?

Yes No

If you checked no, proceed to the next page.

B. Source

How were these standards or guidelines generated and made applicable to your program? (check all that apply)

- State statute
- State supreme court, by rule
- State supreme court, by caselaw
- State commission with responsibility for indigent defense
- Local government – Executive branch
- Local government – Legislative branch
- Local government – Judicial branch
- State bar association
- Local bar association
- State public defense agency
- Local public defense agency
- [If yours is a contract program] Incorporation in a contract for public defense services
- Other (describe)

C. **Compliance** with the standards is – Mandatory Voluntary

D. **Enforcement:** If you checked “Mandatory” above, by whom are the standards enforced?

- Indigent defense oversight commission
- Courts
- Bar association
- Public defense agency itself
- Outside independent audit
- Other (specify)

How are they enforced? (Describe)

E. **National standards:** Are the standards based upon or derived from national standards such as those developed by NLADA or the ABA? Yes No Don't know

9. Attorney Performance

A. Is your indigent defense program governed by standards requiring particular duties to be performed by attorneys at various stages of individual cases, such as client interview, investigation, motion practice?

Yes No

If you checked no, proceed to the next page.

B. Source

How were these standards or guidelines generated and made applicable to your program? (check all that apply)

- State statute
- State supreme court, by rule
- State supreme court, by caselaw
- State commission with responsibility for indigent defense
- Local government – Executive branch
- Local government – Legislative branch
- Local government – Judicial branch
- State bar association
- Local bar association
- State public defense agency
- Local public defense agency
- [If yours is a contract program] Incorporation in a contract for public defense services
- Other (describe)

C. **Compliance** with the standards is – Mandatory Voluntary

D. **Enforcement:** If you checked “Mandatory” above, by whom are the standards enforced?

- Indigent defense oversight commission
- Courts
- Bar association
- Public defense agency itself
- Outside independent audit
- Other (specify)

How are they enforced? (Describe)

E. **National standards:** Are the standards based upon or derived from national standards such as those developed by NLADA or the ABA? Yes No Don't know

10. Caseload/Workload

A. Is your indigent defense program governed by standards limiting the number of cases or the amount of work attorneys are allowed to accept?

- Yes, numerical limits – e.g., no more than X number of felonies per year, or Y units of work.
- Yes, unspecified limits – e.g., no more cases than the attorney can reasonably and competently handle
- Other

If you checked none of the items above, proceed to the next page.

B. Source

How were these standards or guidelines generated and made applicable to your program? (check all that apply)

- State statute
- State supreme court, by rule
- State supreme court, by caselaw
- State commission with responsibility for indigent defense
- Local government – Executive branch
- Local government – Legislative branch
- Local government – Judicial branch
- State bar association
- Local bar association
- State public defense agency
- Local public defense agency
- [If yours is a contract program] Incorporation in a contract for public defense services
- Other (describe)

C. **Compliance** with the standards is – Mandatory Voluntary

D. **Enforcement:** If you checked “Mandatory” above, check any of the following enforcement mechanisms that apply:

- Individual attorneys can decline cases beyond caseload/workload limits
- The program can decline cases beyond caseload/workload limits
- The program can obtain added funding or staffing for cases exceeding the limits
- Governmental funding is conditioned upon compliance with standards
- Judicial citation of standards in Sixth Amendment rulings

E. **National standards:** Are the standards based upon or derived from national standards such as those developed by NLADA or the ABA? Yes No Don't know

C. Utilization of national standards

1. Aside from the questions in Part II-A about whether your state or local standards were shaped by national standards such as those developed by the National Legal Aid and Defender Association (NLADA) or the American Bar Association (ABA), has your program utilized such national standards *in their own right*, by any of the following means?

- By outside auditor(s) assessing your program against the standards
- By internal self-evaluation
- In writing internal policies and procedures
- In legislative testimony or budget presentation
- In litigation
- As models for writing state standards
- As models for writing local standards
- To guide the writing of a defense-services contract, or RFP for a defense-services contract
- In training defender program staff
- Other (describe)

2. Which national standards have been utilized?

(specify) _____

3. Has your program's utilization of national standards had a positive impact? yes no

If you checked this item, please make a copy of the table in PART I-B (Type of Impact), and complete it with respect to the national standards your program has utilized.

D. Other programs' utilization of standards

This survey is being sent to agencies and nonprofits providing full-time indigent defense services, as well as administrators of coordinated assigned counsel programs. If you know of other entities which a) utilize standards, and b) are not likely to receive this survey (e.g., an assigned counsel system run by the judiciary, or a system of part-time contract counsel or firms), please furnish contact information for such entities in the space provided below.

This survey may be returned either in the stamped, self-addressed envelope which accompanied it, or simply by folding it on the dotted line below, closing it with a piece of adhesive tape, and dropping it in the mail.

mailing indicia here?

Defender Standards Survey
National Legal Aid and Defender Association
1625 K Street, NW
Suite 800
Washington, DC 20006

Appendix 2

NSIDS

National Survey of Indigent Defense Systems 2000
Questions Regarding Standards
Percentage by type of system (county or state)

| Question | County (n=103) | State (n=) |
|--|-----------------------|-------------------|
| <i>Type of standards</i> | | |
| Personnel policies | 42% | 54% |
| Attorney qualifications | 55 | 64 |
| Caseload/workload | 26 | 55 |
| Conflict of interest | 33 | 55 |
| Training | 39 | 64 |
| Attorney performance | 39 | 64 |
| Indigency screening | 29 | 46 |
| Cost recovery | 16 | 46 |
| Compensation of court-appointed counsel | 34 | 55 |
| Compensation of non-attorney staff | 29 | 64 |
| Administration of indigent defense systems | 25 | 55 |
| None written | 6 | 9 |
| <i>Source of the standards</i> | | |
| County | 32 | 91 |
| State supreme court | 23 | 18 |
| Statute | 23 | 36 |
| Indigent defense commission | 6 | 18 |
| State or local bar association | 13 | 9 |
| Your own indigent defense program | 54 | 64 |
| Contract funding agency | 8 | 91 |
| Other | 13 | 9 |
| <i>Compliance is --</i> | | |
| Voluntary | 8 | 0 |
| Mandatory | 55 | 82 |
| <i>Who monitors compliance:</i> | | |
| State supreme court | 12 | 91 |
| Indigent defense commission | 11 | 18 |
| Your own indigent defense program | 52 | 82 |
| State or local bar | 16 | 9 |
| Other | 14 | 9 |
| <i>Compliance is tied to funding:</i> | 19 | 18 |

This document is a research report submitted to the U.S. Department of Justice. This report has not been published by the Department. Opinions or points of view expressed are those of the author(s) and do not necessarily reflect the official position or policies of the U.S. Department of Justice.

