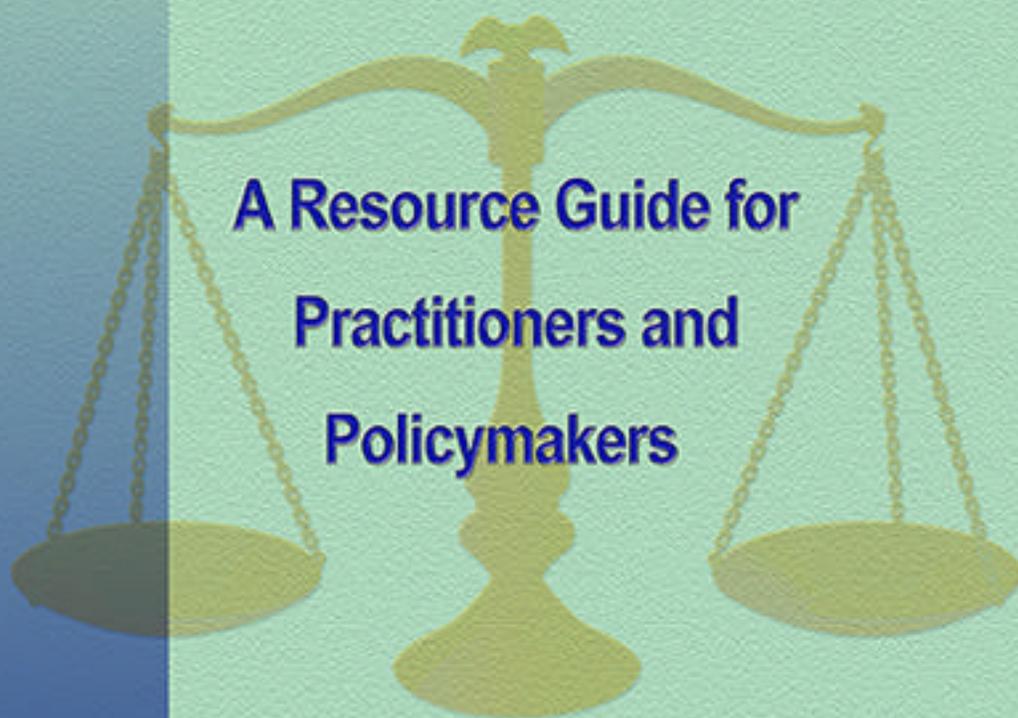




Compendium of Standards for Indigent Defense Systems



A Resource Guide for
Practitioners and
Policymakers

Volume I
Standards for
Administration of Defense Services

**December
2000**

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Foreword

The U.S. Department of Justice (DOJ) is committed to the principle that all Americans should have equal access to quality legal defense. As Attorney General Janet Reno has

Gideon v. Wainwright to provide every criminal defendant charged with a serious crime with competent counsel.” Toward that end, Attorney General Reno has encouraged cooperative efforts among justice officials and the private bar “to strive to implement helpful standards for indigent defense standards that cover, among other things, skills, experience, and appropriate workloads for indigent defense offices.” Implementation of standards governing all aspects of indigent defense systems can enhance the fairness and credibility of our justice system.

The *Compendium of Standards for Indigent Defense Systems* brings together standards from a wide variety of sources and shows the different ways in which they address practice and procedure: administration of defense systems, attorney performance, capital case representation, appellate services, and juvenile justice defense. Included are standards and rules issued by national organizations; by state agencies and special interest groups, including bar associations, public defender organizations, and state high courts; and by local court systems.

The standards presented here do not necessarily represent the only acceptable models. Rather, they have been collected to give practitioners and policymakers examples of the range of current “best practices” developed at the state and local level, along with the recommendations of several national standards-setting bodies.

The Office of Justice Programs is making the *Compendium* available in hard copy, CD, and electronic formats. It is our hope that this resource will be used by State and local governments and agencies to compare standards from other jurisdictions and develop their own, thereby helping to assure the fulfillment of the Sixth Amendment and of *Gideon v. Wainwright*.

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Appendix: NLADA Defender Training and Development Standards

Introduction

The *Compendium of Standards for Indigent Defense Systems* presents national, state, and local standards relating to five major aspects of indigent defense:

- Administration of defense systems (Volume I)
- Attorney performance (Volume II)
- Capital case representation (Volume III)
- Appellate representation (Volume IV)
- Juvenile justice defense (Volume V)

These standards are non-case specific statements that help policymakers assess the adequacy or appropriateness of the provision of defense services to indigent defendants. Some standards are aspirational, that is, a goal for the future; other standards are enforced by operating or funding agencies. The standards and rules collected here were issued by national organizations; state agencies; bar associations; public defender agencies; state high courts; and local court or bar associations.

The *Compendium* is intended to be useful for persons preparing to establish, review, or improve a public defense program or system. It should also be useful for persons dealing with funding sources; for agencies or organizations that are developing standards governing either criminal defense systems or individual attorney performance; and for academics and courts that need a reference point.

Sponsorship and Development

The *Compendium* was commissioned by the Bureau of Justice Assistance in the Office of Justice Programs of the United States Department of Justice. It was developed by the staff of the Institute for Law and Justice with guidance from an advisory board of practitioners and academics in the field of criminal defense systems. The assistance of the Spangenberg Group is also gratefully acknowledged, especially in helping identify state and local standards for inclusion in the *Compendium*.

Methodology

Once a standard was identified, ILJ staff sought permission from the sponsoring agency to reprint the standard here. The intent of the *Compendium* was to be as inclusive as possible. No effort was made to include only the “best” standards. If any standards have been left out, we apologize to the standards’ sponsors.

Each volume lists specific topics, such as provision of training or the need for adequate facilities, and then presents all the standards relevant to those topics. By and large, the selection of topics followed the topical headings used in the standards themselves.

The materials included in the *Compendium* go beyond standards themselves. In several instances, we have included court rules and agency operational policies that are the functional equivalent of standards. The inclusion of such materials points to the need to put standards into context. At the state level, standards do not exist by themselves. Their content is often shaped by state legislation and court rules, either of which may have been the force requiring the development of the standards. Thus, to understand state and local standards, some knowledge of the governing state law is required. By necessity, any state law that creates a defense services delivery mechanism also treats the issues of governance, structure, jurisdiction, funding, and many other topics often covered by standards. While this *Compendium of Standards for Indigent Defense Systems* includes a limited review of state laws, an exhaustive review is beyond its reach.

The table titled “State Legislation and Court Rule Parallels to Standards for the Administration and Performance of Criminal Defense,” located at the end of this introduction, shows how the 50 states have treated some key standards issues relating to the governance and administration of defense systems. Issues include these:

- Use of a state defender agency, local defender agency, or both
- State funding of local defense system
- Authority for the appointment of counsel
- Use of contract attorneys or establishment of agency authority
- Client eligibility criteria
- Recoupment authorization

The table also lists which states have laws, rules, or standards relating to capital and post-conviction representation and to attorney performance.

The table is not exhaustive. Excluded are regulations issued by an administrative agency such as the state public defender office. Although such regulations may have the force of law, resources did not permit their collection. The topics covered in the chart are those most frequently included where standards are adopted.

The lack of a checkmark in any particular box does not necessarily mean state law does not cover the topic. It merely means that there was no explicit mention of the item in the legislation analyzed. However, the topic could be implied by other laws (e.g., appellate

representation may be part of the work of a statewide defender system where state criminal procedure law provides for automatic right of appeal).

Implicit in the standards are the ethical requirements expected of all attorneys in all types of cases. In a sense, the standards are but commentary to certain overriding ethical principles: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for this representation” (ABA Model Rules of Professional Conduct 1.1, adopted 1983). Further, as the Model Code of Professional Responsibility (Canon 7) directs, “A lawyer should represent a client zealously within the bounds of the law.” What the standards do is identify how those principles can be achieved and measured in the indigent defense setting, no matter what type of indigent defense system is used.

These standards may be used either to evaluate an existing system (consisting of public defenders, contract firms, private assigned counsel, or a combination of such systems) or to compare or consider replacing one type of system with another.

The standards allow funders to determine whether providers of defense services are performing effectively and efficiently. For the clients, who can neither choose nor readily change their attorneys, these standards provide some measure of assurance that their lawyers will provide high-quality, zealous representation. Finally, these standards inform both funders and attorneys what services are required and what services need to be funded.