*NIJ Survey of Indigent Defense
Standards Implementation*

Request for Background Materials & Site Visit Protocol

A. Background Materials

Prior to your site visit, the following materials should be requested. Ideally, the materials should be reviewed before interviews are conducted. If this is not possible, available materials should be collected during the trip. Several of the sites may not be able to produce all of the requested materials. Please track which materials are unavailable and why.

1. Detailed Public Defender Budgets for FY 1999, FY2000 and FY 2001;
2. Detailed Budgets for all other Criminal Justice Agencies for FY 1999, FY 2000 and FY 2001;
3. List of case-types for which public defender provides representation;
4. List of all institutional shifts for which public defenders staff the court;
5. Caseload Statistics for a similar time period (1999-2001):
 - a. New assignments by case-type by attorney;
 - b. Dispositions by case-type by attorney (by disposition type);
 - c. Number of withdrawals due to conflict of interest or retaining private counsel;
 - d. Assignment and disposition numbers for indigent defense cases not handled by the public defender office;
 - e. Trial rates (by case-type);
 - f. Indigency Rates (PDO caseload/Total Court Caseload)
6. Personnel Policy and Procedure Manuals;
7. Staff turnover rate by position over the past three years;
8. Training Manuals;
9. Written Standards:
 - a. Performance Standards (or any written materials describing how attorneys interact with clients, including those related to vertical representation, timeliness of appointment and confidential meeting w/ clients);
 - b. Independence Standards (for Chief and/or individual attorney);
 - c. Parity of Resource Standards;
 - d. Attorney Qualification Standards; and,
 - e. Workload/Caseload Standards;
10. Written descriptions of the intake function (who screens clients, etc.); and,

11. A description of any criminal justice case-tracking systems, including a list of data fields that are tracked by the program.

B. Site Protocol

The site protocol will vary from site to site based on the size of indigent defense organization, breadth of standards and implementation method, and impact standards have had on the quality of representation afforded poor people. This site protocol is meant to serve as a minimum guideline for potential questions. Please feel free to pursue any issue for which interviewees feel particularly strong. Additionally, all interviewees should be asked to explain why they checked the categories of standards impact they did on their survey response.

1. Independence

a. Public Defender Office

- Describe the impact of the current independence standard in terms of your practice before and after the adoption of the standard.
- Does the current standard do enough to protect you and the organization in terms of undue political or judicial interference (why or why not)?
- What changes (if any) in the current standard would further protect you and your attorneys from undue influence?
- If the standard is breached, what recourse (if any) do you employ?
- Have you ever sought to challenge an encroachment on your independence? (What was the outcome)

b. Funding Agency

- Has the adoption of the current independence standard had a positive or negative impact on the funding of the public defender office? (Please describe)

2. Resource Parity

a. Public Defender Office

- How does your staff salaries compare with salaries of similar positions in the prosecutor's office?
- How does your staff size compare with the staff size of the prosecutor?
- How does your workload compare with the workload of the prosecutor's office?

- Does the prosecutor's office have access to grant funds or other "off-budget" resources?
- Is the current parity formula adequate?
- Describe the impact of the current parity standard in terms of your practice before and after the adoption of the standard.

b. Funding Agency

- How is parity between the prosecution and defense functions measured?
- Because indigent defense workload is directly affected by the funding of the prosecutor's office (in terms of the number and types of cases that can be pursued), do you measure prosecution "off-budget" grants, etc. in your parity formula?
- What is the procedure for prosecution requesting more staff or higher salaries? How does this impact defense staff and salaries?
- Has the adoption of the current parity standard had a positive or negative impact on the funding of the public defender office? (Please describe)

3. Vertical Representation

a. Public Defender Office

- Does your office practice vertical representation in all instances and case-types or are there institutional shifts in which a staff public defender handles all cases on a docket?
- Did your office practice vertical representation prior to the adoption of the standard?
 - If "Yes:" Has the adoption of the standard had any noticeable impact?
 - If "No," describe the impact of the current vertical representation standard in terms of your practice before and after the adoption of the standard.

b. Funding Agency

- Do you know the difference between "vertical" and "horizontal" representation?
- Are you aware of the attorney performance standard requiring "vertical" representation?

- Has the adoption of the current vertical representation standard had a positive or negative impact on the funding of the public defender office? (Please describe)

4. Attorney Qualification

a. Public Defender Office

- What enforcement mechanisms are in place to guarantee that the current attorney qualification standard is met?
- What case-tracking or other mechanisms are in place to provide objective statistical verification of compliance to the enforcement agency?
- Is attorney qualification weighed during the hiring process or is there training in place to ensure proper qualification requirements are met before assignment of cases?
- Has the adoption of qualification standards had a verifiable effect on factors such as trial rates?
- Has the adoption of qualification standards reduced the number of complaints filed by clients with the bar or other appropriate monitoring agency?
- What changes (if any) in the current standard are needed to guarantee the adequacy of representation?
- Describe the impact of the current attorney qualification standard in terms of your practice before and after the adoption of the standard.

b. Funding Agency

- Has the attorney qualification standard impacted public defender staff salaries?
- Has the attorney qualification standard had an impact on attorney turnover rates?
- Describe other impacts that the current attorney qualification standard has had in terms of the funding of the PDO before and after the adoption of the standard.

5. Attorney Training

a. Public Defender Office

- What are the CLE requirements for your jurisdiction?
- Do you offer in-house CLE training?
- Do you offer in-house training in areas specific to the practice of indigent defense (that is not required CLE)?

- What external training options are available to PDO attorneys?
- Is this training equally available for all PDO attorneys?
- Do you have a separate budget line for such training?
- Do you have discretion regarding how the training budget is allocated?
- Do you need county/state approval for external training?
- Do you need county/state approval for out-of-state travel for training?
- Describe the increase/decrease in the training budget over the past five years.
- Is the current training standard adequate to guarantee that your attorneys can adequately represent clients in all types of cases? (If “no,” please describe).
- What changes (if any) in the current standard are needed?
- Describe the impact of the current attorney training standard in terms of your practice before and after the adoption of the standard.

b. Funding Agency

- Is there a separate budget line for attorney training?
- Has the chief public defender advocated for an increased training budget over the past three budget cycles?
- Was there an increased training budget appropriation coinciding with the adoption of the current training standard?
- Has the adoption of the current attorney training standard had a positive or negative impact on the funding of the public defender office? (Please describe)

6. Client Eligibility

a. Public Defender Office

- What agency is responsible for indigency screening?
- Are the eligibility criteria adequate to allow all people unable to afford private counsel access to a public defender?
- Is the eligibility criteria applied fairly to all potential clients regardless of whether they are in-custody or out-of-custody?
- Are people marginally above the eligibility criteria offered access to counsel at reduced rates?
- Is their verification of eligibility information provided by clients?

- What is the procedure should it become apparent to the court or PDO that a client's ability to retain private counsel has change during the life of a case?
- What recourse does a client have to appeal an eligibility decision?
- Does your jurisdiction attempt to recoup public defender costs from eligible clients? (If "Yes," please describe)
- How is compliance with recoupment efforts enforced (civil contempt of court, criminal contempt)?
- Do clients ever get remanded to jail for failure to pay?
- If "yes," do clients have access to attorneys during the compliance hearing?
- Has there been a noticeable increase/decrease in assignments since the adoption of the eligibility standard?
- What improvement (if any) is needed in the current standard?
- Describe the impact of the current eligibility standard in terms of your practice before and after the adoption of the standard.

b. Funding Agency

- Does the jurisdiction actively seek recoupment of indigent defense representation charges from clients?
- If "Yes," please describe the process?
- Please provide data indicating the amount collected in recoupment fees over the past three years.
- What is the cost to the jurisdiction to manage the cost-recovery system?
- Has the adoption of the current eligibility standard had a positive or negative impact on the funding of the public defender office? (Please describe)

7. Timeliness of Appointment and Contact

a. Public Defender Office

- Describe the procedure for your office to be assigned to a case.
- What mechanisms are in place to guarantee that attorneys meet/interview clients soon after appointment?
- Does your office have a clear, well-written client interview form? (Please provide copy of form)
- If "YES," is it satisfactory to capture key information regarding client's housing situation, family, employment, etc.?

- Was it the practice of your office to meet with clients soon after appointment prior to the adoption of the timeliness standard?
 - If “Yes:” Has the adoption of the standard had any noticeable impact?
 - If “No,” describe the impact of the timeliness standard in terms of your practice before and after the adoption of the standard.
- What percentage of your clientele is detained prior to the initial court appearance?
- Is the current standard adequate?
- What recourse does a client have if he feels that he did not receive timely appointment of counsel?

b. Funding Agency

- What is the current daily bed rate to detain someone in the county jail?
- Has the adoption of the timeliness standard had an impact on the number of people detained in jail pre-trial and/or the average length of stay of pre-trial detainees?
- Has the adoption of the current timeliness standard had any other positive or negative impact on the funding of the public defender office? (Please describe)

8. Confidential Meeting with Clients

a. Public Defender Office

- Did the your client/attorney meeting space change at the jail, in the courthouse, or in your office change with the adoption of the confidentiality standard?
- What is the average amount of time spent with clients prior to initial hearing?
- Is it different for in-custody and out-of-custody defendants?
- Describe the impact of the confidentiality standard in terms of your practice before and after the adoption of the standard.

b. Funding Agency

- Did your jurisdiction need to create confidential meeting space to come into compliance with the standard?
- If “Yes,” describe changes to the jail, courthouse or public defender office.

- Has the adoption of the current confidentiality standard had positive or negative impact on the funding of the public defender office? (Please describe)

9. Attorney Performance

a. Public Defender Office

- Did your office have internal performance guidelines prior to the adoption of the current performance standard?
- Does your office have clear, written performance guidelines (such as NLADA's *Performance Guidelines for Criminal Defense Representation*)? (Please provide copy of policies)
- If "YES," are the office policies regularly adhered to?
- Does your obligation to your client supercede your obligation to the court?
- Do clients feel that they are receiving zealous representation?
- Do you seek to divert your clients from adjudication after exploring whether it is in their best interests?
- Does your offices actively seek alternative sentences for clients if it is in their best interests?
- Would you consider the office representation to be zealous in cases that go to trial?
- Would you consider the office representation to be zealous in cases that are disposed through plea bargains?
- Do experienced defenders have sole responsibility and authority for case management?
- Do attorneys generally keep thorough and accurate case files?
- Are case files maintained such that another attorney could take over or review cases with minimal difficulty?
- Do managers regularly spot check case files for accuracy and thoroughness?
- Are attorneys afforded sufficient time to regularly keep abreast of professional developments in their field that pertains to the representation afforded clients?
- Are attorneys routinely requesting expert witnesses?
- Is the current standard adequate?
- What improvement (if any) is needed in the current standard?
- Describe the impact of the current eligibility standard in terms of your practice before and after the adoption of the standard.