State Legislation and Court Rule Parallels to Standards for the Administration and Performance of Criminal Defense

L = Law, R = Rule, S = Standard or guideline, * = Partial eligibility determinations authorized, + = Partial state funding, and ± = County contributes to cost of state public defender agency

State	State Defender Agency	Local Defender Agency	State Funds Local	Authority to Assign Counsel	Contract Agency Authorized	Capital Case Representation	Client Eligibility	Recoupment	Attorney Fees	Appeals Representation	Post-Conviction Appointment	Attorney Performance
AL		L	L	L	L		R*		L	L, R	L	
AK	L				L		L	L, R			L	
AZ			L			R					L	
AR	L			L, S	S	L, R, S						
CA	L	L	L+	L	L	L, R	L*	L	L, R	L	L	L
CO	L				L			L		L	L	
CN	L			L			L	L			L	S
DE	L			L	R				R			
DC	L, R			L, R				L, R				
FL		L	L	L, R		L	L			R		
GA		L, S	L	L, S	L, S	L, S	R, S	L, S	S	L, S	L	
HA	L			L					L			
ID		L		L		L, R	L*	L		L	L	
IL		L		L		L			L	L		
IN	L	L, S	L+	L, S	L, S	R, S	S	S	S	S		
IA	L	L		L	L		L			L		
KS		L, R	L	L, R	L, R	L, R	L*, R	L	R	L	L, S	R
KY		L	L+	L	L		L	L		L		
LA		L	L+			R, S	L*					
ME				L			R*		R	R		
MD	L			L			L*	L		L, R		
MA	L			L, R	L	S	L*					L
MI				L, R			R			R, S		
MN		L	L+				L*, R	L		L	L	
MS	L	L		L	L		L			L	L	
MO	L			L	L	R	L*	L		L	S	S
MT		L	L							L		
NE		L	L	L		L, S	L, S	L	L	L, S	L, S	

State	State Defender Agency	Local Defender Agency	State Funds Local	Authority to Assign Counsel	Contract Agency Authorized	Capital Case Representation	Client Eligibility	Recoupment	Attorney Fees	Appeals Representation	Post-Conviction Appointment	Attorney Performance
NV	L	L		L	L	R	L*	L		L	L	L
NH	L			L	L		L	L	L	L	L	
NJ	L				L		L	L	L	L	L, R	L
NM	L			L	L		L	L	L	L	L	
NY		L		L, R		L, R	L*		L	L, R	R	L
NC		L	L	L, R		L, R	L*	L	L	L, R	I	
ND					S		S	L, S	S	R	L	
OH	L	L	L+	L, R	L	L	L*	L	L	L	L	
OK	L	L		L, R	L	L, R	R	L	L, R	L	L	
OR	L	L		L	L		L*	L	L			s
PA		L		L			R	L	L	L	L, R	
RI	L			L, R			L				L	
SC		L	L	L, R		L	L*, R	L	L, R	L, R		
SD		L		L, R	L		L	L, R	L, R	L	L	
TN		L	L	L		R	L*			L	L	
TX		L		L	L	L	L		L	L		
UT			L+	L	L	R	L	L	L	L	L	
VT	L			L	L		L*	L		L	L	
VA	L		L+	L		L, S	L		L			
WA		L		L	L, S	S	L*, R*	L	S	R, S	R	S
WV		L	L	L			L		L	L	L	
WI	L			L	L		L	L	L, R	L	L	L
WY	L		L±	L, R			L, R*	L	L	L		

The Ten Commandments of Public Defense Delivery Systems

By

James R. Neuhard, Director, Michigan Appellate Defender Office,

and

Scott Wallace, Director, Defender Legal Services, National Legal Aid and Defender Association

Poverty is not an excuse to provide less than competent representation.

Public defense delivery systems must efficiently and effectively provide high-quality, zealous, conflict-free representation to those charged with crimes who cannot afford to hire an attorney. To meet this goal,¹

Thou shalt...

1. **Assure that the public defense function, including the selection, funding, and payment of appointed counsel, is independent.** The indigent defense function should be independent from political influence and subject to judicial

¹ These 10 principles summarize the dominant themes in the most well-established major national standards concerning the government's duty to furnish quality criminal defense services to those who cannot afford to hire an attorney. The standards are referenced in footnotes herein as follows: National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Courts*, Chapter 13, "The Defense" (1973) ("NAC"); National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) ("NSC"); American Bar Association, *Standards for Criminal Defense, Providing Defense Services* (3rd ed., 1992) ("ABA"); American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function* (3rd ed., 1993) ("ABA Defense Function"); National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970) ("Model Act"); *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* (NLADA, 1984; ABA, 1985) ("Contracting"); *Standards for the Administration of Assigned Counsel Systems* (NLADA, 1989) ("Assigned Counsel"); *Standards and Evaluation Design for Appellate Defender Offices* (NLADA, 1980) ("Appellate"); *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* (NLADA, 1988; ABA, 1989) ("Death Penalty"); *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995) ("Performance Guidelines").

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 Ensuring that the judiciary is independent from undue political pressures is an important means of furthering the independence of indigent defense.⁴

2. **Assure that where the caseload is sufficient, the public defense delivery system consists of both a defender office⁵ 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.⁶ The appointment process should never be ad hoc,⁷ but should be according to a coordinated plan⁸ directed by a full-time administrator who is an attorney familiar with the varied requirements of criminal practice in the jurisdiction.⁹ Since the responsibility to provide defense services rests with the state to assure uniform quality statewide, systems should be funded and organized at the state level.¹⁰
3. **Screen clients for eligibility, then assign and notify counsel of their appointment within 24 hours.** Counsel¹¹ should be furnished upon arrest, detention, or request,¹² and in no event more than 24 hours thereafter.¹³
4. **Provide counsel sufficient time and a confidential space to meet with the client.** Counsel should interview the client as soon as practicable before the preliminary examination or the trial date.¹⁴ Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client.¹⁵ To ensure confidential

² NAC 13.8, 13.9; NSC 2.8, 2.18, 5.13; ABA 5-1.3, 5-1.6, 5-4.1; Assigned Counsel 2.2; Contracting II-1, 2; Model Act §10(d).

³ NSC 2.10-2.13; ABA 5-1.3(b); Assigned Counsel 3.2.1, 2; Contracting II-1, II-3, IV-2.

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

⁵ NAC 13.5; ABA 5-1.2. “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.

⁶ ABA 5-1.2(a) and (b); NSC 2.3; ABA 5-2.1.

⁷ NSC 2.3; ABA 5-2.1.

⁸ ABA 5-1.2(a) and (b); NSC 2.3; ABA 5-2.1.

⁹ ABA 5-2.1 and commentary; Assigned Counsel 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 Code of Professional Conduct).

¹⁰ NSC 2.4; Model Act §10; ABA 5-1.2(c); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (indigent defense is obligation of state).

¹¹ “Counsel” includes a defender office, a criminal defense attorney in a defender office, a contract attorney, or an attorney in private practice accepting appointments.

¹² NAC 13.3; ABA 5-6.1; Model Act §3; NSC 1.2-1.4.

¹³ NSC 1.3.

¹⁴ ABA Defense Function 4-3.2; Performance Guidelines 2.1-4.1.

¹⁵ NSC 5.10; ABA Defense Function 4-2.3, 4-3.1, 4-3.2; Performance Guidelines 2.2.

communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.¹⁶

5. **Assure that counsel's workload matches counsel's capacity.** workload of both 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.¹⁷ National caseload standards should in no event be exceeded,¹⁸ but the concept of workload (i.e., caseload adjusted by factors such as case complexity and an attorney's nonrepresentational duties) is a more accurate measurement.¹⁹
6. **Assure that 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 zealous, high-quality representation.²⁰
7. **Assure 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.²¹ On appeal, the attorney assigned for the direct appeal should represent the client throughout the direct appeal.
8. **Provide counsel with parity of resources with the prosecution and include counsel as an equal partner in the justice system.** There should be parity of workload, salaries, and other resources (such as technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and indigent defense.²² Assigned counsel should be paid a reasonable fee in addition to actual overhead and

¹⁶ Defense Function 4-3.1.

¹⁷ NSC 5.1, 5.3; ABA 5-5.3; ABA Defense Function 4-1.3(e); NAC 13.12; NLADA Contracting III-6, III-12; Assigned Counsel 4.1.4.1.2; ABA Model Code of Professional Responsibility DR 6-101 (lawyers' obligation not to take on more cases than they have competence and time to handle).

¹⁸ Numerical caseload limits are specified in NAC 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 5.1) or "under no circumstances exceed" (Contracting 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 (see NLADA/ABA Death Penalty standards) today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by a guilty plea. *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998).

¹⁹ ABA 5-5.3; NSC 5.1; Appellate 1-F.

²⁰ Performance Guidelines 1.2, 1.3(a); Death Penalty 5.1.

²¹ NSC 5.11, 5.12; ABA 5-6.2; NAC 13.1; Assigned Counsel 2.6; Contracting III-12, III-23.

²² NSC 3.4; ABA 5-4.1, 5-4.3; Contracting III-10; Assigned Counsel 4.7.1; Appellate (*Performance*). See NSC 4.1 (includes numerical staffing ratios, e.g., there must be one supervisor for every 10 attorneys, or one part-time supervisor for every five attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). Cf. NAC 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

expenses.²³ 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, should provide an overflow or funding mechanism for excess, unusual, or complex cases,²⁴ and should separately fund expert, investigative, and other litigation support services.²⁵ No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the adversarial balance and on the other components of the justice system. Indigent defense should participate as an equal partner in improving the justice system.²⁶

9. **Provide and require counsel 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.²⁷
10. **Supervise and systematically review counsel for quality and efficiency according to nationally and locally adopted standards.** The defender office, its professional and support staff, and assigned counsel or contract defenders should be supervised and periodically evaluated for competence and efficiency.²⁸

Discussion²⁹

The “commandments” presented here are designed for experts and non-experts alike to quickly assess a defense delivery system and to clearly communicate its needs to policymakers.