b. Funding Agency

- Has the adoption of the current attorney performance standard had any other positive or negative impact on the funding of the public defender office? (Please describe)

10. Caseload/Workload

a. Public Defender Office

- How do you track caseload/workload such that attorney workload can be objectively assessed?
- How frequently is attorney workload checked for compliance with the standard?
- What recourse does an individual attorney have if she feels her workload is above that required by the standard?
- What recourse does your office have should non-compliance with the workload standard become a systemic issue?
- Have you ever had to seek caseload/workload relief? (Describe)
- Is the current standard adequate?
- Does the workload standard take into account for attorney experience-level and/or severity of the case?
- If “no,” how are these issues addressed internally?
- Describe the impact of the current eligibility standard in terms of your practice before and after the adoption of the standard.

b. Funding Agency

- Is the public defender budget based, in part, on a formula that takes into account the caseload/workload standard?
- Has any increase/decrease in caseload been matched by a corresponding increase/decrease in public defender attorney staffing?
- Has the adoption of the current workload standard had any other positive or negative impact on the funding of the public defender office? (Please describe)

Appendix 4: “Is your indigent defense program governed by standards [in the following areas]?”

Breakdown of survey responses indicating the implementation of each standard by population, funding source, and program organization

| 1. (A) Independence of Chief | # | % |
|-------------------------------------|-----------|------------|
| 100% County-Funded | 9 | 30% |
| 100% State-Funded | 19 | 59% |
| Mixed Funding | 7 | 58% |
| Government Agency | 31 | 48% |
| Non-Profit Under Contract | 4 | 57% |
| Private Law Firm | 0 | 0% |
| Over 1 Million | 17 | 53% |
| 500,000 - 1 Million | 7 | 44% |
| 100,000 - 500,000 | 9 | 56% |
| 50,000 - 100,000 | 0 | 0% |
| Under 50,000 | 2 | 50% |
| TOTAL | 35 | 47% |

| 1. (B) Independence-Attorneys | # | % |
|--------------------------------------|-----------|------------|
| 100% County-Funded | 23 | 77% |
| 100% State-Funded | 3 | 9% |
| Mixed Funding | 2 | 17% |
| Government Agency | 23 | 36% |
| Non-Profit Under Contract | 3 | 43% |
| Private Law Firm | 2 | 67% |
| Over 1 Million | 13 | 41% |
| 500,000 - 1 Million | 6 | 38% |
| 100,000 - 500,000 | 9 | 56% |
| 50,000 - 100,000 | 0 | 0% |
| Under 50,000 | 0 | 0% |
| TOTAL | 28 | 38% |

| 2. Parity of Resources | # | % |
|-------------------------------|-----------|------------|
| 100% County-Funded | 8 | 27% |
| 100% State-Funded | 7 | 22% |
| Mixed Funding | 4 | 33% |
| Government Agency | 17 | 27% |
| Non-Profit Under Contract | 2 | 29% |
| Private Law Firm | 0 | 0% |
| Over 1 Million | 8 | 25% |
| 500,000 - 1 Million | 5 | 31% |
| 100,000 - 500,000 | 6 | 38% |
| 50,000 - 100,000 | 0 | 0% |
| Under 50,000 | 0 | 0% |
| TOTAL | 19 | 26% |

| 3. Vertical Representation | # | % |
|-----------------------------------|-----------|------------|
| 100% County-Funded | 11 | 37% |
| 100% State-Funded | 12 | 38% |
| Mixed Funding | 6 | 50% |
| Government Agency | 25 | 39% |
| Non-Profit Under Contract | 2 | 29% |
| Private Law Firm | 2 | 67% |
| Over 1 Million | 10 | 31% |
| 500,000 - 1 Million | 3 | 19% |
| 100,000 - 500,000 | 11 | 69% |
| 50,000 - 100,000 | 3 | 50% |
| Under 50,000 | 2 | 50% |
| TOTAL | 29 | 39% |

| 4. Attorney Qualification | # | % |
|----------------------------------|-----------|------------|
| 100% County-Funded | 17 | 57% |
| 100% State-Funded | 22 | 69% |
| Mixed Funding | 10 | 83% |
| Government Agency | 41 | 64% |
| Non-Profit Under Contract | 7 | 100% |
| Private Law Firm | 1 | 33% |
| Over 1 Million | 21 | 66% |
| 500,000 - 1 Million | 13 | 81% |
| 100,000 - 500,000 | 12 | 75% |
| 50,000 - 100,000 | 1 | 17% |
| Under 50,000 | 2 | 50% |
| TOTAL | 49 | 66% |

| 5. Attorney Training | # | % |
|-----------------------------|-----------|------------|
| 100% County-Funded | 11 | 37% |
| 100% State-Funded | 16 | 50% |
| Mixed Funding | 7 | 58% |
| Government Agency | 29 | 45% |
| Non-Profit Under Contract | 5 | 71% |
| Private Law Firm | 0 | 0% |
| Over 1 Million | 15 | 47% |
| 500,000 - 1 Million | 10 | 63% |
| 100,000 - 500,000 | 8 | 50% |
| 50,000 - 100,000 | 0 | 0% |
| Under 50,000 | 1 | 25% |
| TOTAL | 34 | 46% |

| 6. Client Eligibility | # | % |
|------------------------------|-----------|------------|
| 100% County-Funded | 28 | 93% |
| 100% State-Funded | 32 | 100% |
| Mixed Funding | 6 | 50% |
| Government Agency | 59 | 92% |
| Non-Profit Under Contract | 5 | 71% |
| Private Law Firm | 2 | 67% |
| Over 1 Million | 27 | 84% |
| 500,000 - 1 Million | 16 | 100% |
| 100,000 - 500,000 | 14 | 88% |
| 50,000 - 100,000 | 6 | 100% |
| Under 50,000 | 3 | 75% |
| TOTAL | 66 | 89% |

| 7. Timeliness of Appointment | # | % |
|-------------------------------------|-----------|------------|
| 100% County-Funded | 15 | 50% |
| 100% State-Funded | 16 | 50% |
| Mixed Funding | 7 | 58% |
| Government Agency | 31 | 48% |
| Non-Profit Under Contract | 5 | 71% |
| Private Law Firm | 2 | 67% |
| Over 1 Million | 13 | 41% |
| 500,000 - 1 Million | 11 | 69% |
| 100,000 - 500,000 | 11 | 69% |
| 50,000 - 100,000 | 1 | 17% |
| Under 50,000 | 2 | 50% |
| TOTAL | 38 | 51% |

| 8. Confidential Meeting Space | # | % |
|--------------------------------------|-----------|------------|
| 100% County-Funded | 7 | 23% |
| 100% State-Funded | 9 | 28% |
| Mixed Funding | 4 | 33% |
| Government Agency | 18 | 28% |
| Non-Profit Under Contract | 1 | 14% |
| Private Law Firm | 1 | 33% |
| Over 1 Million | 8 | 25% |
| 500,000 - 1 Million | 2 | 13% |
| 100,000 - 500,000 | 8 | 50% |
| 50,000 - 100,000 | 0 | 0% |
| Under 50,000 | 2 | 50% |
| TOTAL | 20 | 27% |

| 9. Attorney Performance | # | % |
|--------------------------------|-----------|------------|
| 100% County-Funded | 9 | 30% |
| 100% State-Funded | 16 | 50% |
| Mixed Funding | 3 | 25% |
| Government Agency | 25 | 39% |
| Non-Profit Under Contract | 2 | 29% |
| Private Law Firm | 1 | 33% |
| Over 1 Million | 15 | 47% |
| 500,000 - 1 Million | 4 | 25% |
| 100,000 - 500,000 | 5 | 31% |
| 50,000 - 100,000 | 2 | 33% |
| Under 50,000 | 2 | 50% |
| TOTAL | 28 | 38% |

| 10. Workload | # | % |
|---------------------------|-----------|------------|
| 100% County-Funded | 12 | 40% |
| 100% State-Funded | 15 | 47% |
| Mixed Funding | 8 | 67% |
| Government Agency | 31 | 48% |
| Non-Profit Under Contract | 3 | 43% |
| Private Law Firm | 1 | 33% |
| Over 1 Million | 13 | 41% |
| 500,000 - 1 Million | 9 | 56% |
| 100,000 - 500,000 | 10 | 63% |
| 50,000 - 100,000 | 2 | 33% |
| Under 50,000 | 1 | 25% |
| TOTAL | 35 | 47% |

Appendix 5: “What Other Areas Should Be Covered By Standards?”

Breakdown of survey respondents by structure, funding and population

| Attorney-to-Staff Ratio | # | % |
|--------------------------------|-----------|------------|
| 100% County-Funded | 19 | 63% |
| 100% State-Funded | 24 | 75% |
| Mixed Funding | 6 | 50% |
| Government Agency | 42 | 66% |
| Non-Profit Under Contract | 5 | 71% |
| Private Law Firm | 2 | 67% |
| Over 1 Million | 24 | 75% |
| 500,000 - 1 Million | 10 | 63% |
| 100,000 - 500,000 | 11 | 69% |
| 50,000 - 100,000 | 4 | 67% |
| Under 50,000 | 0 | 0% |
| TOTAL | 49 | 66% |

| Defender-to-Judge Ratio | # | % |
|--------------------------------|-----------|------------|
| 100% County-Funded | 6 | 20% |
| 100% State-Funded | 16 | 50% |
| Mixed Funding | 6 | 50% |
| Government Agency | 25 | 39% |
| Non-Profit Under Contract | 1 | 14% |
| Private Law Firm | 2 | 67% |
| Over 1 Million | 15 | 47% |
| 500,000 - 1 Million | 7 | 44% |
| 100,000 - 500,000 | 3 | 19% |
| 50,000 - 100,000 | 2 | 33% |
| Under 50,000 | 1 | 25% |
| TOTAL | 28 | 38% |

| Prosecutor-to-Defender Ratio | # | % |
|-------------------------------------|-----------|------------|
| 100% County-Funded | 14 | 47% |
| 100% State-Funded | 17 | 53% |
| Mixed Funding | 8 | 67% |
| Government Agency | 36 | 56% |
| Non-Profit Under Contract | 1 | 14% |
| Private Law Firm | 2 | 67% |
| Over 1 Million | 16 | 50% |
| 500,000 - 1 Million | 9 | 56% |
| 100,000 - 500,000 | 8 | 50% |
| 50,000 - 100,000 | 5 | 83% |
| Under 50,000 | 1 | 25% |
| TOTAL | 39 | 53% |

| Mental Illness | # | % |
|---------------------------|-----------|------------|
| 100% County-Funded | 11 | 37% |
| 100% State-Funded | 14 | 44% |
| Mixed Funding | 7 | 58% |
| Government Agency | 26 | 41% |
| Non-Profit Under Contract | 4 | 57% |
| Private Law Firm | 2 | 67% |
| Over 1 Million | 14 | 44% |
| 500,000 - 1 Million | 8 | 50% |
| 100,000 - 500,000 | 4 | 25% |
| 50,000 - 100,000 | 3 | 50% |
| Under 50,000 | 3 | 75% |
| TOTAL | 32 | 43% |

| Adjudication Partnership | # | % |
|---------------------------------|-----------|------------|
| 100% County-Funded | 10 | 33% |
| 100% State-Funded | 15 | 47% |
| Mixed Funding | 6 | 50% |
| Government Agency | 26 | 41% |
| Non-Profit Under Contract | 3 | 43% |
| Private Law Firm | 2 | 67% |
| Over 1 Million | 13 | 41% |
| 500,000 - 1 Million | 4 | 25% |
| 100,000 - 500,000 | 9 | 56% |
| 50,000 - 100,000 | 5 | 83% |
| Under 50,000 | 0 | 0% |
| TOTAL | 31 | 42% |