While all counsel are bound by the Rules of Professional Conduct, specific standards concerning public defense have been adopted both nationally and locally. More standards, regulations, case law, and statutes have been written for this area of law than for any other. The result is an often daunting mix of mandatory and hortatory standards, guidelines, court rules, and regulations so comprehensive that few can fully read or assimilate it.

The recognition of the need for national standards for the provision by the government of criminal defense services began in 1967 with the American Bar Association’s *Standards for Criminal Justice, Providing Defense Services*, now in its third edition. This was

²³ ABA 5-2.4; Assigned Counsel 4.7.3.

²⁴ NSC 2.6; ABA 5-3.1, 5-3.2, 5-3.3; Contracting III-6, III-12, and *passim*.

²⁵ ABA 5-3.3(b)(x); Contracting III-8, III-9.

²⁶ Defense Function 4-1.2(d); note 19, *supra*.

²⁷ NAC 13.15, 13.16; NSC 2.4(4), 5.6-5.8; ABA 5-1.5; Model Act, §10(e); Contracting III-17; Assigned Counsel 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA *Defender Training and Development Standards* (1997).

²⁸ NSC 5.4, 5.5; Contracting III-16; Assigned Counsel 4.4. Examples of performance standards applicable in conducting these reviews include NLADA Performance Guidelines, ABA Defense Function, and NLADA/ABA Death Penalty.

²⁹ By James R. Neuhard.

followed in 1973 with the *Report of the Task Force on the Courts*, Chapter 13, “The Defense,” by the President’s National Advisory Commission on Criminal Justice Standards and Goals, and then with the *Guidelines for Legal Defense Systems in the United States* by the National Study Commission on Defense Services. The American Bar Association and the National Legal Aid and Defender Association followed these with a series of standards covering appeals, juvenile defense, death penalty, contract defender systems, assigned counsel systems, and defender training, plus related model materials such as model public defender legislation and model contracts for public defense services.

At the local level, states enacted defender legislation that included numerous regulations, governance mechanisms, and system design requirements. States and local governments passed court rules and system regulations, modeled on or influenced by the national standards.

Collectively, these standards cover the wide diversity of areas where criminal defense systems provide counsel. The body of work is impressive, extremely useful, and scholarly in its integration of the Rules of Professional Conduct into often dissimilar areas of practice. However, for the most part, the standards themselves are written for lawyers who provide the service and are difficult to assimilate for those not familiar with or involved in the area.

In addition, effectively communicating the needs of a criminal defense system to legislators will become more difficult as terms shorten and as the number of lawyers continues to decline in our legislatures. This is not to suggest that lawyers are the only political constituency for quality indigent defense. Often the most knowledgeable and the strongest supporters of quality indigent defense systems are non-lawyers. However, it takes more time for non-lawyers to understand the issues and move indigent defense to a priority.

The introductions in the various national standards set out why the particular standards were necessary. The reasons include

- increasing areas of specialization, such as death penalty representation, appeals, and juvenile practice,
- scandals in the selection and payment of attorneys,
- staggering caseloads,
- salaries often half those of prosecutors,
- litigation by appointed counsel over fees that do not even cover overhead,
- low-bid contracts without concern for quality,
- high turnover of staff and appointed counsel,
- no training, investigation, expert witnesses, or sentencing specialists,
- inexperience, incompetence, and innocents being convicted,
- poor or nonexistent research capabilities or access to basic libraries, and

- gross underfunding.

Traditional governmental funding processes and marketplace incentives have not operated effectively to improve or moderate these problems. Unlike the private sector, indigent clients do not choose their attorneys and cannot fire them for unsatisfactory services. Legislators who fund and choose the type of defense delivery system do not directly oversee, receive, or use the services the system provides. Further, defendants who do use the services are not an influential constituency to voice their concerns to legislators.

Contributing to the problems and the difficulty of change is the diffusion of governance responsibilities. Responsibility directly or indirectly for the quality of indigent defense services resides in part with the funding authority, the judiciary, boards or commissions, grievance processes, and the executive branch. Funders and executive officers are not in a position to judge the performance of the system. Clients have little or no say in who their attorneys will be, whether attorneys stay on the appointment list, and whether they are well paid or have their fees cut.

In most jurisdictions that lack organized systems, with few exceptions, judges choose the attorneys and determine their pay. This immediate control by the judge may create the perception of patronage or concerns that the assigned lawyers chosen or paid by the judge will not willingly confront the judge who selects and pays them. Often there are complaints from the bar about too-low fees, the cutting of vouchers, or unfair denial of access to the work. Turnover is often high, training is almost nonexistent, and the quality of representation is subjective to the judge. This power far exceeds any similar power a judge has over the prosecutor or, for that matter, any other counsel in the court.

In the end, the national standards embodied and distilled in these commandments provide clear principles to assess the current system, no matter the system in place.

The concept of using standards to address quality concerns is not unique to the field of indigent defense. There are other areas of government where strong pressures of favoritism, greed, partisanship, or profits can undermine concerns for fundamental quality. Commissioners, county supervisors, and legislators long ago ceased taking the lowest bid to build a hospital or a bridge. They realized standards and codes were necessary to compare bids with confidence and to assure quality and protect public safety and health. Inspections and oversight help assure that the standards are complied with. With proper enforcement, standards help assure professionals' compliance with national norms in areas where the legislators themselves may lack expertise.

Ultimately, there remains this question: if "fixing" the problem requires more tax dollars, why should we, the taxpayers, pay for it? Why should an elected official require that the lawyers selected and paid by the state provide competent representation to accused individuals who cannot afford to hire a private lawyer? One reason is that those charged with a crime face the loss of their dignity, their families, their jobs, their liberty, and even their lives. Further, if defendants are wrongfully convicted or sentenced, the guilty go free and the state bears the cost of needless years of imprisonment. But equally at stake is the very soul of our justice system and our sense of justice. At the core of the system is the concept of fundamental fairness. This touchstone of American justice accounts for all

the protections built into the process of accusation, arrest, trial, and appeal. But all those protections are of little value without “the guiding hand of counsel.”

We have a well-developed adversarial criminal justice structure. However, without competent counsel, the system of justice is not adversarial—a flaw that threatens not just a few but the overwhelming majority of those arrested and processed through our criminal courts. In many urban settings, over 90 percent of the criminal defendants cannot afford to pay for counsel, even though the majority of defendants are employed when they are arrested. What used to be referred to as “appointment of counsel for the indigent” does not capture by any degree the reality of the populations requiring the appointment of counsel.

The sheer force of the government’s power to accuse will overwhelm the untrained, the inexperienced, and the unprepared. Our system assumes and expects that defense counsel will test the government’s case at every step. We can take no solace that “endless appeals” or “technicalities” protect the innocent unless a competent attorney is there to make us all stop and give individual attention to each case no matter the clamor, the passion, or the routineness that surrounds it.

If one leg of the structure comprising the prosecution, the court, and the defendant is fundamentally and chronically weak, the justice system’s classic three-legged stool will collapse. There are no market forces that will cause self-correction of our systems of representation of low-income individuals charged with a crime. And if such representation collapses, so too does our entire system of criminal justice and our nation’s dream of fundamental fairness.

Parity: The Failsafe Standard

By

Scott Wallace, Director, Defender Legal Services, National Legal Aid and Defender Association

This *Compendium of Standards for Indigent Defense Systems* reflects the breadth and complexity of the task of prescribing the essential elements of systems for providing quality legal defense services for people accused of crime who lack the resources to retain private counsel. Unfortunately, the very thoroughness of these standards may impede their adoption and implementation in jurisdictions around the country. If the most critical themes of all the standards were distilled, it has been theorized, the job of understanding their value would be facilitated, and their implementation hastened.

An effort to advance this goal is made in the preceding essay, “The Ten Commandments of Public Defense Delivery Systems.” It captures the essence of the major sets of standards compiled in this dense compendium for quick reference by busy defenders, policymakers, and funding authorities.

But one of the commandments is qualitatively different from the others. Most standards throughout the country are written as absolute norms, rather than relativistic ones: There must be adequate funding to ensure independent, quality representation...Individual lawyers should receive reasonable compensation...Staff levels should be projected through detailed resource planning...Defender systems must provide training, supervision, and evaluation...Offices must have adequate computer technology, office space, and legal research capacity...No defender should have excessive caseloads—e.g., no more than 150 felonies per year...There should be at least one supervisor for every 10 staff attorneys, and one investigator for every three attorneys.

But what if the application of such standards would make a jurisdiction’s public defender system better resourced than other agencies, such as the prosecution or the judiciary? What if, for example, the jurisdiction’s prosecutors routinely carry 500 felonies, or the lack of adequate and up-to-date computer systems is a problem experienced by all agencies? Standards describing a fixed norm of “adequate” defender staffing and services would be at risk of being dismissed across the board as unrealistic in such a jurisdiction.