| Civil Commitment | # | % |
|---------------------------|-----------|------------|
| 100% County-Funded | 9 | 30% |
| 100% State-Funded | 3 | 9% |
| Mixed Funding | 5 | 42% |
| Government Agency | 15 | 23% |
| Non-Profit Under Contract | 2 | 29% |
| Private Law Firm | 0 | 0% |
| Over 1 Million | 6 | 19% |
| 500,000 - 1 Million | 5 | 31% |
| 100,000 - 500,000 | 6 | 38% |
| 50,000 - 100,000 | 0 | 0% |
| Under 50,000 | 0 | 0% |
| TOTAL | 17 | 23% |

| Capital Mitigation | # | % |
|---------------------------|-----------|------------|
| 100% County-Funded | 15 | 50% |
| 100% State-Funded | 9 | 28% |
| Mixed Funding | 6 | 50% |
| Government Agency | 27 | 42% |
| Non-Profit Under Contract | 2 | 29% |
| Private Law Firm | 1 | 33% |
| Over 1 Million | 12 | 38% |
| 500,000 - 1 Million | 6 | 38% |
| 100,000 - 500,000 | 11 | 69% |
| 50,000 - 100,000 | 1 | 17% |
| Under 50,000 | 0 | 0% |
| TOTAL | 30 | 41% |

| DNA | # | % |
|---------------------------|-----------|------------|
| 100% County-Funded | 7 | 23% |
| 100% State-Funded | 16 | 50% |
| Mixed Funding | 6 | 50% |
| Government Agency | 26 | 41% |
| Non-Profit Under Contract | 1 | 14% |
| Private Law Firm | 2 | 67% |
| Over 1 Million | 16 | 50% |
| 500,000 - 1 Million | 4 | 25% |
| 100,000 - 500,000 | 6 | 38% |
| 50,000 - 100,000 | 2 | 33% |
| Under 50,000 | 1 | 25% |
| TOTAL | 29 | 39% |

**Adopted by ABA House of Delegates
February 5, 2002**

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS

CRIMINAL JUSTICE SECTION

GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION

**STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN
COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION**

STANDING COMMITTEE ON PRO BONO AND PUBLIC SERVICE

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 **RESOLVED**, That the American Bar Association adopts or reaffirms THE TEN
2 PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, dated February 2002, which
3 constitute the fundamental criteria to be met for a public defense delivery system to deliver
4 effective and efficient, high quality, ethical, conflict-free representation to accused persons who
5 cannot afford to hire an attorney.

6 **FURTHER RESOLVED**, That the American Bar Association recommends that each
7 jurisdiction use **THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY**
8 **SYSTEM**, dated February 2002, to assess promptly the needs of its public defense delivery
9 system and clearly communicate those needs to policy makers.

THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM February 2002

1. The public defense function, including the selection, funding, and payment of defense counsel,¹ is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.² To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.³ Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.⁴ The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.⁵

2. Where the caseload is sufficiently high,⁶ the public defense delivery system consists of both a defender office⁷ and the active participation of the private bar. The private bar participation may include part time defenders, a controlled assigned counsel plan, or contracts for services.⁸ The appointment process should never be ad hoc,⁹ but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the

¹ "Counsel" as used herein includes a defender office, a criminal defense attorney in a defender office, a contract attorney or an attorney in private practice accepting appointments. "Defense" as used herein relates to both the juvenile and adult public defense systems.

² National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973) [hereinafter "NAC"], Standards 13.8, 13.9; National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) [hereinafter "NSC"], Guidelines 2.8, 2.18, 5.13; American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992) [hereinafter "ABA"], Standards 5-1.3, 5-1.6, 5-4.1; *Standards for the Administration of Assigned Counsel Systems* (NLADA 1989) [hereinafter "Assigned Counsel"], Standard 2.2; NLADA *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984) [hereinafter "Contracting"], Guidelines II-1, 2; National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970) [hereinafter "Model Act"], § 10(d); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979) [hereinafter "ABA Counsel for Private Parties"], Standard 2.1 (D).

³ NSC, *supra* note 2, Guidelines 2.10-2.13; ABA, *supra* note 2, Standard 5-1.3(b); Assigned Counsel, *supra* note 2, Standards 3.2.1, 2; Contracting, *supra* note 2, Guidelines II-1, II-3, IV-2; Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Monitoring* (1979) [hereinafter "ABA Monitoring"], Standard 3.2.

⁴ Judicial independence is "the most essential character of a free society" (American Bar Association Standing Committee on Judicial Independence, 1997).

⁵ ABA, *supra* note 2, Standard 5-4.1

⁶ "Sufficiently high" is described in detail in NAC Standard 13.5 and ABA Standard 5-1.2. The phrase can generally be understood to mean that there are enough assigned cases to support a full-time public defender (taking into account distances, caseload diversity, etc.), and the remaining number of cases are enough to support meaningful involvement of the private bar.

⁷ NAC, *supra* note 2, Standard 13.5; ABA, *supra* note 2, Standard 5-1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2. "Defender office" means a full-time public defender office and includes a private nonprofit organization operating in the same manner as a full-time public defender office under a contract with a jurisdiction.