At the other end of the spectrum, what if prosecutor resources are substantially better than the minimum national indigent defense standards—e.g., caseloads never exceed 25 felonies per year, and salaries, benefits, space, working conditions, equipment, staffing

ratios, and resources for experts and investigations are well above “adequate”? The prosecution then has an advantage in recruiting and retaining competent attorneys, and in preparing and presenting its cases, while the quality of services provided by the public defender’s office suffers due to staffing disruptions and shortages, a seniority or competence gap with the prosecutor’s office, and the draining of additional resources to recruit, train, and retain a higher volume of short-term staff. Adherence to fixed norms of indigent defense standards would throw the adversarial system of criminal justice fundamentally out of balance, to the detriment of indigent individuals facing criminal charges.

This is why all major national indigent defense standards contain a core, failsafe, relativistic commandment: that there should be parity of resources between public defense and prosecution.

The U.S. Department of Justice endorsed the concept of parity in the same year that *Gideon v. Wainwright* was handed down. Because the adversary system demands a “constant, searching and creative questioning of official decisions and assertions of authority at all stages of the process,” the Attorney General’s Committee on Poverty and the Administration of Federal Criminal Justice found in its 1963 final report that “the proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions.”

And when *Gideon*’s mandate was extended to misdemeanors in 1972, in *Argersinger v. Hamlin*, Chief Justice Burger wrote in his concurring opinion 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’” (citing ABA *Standards Relating to Providing Defense Services*).

All the national standards developed over the past quarter century contain explicit statements of parity. The *Guidelines for Legal Defense Systems in the United States*, promulgated over several years by the National Study Commission on Defense Services in the mid-1970’s with Justice Department support, direct that, in order to attract and retain qualified personnel, salaries for all staff should “in no event be less than” those paid for comparable positions in the prosecutor’s office.³⁰ The guidelines also provide that other resources and facilities should similarly be “not less than that provided for other components of the justice system with which the defender must interact, such as the courts, prosecution and the police.”³¹

³⁰ Guideline 3.2.

³¹ Guideline 3.4. [In fact, the earliest national standards set the bar even higher, out of concern that prosecutor resources were commonly just as inadequate as defender resources. In 1973, standards for courts and indigent defense systems were promulgated by the National Advisory Commission on Criminal Justice Standards and Goals, which had been appointed by the Administrator of the Law Enforcement Assistance Administration to write standards for all criminal justice agencies to fulfill the standards mandate of the 1967 President’s Commission on Law Enforcement and the Administration of Justice. These standards prescribed that chief public defenders should be paid at a rate comparable to the presiding judge of the trial court of general jurisdiction, and compensation for assistant public defenders in their first five years of service should be comparable to that of associates in local private law firms (NAC Chapter 13, “The Defense,” Standard 13.7 Defender to be Full Time and Adequately Compensated; and Standard

Standards developed by the American Bar Association similarly provide, “The chief defender and staff should be compensated at the rate commensurate with their experience and skill sufficient to attract career personnel and comparable to that provided for their counterparts in prosecutorial offices.”³² Commentary to the standards discusses the example of parity set by the federal system, and indicates that the purpose is to avoid a recruitment and retention disadvantage vis-à-vis prosecutorial offices. The ABA standards similarly call for parity in technology and access to legal research tools or a law library.³³

Other major national indigent defense standards have similar provisions. The standards regarding contract defender offices, the *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, adopted by NLADA in 1984 and by the ABA in 1985, provide that all “staff, employees, subcontractors and retained forensic experts must be compensated at rates commensurate...with compensation paid to persons doing similar work in public agencies in the jurisdiction.”³⁴ Salary parity is also directed for appellate defenders in *Standards for Appellate Defender Offices*.³⁵ For private attorneys appointed to represent indigent individuals, the *Standards for the Administration of Assigned Counsel Systems* direct that compensation shall be “reasonable” and “at a rate commensurate with that paid for other contracted government legal work (e.g., work contracted for by attorneys general, county legislatures, or commissions, etc.) or with prevailing rates for similar services performed by retained counsel in the jurisdiction.”³⁶ Commentary to these standards stresses that “market” compensation for privately retained defense counsel remains the preferred rate.

Guidance from the U.S. Department of Justice has reinforced these principles. Attorney General Janet Reno has often stated her belief in the principle of a level playing field. “Our criminal justice system is interdependent,” she stated at the Department’s National Symposium on Indigent Defense in February 1999. “If one leg of the system is weaker than the others, the whole system will ultimately falter.” The final report of the symposium, published by the Justice Department, discusses resource parity in the context of the ABA and NLADA national standards, and 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,

13.11 Salaries for Defender Attorneys). The commentary to both standards also discussed the importance of balance between the ability of the prosecution and the defense to recruit qualified staff.]

³² ABA Standards for Criminal Justice, Providing Defense Services, 5-4.1.

³³ Standard 5-4.3 and commentary.

³⁴ Guideline III-10. These contracting guidelines are effectuated in a *Model Contract for Public Defense Services*, promulgated by NLADA and the American University Criminal Courts Technical Assistance Project in February 2000; section VII(F) and XII provide for parity of compensation for attorneys and support staff.

³⁵ NLADA, 1980 (Personnel Standards).

³⁶ NLADA, 1989, standard 4.7.1.

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.

(Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations: Report of the National Symposium on Indigent Defense, Bureau of Justice Assistance, U.S. Department of Justice, March 2000, at 14).

The DOJ report's statements relating to comparability of staffing and workloads, and various "related resource allocations," are essential adjuncts to the concept of salary parity. If an assistant public defender receives the same total compensation as her counterpart in the district attorney's office, but is expected to do twice as much work, with half as much support—whether in terms of secretaries, paralegals, investigative services, computers, or access to legal research—the adversarial scales are still out of balance. Parity must embrace comparability of both resources and workload. Additionally, comparability of workload may vary from jurisdiction to jurisdiction, depending on factors such as prosecutorial declination or plea bargaining policies, rates of indigency among defendants, and the complexity of the law or the existence of statutory provisions requiring more defense work or discouraging negotiated dispositions, such as mandatory minimum sentences, inflexible sentencing guidelines, three-strikes laws, or sexual civil-commitment or capital cases.

The DOJ report discusses in greater detail the implementation of parity in several jurisdictions, including the states of New Mexico and Connecticut, and the federal system. An NLADA salary survey presented at the DOJ symposium indicated that many larger public defender programs do have salary parity.

But significant challenges remain. Salary parity remains the exception rather than the rule, especially among smaller programs. And salary parity is just one small part of overall parity of resources and workload, which is even more elusive.

Ironically, though the federal system has been a leader in terms of salary parity, federal policymakers in Congress and the executive branch to this day are prone to creating serious imbalances in the way federal money is allocated to assist state and local criminal justice systems.

One such problem area is student loan forgiveness. Since 1990, state and local government employees who are "essential" to the enforcement of the criminal law have been eligible for forgiveness of one important type of student financial assistance for undergraduate and graduate education: the Perkins student loan program (second in size to the Stafford loan program only). The Department of Education extended the forgiveness program to prosecutors but refused NLADA's request to include indigent defenders as well, expressing the view that defenders are not "essential" to the enforcement of the criminal law. The department's letter did not discuss the U.S. Supreme Court's holding to the contrary in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Bipartisan legislation was introduced in both houses of Congress, and a version actually passed the House of Representatives, to correct this imbalance.

Another problem area is federal support for training. In the mid-1990s, Congress spent \$26 million building the National Advocacy Center in Columbia, South Carolina, to train

federal prosecutors, and subsequently began appropriating some \$5 million annually to train local prosecutors there as well. A similar college in Reno, Nevada, for training state and local judges also receives substantial federal funding. There is no counterpart for training state and local indigent defense providers. As Attorney General Reno told the Second National Symposium on Indigent Defense in June 2000, “Public defenders need access to training resources to the same degree that federal, state, and local prosecutors have the same.”

In a third area relating to parity, new proposals are from time to time put forward by the executive branch and Congress to directly fund the hiring of state and local prosecutors in order to prosecute particular types of crimes in the news and public consciousness. For example, two proposals debated in 1999 provided for states to receive \$150 million to hire prosecutors to handle gun-related offenses and offenses by juveniles, and Congress appropriated \$100 million for fiscal year 2001 to allow states to hire “community prosecutors.” Though the amounts of proposed federal support are very substantial, the proposals never include matching funds for the constitutionally mandated provision of legal representation services in the new cases which will be filed by the new prosecutors.

Attorney General Reno told the June 2000 Indigent Defense Symposium, “We have to ensure that we provide the same level of support and oversight for indigent defense services that we provide for other agencies and functions, or our criminal justice system will not be a system and it won’t work.”

The enduring symbol of the criminal justice system is the scales of justice. They embody the adversarial balance between the awesome power of the government to forfeit a person’s liberty, property, or life, and the fundamental rights of individuals to have such penalties exacted from them only upon proof beyond a reasonable doubt in a fair proceeding, with the assistance of counsel possessed of the competence and resources to test the government’s evidence and insist upon all the trappings of due process. Giving the prosecution greater resources than the defense tilts the scales toward the government and away from individual rights. Reserving that disadvantage for the poor calls into question the system’s integrity and fairness, and ultimately its very legitimacy. The requirement of parity embodies and helps safeguard the adversarial balance.