⁸ ABA, *supra* note 2, Standard 5-1.2(a) and (b); NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

⁹ NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

varied requirements of practice in the jurisdiction.¹⁰ Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.¹¹

3. Clients are screened for eligibility,¹² and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention or request,¹³ and usually within 24 hours thereafter.¹⁴

4. Defense counsel is provided sufficient time and a confidential space with which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date.¹⁵ Counsel should have confidential access to the client for the full exchange of legal, procedural and factual information between counsel and client.¹⁶ To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses and other places where defendants must confer with counsel.¹⁷

5. Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.¹⁸ National caseload standards should in no event be exceeded,¹⁹ but the concept of workload (i.e., caseload

¹⁰ ABA, *supra* note 2, Standard 5-2.1 and commentary; Assigned Counsel, *supra* note 2, Standard 3.3.1 and commentary n.5 (duties of Assigned Counsel Administrator such as supervision of attorney work cannot ethically be performed by a non-attorney, citing ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct).

¹¹ NSC, *supra* note 2, Guideline 2.4; Model Act, *supra* note 2, § 10; ABA, *supra* note 2, Standard 5-1.2(c); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (provision of indigent defense services is obligation of state).

¹² For screening approaches, see NSC, *supra* note 2, Guideline 1.6 and ABA, *supra* note 2, Standard 5-7.3.

¹³ NAC, *supra* note 2, Standard 13.3; ABA, *supra* note 2, Standard 5-6.1; Model Act, *supra* note 2, § 3; NSC, *supra* note 2, Guidelines 1.2-1.4; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4 (A).

¹⁴ NSC, *supra* note 2, Guideline 1.3.

¹⁵ American Bar Association Standards for Criminal Justice, *Defense Function* (3rd ed. 1993) [hereinafter "ABA Defense Function"], Standard 4-3.2; *Performance Guidelines for Criminal Defense Representation* (NLADA 1995) [hereinafter "Performance Guidelines"], Guidelines 2.1-4.1; ABA Counsel for Private Parties, *supra* note 2, Standard 4.2.

¹⁶ NSC, *supra* note 2, Guideline 5.10; ABA Defense Function, *supra* note 15, Standards 4-2.3, 4-3.1, 4-3.2; Performance Guidelines, *supra* note 15, Guideline 2.2.

¹⁷ ABA Defense Function, *supra* note 15, Standard 4-3.1.

¹⁸ NSC, *supra* note 2, Guideline 5.1, 5.3; ABA, *supra* note 2, Standards 5-5.3; ABA Defense Function, *supra* note 15, Standard 4-1.3(e); NAC, *supra* note 2, Standard 13.12; Contracting, *supra* note 2, Guidelines III-6, III-12; Assigned Counsel, *supra* note 2, Standards 4.1, 4.1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2 (B) (iv).

¹⁹ Numerical caseload limits are specified in NAC Standard 13.12 (maximum cases per year: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals), and other national standards state that caseloads should "reflect" (NSC Guideline 5.1) or "under no circumstances exceed" (Contracting Guideline III-6) these numerical limits. The workload demands of capital cases are unique: the duty to investigate, prepare and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea. *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998). See also *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989) [hereinafter "Death Penalty"].

adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.²⁰

6. Defense counsel's ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.²¹

7. The same attorney continuously represents the client until completion of the case. Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing.²² The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.²³ Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.²⁴ Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases,²⁵ and separately fund expert, investigative and other litigation support services.²⁶ No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system.²⁷ This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

²⁰ ABA, *supra* note 2, Standard 5-5.3; NSC, *supra* note 2, Guideline 5.1; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980) [hereinafter "Appellate"], Standard 1-F.

²¹ Performance Guidelines, *supra* note 11, Guidelines 1.2, 1.3(a); Death Penalty, *supra* note 15, Guideline 5.1.

²² NSC, *supra* note 2, Guidelines 5.11, 5.12; ABA, *supra* note 2, Standard 5-6.2; NAC, *supra* note 2, Standard 13.1; Assigned Counsel, *supra* note 2, Standard 2.6; Contracting, *supra* note 2, Guidelines III-12, III-23; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4 (B) (i).

²³ NSC, *supra* note 2, Guideline 3.4; ABA, *supra* note 2, Standards 5-4.1, 5-4.3; Contracting, *supra* note 2, Guideline III-10; Assigned Counsel, *supra* note 2, Standard 4.7.1; Appellate, *supra* note 20 (*Performance*); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1 (B) (iv). *See* NSC, *supra* note 2, Guideline 4.1 (includes numerical staffing ratios, e.g., there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). *Cf.* NAC, *supra* note 2, Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

²⁴ ABA, *supra* note 2, Standard 5-2.4; Assigned Counsel, *supra* note 2, Standard 4.7.3.

²⁵ NSC, *supra* note 2, Guideline 2.6; ABA, *supra* note 2, Standards 5-3.1, 5-3.2, 5-3.3; Contracting, *supra* note 2, Guidelines III-6, III-12, and *passim*.

²⁶ ABA, *supra* note 2, Standard 5-3.3(b)(x); Contracting, *supra* note 2, Guidelines III-8, III-9.

²⁷ ABA Defense Function, *supra* note 15, Standard 4-1.2(d).

9. Defense counsel is provided with and required to attend continuing legal education.

Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.²⁸

10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.²⁹

²⁸ NAC, *supra* note 2, Standards 13.15, 13.16; NSC, *supra* note 2, Guidelines 2.4(4), 5.6-5.8; ABA, *supra* note 2, Standards 5-1.5; Model Act, *supra* note 2, § 10(e); Contracting, *supra* note 2, Guideline III-17; Assigned Counsel, *supra* note 2, Standards 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA *Defender Training and Development Standards* (1997); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1 (A).

²⁹ NSC, *supra* note 2, Guidelines 5.4, 5.5; Contracting, *supra* note 2, Guidelines III-16; Assigned Counsel, *supra* note 2, Standard 4.4; ABA Counsel for Private Parties, *supra* note 2, Standards 2.1 (A), 2.2; ABA Monitoring, *supra* note 3, Standards 3.2, 3.3. Examples of performance standards applicable in conducting these reviews include NLADA Performance Guidelines, ABA Defense Function, and NLADA/ABA Death Penalty.