Trends in Defense Services Standards

By

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For the last 37 years, since the Supreme Court decided *Gideon v. Wainwright*,³⁷ it has been the law in America that persons charged with serious crimes and unable to afford counsel are entitled to be represented by an attorney free of charge. Moreover, the Supreme Court has insisted in the abstract that the right to counsel means nothing less than the right to effective, meaningful assistance of counsel.³⁸ The popular understanding of meaningful assistance of counsel has been shaped by novels like Harper Lee's *To Kill a Mockingbird*, where Atticus Finch risks his livelihood and his children's security to zealously defend his client.³⁹ Reality is different.

Almost as soon as *Gideon* was decided, the United States began waging an all-out war on crime. The now familiar tactics include criminalization of behavior which was formerly simply undesirable, such as loitering, panhandling, trespassing, and drinking alcohol in public; escalated enforcement of the law through additional arrests, which simultaneously provides the police with a pretext to search offenders for drugs and weapons and to check for warrants; and an increase in the sanctions available as punishment for violation of the law. The battle plan has been successful in reducing crime, but it has not been cheap.

America is incarcerating more of its population than any other country on earth.⁴⁰ Even though serious crime finally began to decline in the late 1990s, after a dramatic rise in the two prior decades, incarceration continues to increase, more than tripling since 1980.⁴¹ Because those who are accused must be represented, the criminal defense industry has expanded along with correctional services. In many jurisdictions, indigent defense

³⁷ 372 U.S. 335 (1963).

³⁸ *McMann v. Richardson*, 397 U.S. 759 (1970); *Evitts v. Lucy*, 469 U.S. 387, 396 (1985).

³⁹ Philadelphia: J. B. Lippincott Co., 1960.

⁴⁰ "No matter what the question has been in American criminal justice over the last generation, prison has been the answer." Eric Schlosser, "The Prison Industrial Complex," *The Atlantic Monthly*, Dec. 1998, at 51.

⁴¹ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics*, Washington, D.C. (1998).

systems represent the overwhelming majority of defendants, as many as 90 percent of those arrested.⁴²

Providing effective, meaningful assistance of counsel to so many has become increasingly expensive. Naturally, the cost of defense services has been a pressing concern for governments, while the adequacy of the services has been less of a worry. As a result, public defense has starved and clients have suffered.⁴³ Although everyone arrested has a right to a lawyer, as more and more people are arrested, that guarantee means less and less. Lawyers working in underfinanced, overburdened public defender offices handle too many cases and can give only minimal attention to each client. Investigations are omitted. Social work intervention is eliminated. Legal research is minimized. Motion practice becomes the exception instead of the rule. As salaries decline and working conditions for public defenders and assigned counsel lawyers degenerate, fewer qualified attorneys agree to represent the indigent accused, and problems caused by too many arrests and not enough funding are compounded.

Although lack of resources is the primary cause of inadequate criminal defense services, there are other factors which contribute to ineffective assistance of counsel. Paramount among these is the striking absence, in most delivery systems, of quality control. Once lawyers are hired, approved for felony duty, or accepted onto an assigned counsel panel, they are often free to practice as they wish without supervision or further evaluation. Closed cases are rarely analyzed. Dispositions are not reconsidered. Malpractice is not reported. Moreover, there is little motivation for the individual attorney to independently improve the quality of practice since, in the criminal justice system, raises and promotions are not awarded for zealous representation. Gratitude is rare and often misplaced, and prestige is rarely won by those who zealously represent the accused.

Part of the explanation for the almost total lack of monitoring or evaluation can be attributed to the difficulty of defining quality criminal defense work. Part of it can be attributed to the general reluctance of lawyers to engage in evaluation.⁴⁴ Whatever the difficulty, evaluation cannot be ignored. In Los Angeles, where the pervasive police criminality exposed by the Rampart scandal⁴⁵ went undetected by counsel for the accused (in fact the majority of the framed defendants pleaded guilty), defender offices are now looking for ways to audit and improve their service delivery. Those efforts must be supported.

⁴² Robert L. Spangenberg and Marea L. Beeman, "Indigent Defense Systems in the United States," 58 *LAW AND CONTEMPORARY PROBLEMS* 31 (Winter 1995).

⁴³ See generally: Stephen B. Bright, "Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor when Life and Liberty are at Stake," 783 *ANNUAL SURVEY OF AMERICAN LAW* 836 (1999); and Richard Klein, "The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel," 13 *HASTINGS CONSTITUTIONAL LAW QUARTERLY* 625 (1986).

⁴⁴ Lawrence M. Grosberg, "Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11," 32 *VILLANOVA LAW REVIEW* 575 (1987).

⁴⁵ The Rampart scandal refers to the widespread planting of evidence and physical intimidation of Los Angeles residents by a high-profile unit within the Los Angeles Police Department. Harvey Weinstein and Jim Newton, "The Rampart Scandal Civil Rights Lawyers Form a Gathering Storm for L.A.," *Los Angeles Times*, March 1, 2000.

It is impossible to underestimate the pervasive degenerative effect of the combination of financial pressures and the absence of accountability. The lack of monitoring and evaluation adversely affects the caliber of the work, the public's appreciation of the work, the clients' trust in the services provided, and the support of local legislatures.

The deficiencies in public defense are common knowledge. In 1997 the American Bar Association's Special Committee on Criminal Justice in a Free Society recommended a moratorium on the imposition of the death penalty because "grossly unqualified and undercompensated lawyers who have nothing like the support necessary to mount an adequate defense are often appointed to represent capital clients. In case after case, decisions about who will die and who will live turn not on the nature of the offence...but rather on the nature of the legal representation the defendant receives."⁴⁶ A former chief judge of the D.C. Circuit Court of Appeals put it this way:

The battle for equal justice is being lost in the trenches of the criminal courts where the promise of *Gideon* and *Argersinger* goes unfulfilled. The casualties of those defeats are easy to identify.... The prime casualties are defendants accused of street crimes, virtually all of whom are poor, uneducated, and unemployed...represented all too often by 'walking violations of the Sixth Amendment.'⁴⁷

In every study of wrongful convictions, investigators inevitably conclude that ineffective assistance of counsel or bad lawyering has played a significant role. Of the 12 men originally sentenced to death in Illinois who have been exonerated since 1987, "four were represented at trial by an attorney who had been disbarred or suspended."⁴⁸ Twenty-six men, at one time sentenced to death, have received a new trial or a new sentencing hearing because reviewing courts determined that their trial counsel was ineffective.⁴⁹ Thirty-three defendants sentenced to death were represented at trial by an attorney who had been or was later, disbarred or suspended.⁵⁰ The Innocence Project found that 27 percent of the first 68 wrongfully convicted individuals whose convictions the Project helped to reverse had "sub-par or outright incompetent legal help."⁵¹

In addition to increased funding, another way to force change might be the creation, adoption, and implementation of standards for the administration of defender organizations. Standards identify the essential tasks, the non-negotiable characteristics of a defense organization, informing the outside community, as well as the defenders themselves, of the minimum acceptable level of operations. For example, if an organization adopts standards that require hiring an investigator for every 10 lawyers or a social work professional for every eight, that organization has committed to investigating cases and exploring alternative sentences. Standards can be used internally by an office

⁴⁶ 61 LAW AND CONTEMP. PROBS. 219 (August 1998).

⁴⁷ David Bazelon, "The Realities of *Gideon* and *Argersinger*," 69 GEORGETOWN L. J. 811 AT 838 (1976).

⁴⁸ Ken Armstrong and Steve Mills, "Inept Defenses Cloud Verdict," *Chicago Tribune*, November 15, 1999, Chicago Tribune Internet Edition: [wysiwyg://55/http://www.chicagotribune.org/item/0,1308,37842-0-37872,00.html](http://www.chicagotribune.org/item/0,1308,37842-0-37872,00.html)

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Barry Scheck, Peter Neufeld, and Jim Dwyer, *Actual Innocence* (Doubleday, 2000).

as a framework for continuing legal education or review, and externally in lobbying efforts, or in litigation to leverage the funds necessary to allow an organization to meet its standards. Standards are a useful force for change because they operate on multiple levels. They are educational, informing the public about what goes into providing quality defense services and ultimately engendering support for increased spending. They provide notice to the defense provider, outlining what is expected of a publicly funded defense office. They can be a yardstick with which to measure the performance of an office.

Because the method of providing services varies from county to county across the nation, standards for the administration of defense services must vary as well.⁵² Where a criminal justice system depends heavily upon assigned counsel, the local administrative standards must concentrate on delineating the essential qualifications for appointment (see Standard E. of the Indiana Standards or 105-3-2 of the Kansas Regulations) and on ensuring rotation of assignments (Georgia Guideline 2.4), prompt compensation of counsel fees, and fair adjudication of fee disputes. Where public defender offices exist, standards need to focus on estimating reasonable caseloads, attorney-supervisor ratios, adequate support services, and the sufficiency of continuing legal education. Where contracts exist, standards require, at a minimum, that awards not be made exclusively on the basis of cost (see Standard L. of the Indiana Standards) and may mandate inclusion of the administrative costs associated with providing legal representation in fee awards (Washington Standard 5: Administrative Expenses) or insist that contracts be awarded only to firms with prior criminal experience. No matter whether standards address assigned counsel plans, public defender offices, or contract work, their intent should be the same: to ensure that the best possible defense services are delivered to clients.

In order to have relevance and force, the defense community whose operations will be guided by the rules must be involved in drafting them. The standards must conform to the community's internal, unarticulated or express standards. They must be enforceable, so that failure to comply will result in a sanction. Finally, they must be specifically tailored to the needs of the jurisdiction and to the type of defender system upon which the locality depends.

In New York City, for example, the First Department, Appellate Division, an intermediate appeals court, which in addition to deciding appeals administers the trial and appellate courts in Manhattan and the Bronx, works together with private bar associations to monitor the provision of defense services. The court established a committee, whose members were selected by local bar groups and the court, to monitor the defense organizations and ensure that each provides quality services⁵³—at a time when the provision of defense services was becoming highly politicized in New York City.

⁵² The American Bar Association and the National Legal Aid and Defender Organization have promulgated national standards for the provision of defense services, which have been adopted by many jurisdictions. They are however, by necessity, general and motivational, providing inspiration rather than specific guidance. See: Criminal Justice Standards Committee of the American Bar Association, *Standards for Criminal Justice, Prosecution Function and Defense Function*, 3rd Ed.(1993).

⁵³ *Rules to Implement an Indigent Defense Organization Oversight Committee*, NEW YORK RULES OF COURT, PART 613, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

Infuriated by a strike by staff attorneys, the mayor decided to award contracts for the delivery of defense services to new organizations which would compete with The Legal Aid Society (LAS), the city's traditional primary defender.

The Indigent Defense Organization Oversight Committee (IDOOC) understood that it would be comparing LAS, a venerable law office whose primarily young, idealistic staff represents tens of thousands of individuals each year, to brand new defender organizations backed by the mayor's office. IDOOC needed an evaluation process which would guarantee review on the merits, insist on scrutinizing the work (rather than the leadership), and ensure that information gleaned would be more than simply anecdotal. IDOOC adapted the American Bar Association accreditation process, which measures schools against a set of standards generated by the legal education community. The process requires the organization being evaluated to draft a self-study explaining how it complies with the standards. The monitoring body then conducts site visits to confirm the information in the self-study and drafts a report.

First, IDOOC drafted standards for organized providers of criminal defense services at the trial and appellate level. The standards were designed to measure the support provided by the various organizations to staff. Since detailed standards are easier to use in monitoring than vague pronouncements that are open to multiple interpretations, IDOOC tried to draft detailed, explicit standards. The training standard, for example, includes sections discussing continuing legal education and trial advocacy training, as well as new attorney training. The standards further require a 1:10 supervisor to attorney ratio, periodic performance evaluations of the staff by the supervisors, advertisement of opportunities for promotion, the existence of support services, and implementation of case management and quality control systems. The most important IDOOC standard is the limit on attorney caseloads, since no attorney can provide quality services to too many clients. Portions of these standards are included in this volume of administration standards.

Finally, to provide added incentive to meet the standards, IDOOC decided that failure to meet any one standard would create a rebuttable presumption that the organization as a whole was not providing quality services. The burden would be on the organization to explain how it was providing quality representation despite the failure. "In such cases the defense organization must demonstrate that it has adopted equivalent practices and procedures suitable to its particular structure and method of operation to ensure adherence to each of the Performance Standards."⁵⁴

The LAS as well as the new providers read and commented on the draft. After adjustments were made, the Appellate Division promulgated the standards. Then the monitoring process began. Volunteer lawyers spent many hours in the various offices asking attorneys, supervisors, and staff questions designed to elicit information about the quality of practice. Judges were interviewed as well. The results were surprising. Applying the standards to the operation of the defense offices revealed problems in the management and delivery of services and alerted the courts and the public to dangerous

⁵⁴ Indigent Defense Organization Oversight Committee, *General Requirements for All Organizations Providing Defense Services to Indigent Defendants*. 1996. Supreme Court of New York Appellate Division, First Department.

trends in the operation of the local criminal justice system within which the defender organizations function.

When the contracts for the new defenders were first put out to bid, observers feared that the city would fund the new contractors stingily, forcing the sacrifice of quality for efficiency, while undercutting the work of LAS. Those fears were misplaced. The new organizations did undercut the older established provider, but in an unexpected way by providing an excellent product. The city funded the new providers generously, permitting slightly higher salaries. Some senior experienced staff attorneys deserted LAS to join the upstarts, just as LAS was forced by punishing budget cuts to eliminate supervisory positions. At the same time, the new contracts were very different from LAS's traditional agreement with the city. The new providers were expected only to handle a fixed number of cases for a fixed price. LAS, on the other hand, as the default provider, was responsible for all other arrests, no matter how many, for a fixed price. Since LAS is not in a position to accurately predict the number of future arrests, its staffing allocations were constantly in a state of crisis, rushing to catch up to changing circumstances. Meanwhile, the new defense offices could accurately predict their workload and ensure sufficient staffing to meet client needs. Finally, since the new providers were forbidden to hire recent law graduates, they were inadvertently protected from the expense of training new lawyers, which was shouldered entirely by LAS. These observations illustrated that the new providers were actually in a position to provide better services than LAS.

The information revealed by the monitoring process has forced LAS to take a hard look at some of its bedrock assumptions and has pushed observers to think more expansively about providing criminal defense services. Presumably, if problems in the delivery of services continue to grow and changes do not result, the Appellate Division could act to prevent the funding sources from awarding contracts to organizations which fail to meet the standards. But even beyond the potential for enforcement, the report and the standards upon which the report is based surely focus the public, the funding sources, and the defenders on the real issues: what defenders must do to serve their clients and the public and how a defender office can help its staff provide the best possible services.

The recent spate of highly publicized exonerations of wrongly convicted individuals illustrates the importance of an adequate defense and reveals how often our society fails to provide it. Criminal defense services must be improved. Financial resources must be committed to representation of the indigent. In some areas, litigation may be required to force systemic change.⁵⁵ Everywhere, public education and outreach are essential to teach the community about the value of defense services and to build support for increased funding. Task forces and collaborative efforts can bring the prosecution, police, corrections, and court personnel together with the defense to collectively improve the quality of criminal justice. Information about the state of indigent criminal defense

⁵⁵ The Connecticut Civil Liberties Union successfully sued the State of Connecticut on behalf of indigent defendants. The lawsuit was settled, the state agreeing to raise the rates of assigned counsel, to substantially (by 30 percent) increase the funding and staff positions for the regular public defender system, and to adopt training requirements, oversight systems, and specific performance standards for attorneys representing poor people in criminal court. September 1999 letter from the CCLU Legal Director on file with the author.

should be routinely gathered and shared. Successful ideas must be located and reproduced. Experiments such as the ones in progress in New York City, where new contract defender offices have fashioned a team approach to representation, need to be studied and, if successful, replicated.⁵⁶ Defense offices must engage in a continual process of reinvention and self-evaluation. Standards, including the examples collected in this compendium, are one practical tool in that effort.

⁵⁶ David E. Rovella, "The best defense...Rebuilding clients' lives to keep them from coming back," THE NATIONAL LAW JOURNAL, January 31, 2000, at 1.

Trends in Juvenile Justice Standards

By

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The inclusion of juvenile justice standards in the *Compendium of Standards for Indigent Defense Systems* reflects the growing importance of the field of juvenile justice. Given the increased criminalization of juvenile sentencing laws, the growing use of juvenile records in criminal court proceedings, and the expansion of the scope of waiver and transfer hearings, juvenile justice representation is no longer a backwater in the larger justice system.

However, *Compendium* Volume V, “Standards for Juvenile Justice Defense,” shows that relatively little attention has been paid to the development of standards for this growing field. The lead in developing juvenile justice standards has primarily been taken by the American Bar Association and a few state groups. The result is that in many jurisdictions, the only applicable standards are those for criminal adult defense services. This trend overlooks some very significant differences between the two types of defense work.

The principles underlying the ABA Juvenile Justice Standards can serve as useful guideposts for developing additional, local standards for juvenile defense services. The Juvenile Justice Standards Project was initiated in 1971 at the Institute of Judicial Administration (IJA) at the New York University School of Law. The IJA was the secretariat for the ABA’s effort to develop its *Standards for Criminal Justice*. When IJA staff members attempted to annotate the differences between the ABA criminal standards and prevailing juvenile justice law, they recognized the need for dedicated juvenile justice standards. In 1973, the IJA and ABA created the IJA/ABA Joint Commission on Juvenile Justice Standards. The commission adopted the following statements of purpose:

The juvenile justice system stands in dire need of thorough dissection preparatory to the promulgation of a comprehensive set of standards. Standards generally are adopted for the following purposes:

1. *To achieve uniformity* in the law for greater fairness, efficiency, and predictability in the consequences of the same conduct, action, or behavior, regardless of jurisdiction;

2. *To develop linkages* within the system by: defining the roles of affected individuals and agencies; eliminating gaps and duplication in services; and coordinating the planning, operation, and monitoring of programs;
3. *To reexamine accepted concepts and premises* underlying the current laws in the light of objective findings derived from recent studies and other developments. Basic principles should be reaffirmed, revised, or replaced, as a result of taking a fresh look at the system;
4. *To codify* the relevant case law, administrative decisions, selected statutory innovations, and fundamental principles approved in the standards in a form readily translatable into a model act or acts.⁵⁷

About 300 interdisciplinary professionals worked over 10 years to produce the *IJA-ABA Juvenile Justice Standards'* 23 volumes. The ABA House of Delegates approved 17 volumes in 1979 and three more in 1980. The remaining three volumes, "Standards Relating to Schools and Education," "Standards Relating to Noncriminal Misbehavior," and "Standards Relating to Abuse and Neglect" were never adopted by the ABA House of Delegates. The standards commission also created commentary to accompany the black-letter standards. While the commentary is absent from the juvenile justice volume of this *Compendium*, it is available on Westlaw in the ABA-JJS library and from the Juvenile Justice Clearinghouse of the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention at (800) 638-8736.