REPORT

Introduction

“The Ten Principles of a Public Defense Delivery System” is a practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, systems by which public defense services are delivered within their jurisdictions.¹ More often than not, these individuals are non-lawyers who are completely unfamiliar with the breadth and complexity of material written about criminal defense law, including the multitude of scholarly national standards concerning the issue of what constitutes quality legal representation for criminal defendants. Further, they operate under severe time constraints and do not have the time to wade through the body of standards; they need quick and easy, yet still reliable and accurate, guidance to enable them to make key decisions.

As explained more fully in the sections that follow, “The Ten Principles of a Public Defense Delivery System” fulfills this need. It represents an effort to sift through the various sets of national standards and package, in a concise and easily understandable form, only those fundamental criteria that are absolutely crucial for the responsible parties to follow in order to design a system that provides effective and efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney. By adopting “The Ten Principles of a Public Defense Delivery System,” the ABA would create, for the first time ever, much-needed policy that is directed toward guiding the designers of public defense delivery systems.

The Need for ABA Policy Geared Toward Designers of Public Defense Delivery Systems

The ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) has provided technical assistance in all 50 states to bar leaders, legislators, and others interested in improving public defense services. Through our extensive work in the states, we have learned that oftentimes, the people who have the primary responsibility for establishing or improving public defense delivery systems are not lawyers and have little or no knowledge in the area of criminal defense services. In the state legislatures, where many choices are made regarding the design and funding of these systems, there appears to be a growing trend—the number of legislators who are also lawyers (and who would therefore better understand these issues) is declining, and their terms are getting shorter.

Another trend is that in many states, the legislature, supreme court, governor, or state bar association authorizes a “study commission” or “task force” to recommend plans for establishing or improving public defense delivery systems. This is especially the case as the crisis in indigent defense—in terms of quality of services and resource availability—continues to

¹ “The Ten Principles of a Public Defense Delivery System” are based on a paper entitled *The Ten Commandments of Public Defense Delivery Systems*, which was written by James R. Neuhard, Director of the Michigan State Appellate Defender Office and former member of the ABA Standing Committee on Indigent Defendants (SCLAID), and by Scott Wallace, Director of Defender Legal Services for the National Legal Aid and Defender Association.

deepen across the country. These task forces generally have broad representation from all branches of government and many sectors of the community. For example, task forces that were recently established in North Carolina and Georgia include state legislators, judges, heads of executive agencies, private attorneys, and members of the community. In Michigan, a community organization called the Michigan Council on Crime and Delinquency has taken the lead and organized a task force composed primarily of non-defense attorney groups to recommend to the legislature a model plan for public defense services in Michigan. The commonality among all the task forces is the fact that the members volunteer their time and operate under tight deadlines within which recommendations must be made or else the window of opportunity closes, for political or other reasons.

There is no question that the people who are making these important decisions under such severe time constraints desperately need reliable guidance that is presented in an easily understandable, concise, and succinct package. SCLAID has received numerous requests for ABA policy written for and directed at the government officials and others who are responsible for designing public defense delivery systems; unfortunately, current ABA policy (in the form of numerous sets of criminal justice standards) does not address this particularized need, as explained further below.

Overview of National Standards on Providing Criminal Defense Services

The ABA was the first organization to recognize the need for standards currently relating to the provision of criminal defense services, adopting the *ABA Standards for Criminal Justice, Providing Defense Services* (now in its 3rd edition) in 1967. The *ABA Standards for Criminal Justice, Defense Function*, soon followed in 1971, and the *ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases* were adopted in 1989.

In addition, several other organizations have adopted standards in this area over the past three decades: the National Legal Aid and Defender Association adopted its *Performance Guidelines for Criminal Defense Representation* in 1995, *Standards for the Administration of Assigned Counsel Systems* in 1989, and *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* in 1984; the Institute of Judicial Administration collaborated with the ABA to create the *IJA/ABA Juvenile Justice Standards*, totaling 23 volumes adopted from 1979 through 1980; the National Study Commission on Defense Services adopted its *Guidelines for Legal Defense Systems in the United States* in 1976; and the President's National Advisory Commission on Criminal Justice Standards and Goals adopted Chapter 13, *The Defense*, in 1973.

Collectively, these standards contain the minimum requirements for legal representation at the trial, appeals, juvenile, and death penalty levels and are a scholarly, impressive, and extremely useful body of work. However, they are written for the most part for lawyers who provide defense services, not for governmental officials or policymakers who design the systems by which these services are delivered. As the Introduction to the *ABA Standards for Criminal Justice, Defense Function* notes, "The Defense Function Standards have been drafted and adopted by the ABA in an attempt to ascertain a consensus view of all segments of the criminal justice community about what good, professional practice is and should be. Hence, these are extremely useful standards for consultation by lawyers and judges who want to do 'the right

thing' or, as important, to avoid doing 'the wrong thing.'" Further, the sheer volume of the standards make it impracticable for policymakers or others charged with designing systems to wade through them in order to find information of relevance to their duties. Indeed, even one of the smallest of the volumes, the *ABA Standards for Criminal Justice, Defense Function*, is 71 pages in length and contains 43 black letter standards with accompanying commentary. Thus, the standards do not address the particular need for ABA policy expressly directed toward those who are responsible for designing and funding systems at the state and local levels.

The Ten Principles of a Public Defense Delivery System

"The Ten Principles of a Public Defense Delivery System" fulfills this need. If adopted by the ABA, it would provide new policy targeted specifically to the designers and funders of public defense delivery systems, giving them the clear and concise guidance that they need to get their job done.

Conclusion

Through this resolution, the American Bar Association would fulfill a critical need by providing, for the first time ever, a practical guide ("The Ten Principles of a Public Defense Delivery System") for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, systems to deliver effective and efficient, high quality, ethical, conflict-free legal representation to accused persons who cannot afford to hire an attorney.

Respectfully submitted,

L. Jonathan Ross, Chair
Standing Committee on Legal Aid and Indigent Defendants

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