Although their volumes are varied, the *Juvenile Justice Standards* all observe these general principles:

1. Sanctions should be proportionate to the seriousness of the offense.
2. Sentences or dispositions should be fixed or determinate as declared by the court after a hearing, not indeterminate as determined by correctional authorities based on subsequent behavior or administrative convenience.
3. The least restrictive alternative to accomplish the purpose of the intervention should be the choice of decision makers at every stage, with written reasons for finding less drastic remedies inadequate required of every official decision maker.
4. Noncriminal misbehavior (status offenses or conduct that would not be a crime if committed by an adult) should be removed from juvenile court jurisdiction.
5. Limitations should be imposed on detention, treatment, or other intervention prior to adjudication and disposition.
6. Visibility and accountability of decision making should replace closed proceedings and unrestrained official discretion.

⁵⁷ Barbara D. Flicker, *STANDARDS FOR JUVENILE JUSTICE: A SUMMARY AND ANALYSIS* 3 (2d ed. 1982).

7. Juveniles should have the right to decide on actions affecting their lives and freedom, unless they are found incapable of making reasoned decisions.
8. Parental roles in juvenile proceedings should be redefined with particular attention to possible conflicts between the interests of parent and child.
9. There should be a right to counsel for all affected interests at all crucial stages of proceedings and an unwaivable right to counsel for juveniles.
10. Strict criteria should be established for waiver of juvenile court jurisdiction to regulate the transfer of juveniles to adult criminal court.⁵⁸

These principles are still valid today. As recently as 1996, the Honorable Patricia M. Wald, formerly a judge on the U.S. Court of the Appeals for the District of Columbia Circuit, currently a judge on the International Criminal Tribunal for former Yugoslavia, and a member of the original IJA/ABA Joint Commission on Juvenile Justice Standards, concluded that “the IJA-ABA standards still represent the most comprehensive, balanced vision of a just and potentially effective system for dealing with youthful offenders that exists.”⁵⁹

⁵⁸ IJA/ABA, *JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH*, xviii-xx (Robert E. Shepherd, Jr., ed. 1996).

⁵⁹ *Id.* at xii.

List of Standards and Table of Key Elements

Standards Included

National

American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function*, 1993

American Bar Association, *Standards for Criminal Justice: Providing Defense Services*, 1992

National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on the Courts*, 1973

National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act*, 1970

National Legal Aid and Defender Association, *Defender Training and Development Standards*, 1997

National Legal Aid and Defender Association, *Guidelines for Legal Defense Systems in the United States*, 1976

National Legal Aid and Defender Association, *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, 1984

National Legal Aid and Defender Association, *Standards for the Administration of Assigned Counsel Systems*, 1989

State and Local

Connecticut Public Defender Services Commission, *Guidelines on Indigent Defense: Guidelines Relating to the Representation of Indigent Defendants Accused of a Criminal Offense*, 1997

Georgia Indigent Defense Council, *Guidelines for the Operation of Local Indigent Defense Programs*, 1999

Indiana Public Defender Commission, *Standards for Indigent Defense Services in Non-Capital Cases*, 1995

Kansas Board of Indigents' Defense Services, *Permanent Administrative Regulations*, 1999

Minnesota Office of the State Public Defender, *Caseload Standards for District Public Defenders in Minnesota*, 1991

Nebraska Commission on Public Advocacy, *Standards for Indigent Defense Services in Capital and Non-Capital Cases*, 1997

New York City Indigent Defense Organization Oversight Committee, *General Requirements for All Organized Providers of Defense Services to Indigent Defendants*, 1997

North Dakota Legal Counsel for Indigents Commission, *Indigent Defense Guidelines and Procedures*, 1998

Oregon State Bar, *Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases*, 1996

Washington Defender Association, *Standards for Public Defense Services*, 1989

Key Elements

Category	Standard	National Standards						State Standards									
		ABA Standards	NLADA Legal Defense Systems	NLADA Assigned Counsel Systems	NLADA Contracting	Model Act	NAC	CT	GA	IN	KS	MN	NE	NY	ND	OR	WA
A. Defense Services Administration and Standards																	
	Purpose of standards	✓		✓				✓									
	Role of counsel							✓								✓	✓
B. Scope of Representation																	
	Case selection	✓	✓		✓	✓	✓		✓								
	Duration of representation		✓		✓												
	Early intervention	✓		✓	✓	✓	✓		✓						✓		
	Appearance at all stages	✓		✓		✓	✓										
	Termination or removal of attorney	✓															✓
	Procedures to identify conflict of interest				✓			✓			✓			✓	✓		

Category	Standard	National Standards						State Standards									
		ABA Standards	NLADA Legal Defense Systems	NLADA Assigned Counsel Systems	NLADA Contracting	Model Act	NAC	CT	GA	IN	KS	MN	NE	NY	ND	OR	WA
C. Financial Eligibility																	
	Financial criteria	✓	✓	✓		✓	✓		✓	✓	✓		✓		✓		
	Eligibility	✓					✓		✓						✓		
	Contribution, reimbursement requirements	✓	✓	✓		✓	✓		✓	✓					✓		
	Publicly provided support services for non-indigent clients	✓								✓							
D. Right to Counsel																	
	Preassignment communication	✓		✓		✓	✓		✓								
	Waiver of right to counsel	✓		✓		✓											
	Facilitating attorney-client communication	✓															

Category	Standard	National Standards						State Standards									
		ABA Standards	NLADA Legal Defense Systems	NLADA Assigned Counsel Systems	NLADA Contracting	Model Act	NAC	CT	GA	IN	KS	MN	NE	NY	ND	OR	WA
E. Defense Services Plan																	
	System/plan required	✓		✓					✓	✓							✓
	Plan protects independence	✓	✓	✓	✓	✓	✓		✓	✓				✓			
	Governing board	✓	✓	✓	✓	✓			✓	✓				✓			
	Facilities		✓			✓	✓										
	Support services	✓	✓	✓	✓	✓	✓		✓	✓	✓			✓			✓
	Training	✓	✓	✓		✓	✓			✓				✓	✓		✓
	Attorney supervision		✓	✓	✓				✓					✓			✓
	Recruitment and hiring		✓	✓										✓			
	Case overload and case mgmt systems		✓											✓			
	Related standards																✓
F. Mixed Systems																	
	Statewide system		✓			✓	✓										
	Case allocation		✓														
	Related provisions		✓														

Category	Standard	National Standards						State Standards									
		ABA Standards	NLADA Legal Defense Systems	NLADA Assigned Counsel Systems	NLADA Contracting	Model Act	NAC	CT	GA	IN	KS	MN	NE	NY	ND	OR	WA
G. Public Defender Offices																	
	Chief public defender	✓	✓	✓	✓	✓	✓		✓		✓						
	Prohibition on private practice	✓	✓	✓	✓		✓										
	Compensation		✓	✓	✓	✓	✓			✓				✓			✓
	Responsibility for administration of criminal justice	✓				✓	✓										
H. Assigned Counsel Systems																	
	Integrated defense system plan	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓				
	Plan administrator	✓	✓	✓	✓		✓		✓								
	Attorney panel qualifications	✓	✓	✓	✓				✓	✓							
	Rotation of assignments	✓	✓		✓				✓		✓						
	Attorney compensation	✓	✓	✓	✓	✓			✓	✓	✓				✓		✓
	Attorney expenses	✓		✓	✓					✓	✓				✓		
	Related provisions			✓													

Category	Standard	National Standards						State Standards									
		ABA Standards	NLADA Legal Defense Systems	NLADA Assigned Counsel Systems	NLADA Contracting	Model Act	NAC	CT	GA	IN	KS	MN	NE	NY	ND	OR	WA
I. Contract Defense																	
	Authorization of contract services	✓	✓	✓	✓	✓			✓	✓	✓		✓				
	Compensation			✓	✓					✓					✓		✓
	Contract termination and minimum term			✓	✓				✓								✓
	Contracting procedures	✓		✓						✓	✓						
	Contract provisions	✓		✓	✓					✓				✓	✓		✓
	Prohibition on substitution of attorneys			✓						✓							✓
	Related provisions			✓					✓								✓

A. Defense Services Administration and Standards

The standards in this section address the following topics:

1. Purpose of standards
2. Role of counsel

See also the Federal Office Management Assessment Guide (1995) , which is used by the Defender Service Division of the Administrative Office of the United States Courts to evaluate federal public defender offices.

1. Purpose of Standards

Commentary. Few sets of standards explicitly state the purposes they serve; especially lacking is any definition of the intended audience. The Connecticut guidelines included here specifically state that the judiciary should not use the guidelines either in disciplining attorneys or in determining adequacy of representation in challenges to a conviction. By contrast, the ABA Defense Function Standards countenance some use by the judiciary. See also, Gwinnett Judicial Circuit (Georgia) Internal Operating Procedure 98-5, Part 1.1, “The Function of the Guidelines.”

ABA Standards for Criminal Justice: Providing Defense Services

Standard 4-1.1. The Function of the Standards

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

Standard 5-1.1. Objective

The objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel pursuant to this chapter. The bar should educate the public to the importance of this objective.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 1 Scope

These Standards apply whenever private counsel, rather than defender offices or contracting entities, are being assigned to provide representation for persons who are financially unable to retain counsel (as defined in Standard 2.3) and who are entitled to representation.

Standard 2.1 Provision of Quality Representation

- a. Provision of quality representation to all persons eligible under Standard 2.3 is the overarching purpose of these Standards, and shall inform the creation and maintenance of all Assigned Counsel Programs.
- b. Assigned counsel shall provide to their clients quality representation equivalent to that provided by a skilled, knowledgeable and conscientious criminal defense lawyer to paying clients.
- c. Assigned counsel shall provide quality representation in all relevant legal proceedings involving their clients.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense: Guidelines Relating to the Representation of Indigent Defendants Accused of a Criminal Offense

Purpose:

These guidelines are intended to be used as a guide to the representation of clients, and the obligations due a client are not limited by the guidelines articulated here. However, these guidelines are not intended to be used as criteria for the judicial evaluation of performance or alleged misconduct of defense counsel to determine the validity of a conviction. These guidelines are intended to encourage public defenders and special public defenders contracted by the Division of Public Defender Services to perform to a high standard of representation and to promote professionalism in the representation of clients.

2. Role of Counsel

Commentary. Some sets of standards begin with a general statement defining the role of defense counsel. Included here are standards from Connecticut, Oregon, and Washington. See also, Missouri State Public Defender, Guidelines for Representation (1992), Guideline 1.1, “Role of the Public Defender.”

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense: Guidelines Relating to the Representation of Indigent Defendants Accused of a Criminal Offense

Guideline 1.1. Role of Defense Counsel

- (a) All counsel should abide by the policies adopted by the Connecticut Public Defender Services Commission and the chief Public Defender in regard to the representation of a client.
- (b) Counsel should zealously represent and advocate for each client and render effective assistance of counsel.
- (c) Counsel should adhere to the Rules of Professional Conduct and other guidelines of professional conduct stated in statutes, rules, court decisions, codes or canons.
- (d) Counsel should act with reasonable diligence and promptness in representing a client.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Principle 1

The paramount obligation of counsel is to provide quality representation and diligent advocacy for the client at all stages of the representation.

Principle 2

To provide quality representation and diligent advocacy, counsel must preserve, protect and promote the client’s rights and interests.

Washington Defender Association, Standards for Public Defense Services

Standard Two. Duties and Responsibilities of Counsel

...Counsel’s primary and most fundamental responsibility is to promote and protect the best interests of the client.

B. Scope of Representation

Although a defense provider is generally responsible for representing criminal defendants, it is not always clear when that responsibility begins or for how long it continues. Hence, issues concerning attorney appearance include two separate principles:

- The attorney must appear in all cases where incarceration is threatened.
- The duration of the attorney's representation for trial and sentencing extends to all case stages.

This section includes standards that address the following topics:

1. Case selection
2. Duration of representation
3. Early interaction
4. Appearance at all stages
5. Termination or removal of attorney
6. Conflict of interest procedures

1. Case Selection

Commentary. U.S. Supreme Court decisions hold that defendants who cannot afford counsel have a right to counsel at government expense in criminal proceedings where significant liberty issues are at stake. See *Gideon v. Wainright* and *Agersinger v. Hamlin*. The ABA, NLADA, and NAC standards go further and require publicly funded defense counsel in all criminal matters even where not constitutionally required. The Model Public Defender Act does not go so far. At the state level, defendant eligibility for defense services is largely controlled by statute and in some instances by state Supreme Court holdings or administrative rules. Only two states make reference to case type eligibility. The Georgia guidelines below follow the lead of the national standards.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-5.1. Criminal cases

Counsel should be provided in all proceedings for offenses punishable by death or incarceration, regardless of their denomination as felonies, misdemeanors, or otherwise. An offense is also deemed to be punishable by incarceration if the fact of conviction may be established in a subsequent proceeding thereby subjecting the defendant to incarceration.

Standard 5-5.2. Collateral proceedings

Counsel should be provided in all proceedings arising from or connected with the initiation of a criminal action against the accused, including but not limited to extradition, mental competency, postconviction relief, and probation and parole revocation, regardless of the designation of the tribunal in which they occur or classification of the proceedings as civil in nature.

Standard 5-5.4. Impact Litigation

- (a) The legal representation plan should permit pursuit of litigation which affects:
 - (i) substantial numbers of similarly situated clients of the program, or
 - (ii) fundamental rights which cannot otherwise be effectively protected.
- (b) Any such litigation should be undertaken only when it is in the best interests of the affected clients.

NLADA Guidelines for Legal Defense Systems in the United States

1.2 Time of Entry

Effective representation should be available for every eligible person as soon as:

- (a) The person is arrested or detained, or
- (b) The person reasonably believes that a process will commence which might result in a loss of liberty or the imposition of a legal disability of a criminal or punitive nature, whichever occurs earliest.

1.3 Procedures for Providing Early Representation: Program Responsibilities

In order to ensure early representation for all eligible persons, the defender office or assigned counsel program should:

- (a) Respond to all inquiries made by, or on behalf of, any eligible person whether or not that individual is in the custody of law enforcement officials;
- (b) Establish the capability to provide emergency representation on a 24 -hour basis;
- (c) Implement systematic procedures, including daily checks of detention facilities, to ensure that prompt representation is available to all persons eligible for services ;
- (d) Provide adequate facilities for interviewing prospective clients who have not been arrested or who are free on pre-trial release;
- (e) Prepare, distribute and make available by posting in a conspicuous place in all police stations, courthouses and detention facilities a brochure that describes in simple, cogent language or languages the rights of any person who may require the services of the defender or assigned counsel and the nature and availability of such services, including the telephone number and address of the local defender office or assigned counsel program; and
- (f) Publicize its services in the media.

Upon initial contact with a prospective client, the defender or assigned counsel should offer specific advice as to all relevant constitutional or statutory rights, elicit matters of defense, and direct investigators to commence fact investigations, collect information relative to pretrial release, and make a preliminary determination of eligibility for publicly provided defense services.

Where the defender or assigned counsel interviews a prospective client and it is determined that said person is ineligible for publicly provided representation, the attorney should decline the case and, in accordance with appropriate procedure, assist the person in obtaining private counsel. However, should immediate service be necessary to protect that person's interest, such service should be rendered until the person has had the opportunity to retain private counsel.

Guideline 4.5. Prisoner Legal Assistance Programs

Every defender system should make an assessment of the availability of postconviction representation of the criminally confined in its jurisdiction and, if indicated, establish a separate division to deliver that representation in a comprehensive fashion.

The defender system should seek to utilize and incorporate existing community resources including, but not limited to, law students, paraprofessionals, jailhouse lawyers and

volunteers to assist in delivering the services. These individuals, however, should be carefully selected, properly trained and supervised, and their duties precisely defined.

Since the legal claims of prisoners may require of defender staff attorneys many skills and/or substantive law knowledge not necessarily possessed by criminal law practitioners, this fact should be reflected in the program's hiring policies, training programs, law library content and internal office structure.

In the event that the defender system opts, due to lack of available resources, lack of expertise, or for others reasons to limit its inmate representation to certain specified types of cases, the Defender Director should identify and coordinate with alternative prison legal services programs and initiate an effective referral system for inmate requests.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-18 Standards of Recommendation

...

The contract shall require that the Contractor provide defense services to all clients in a professional, skilled manner consistent with minimum standards set forth by the American Bar Association, any applicable state bar association standards, the canons of ethics for attorneys in the state of the contract, and case law and applicable court rules defining the duties of counsel and the rights of defendants in criminal cases. The contract shall provide that a counsel under contract shall be available to eligible defendants at their request, or the request of someone acting on their behalf, beginning at questioning, arrest, formal charging, or indictment. The Contracting Authority or the Contractor, as appropriate, shall ensure that attorneys provided by the contract shall be accessible to defendants before formal court appointment.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 1. Definitions

In this Act, the term:

...

(4) "serious crime" includes

- (i) a felony;
- (ii) a misdemeanor or offense any penalty for which involves the possibility of confinement for more than 6 months or a fine of more than \$500; and
- (iii) an act that, but for the age of the person involved, would be a serious crime.

***National Advisory Commission on Criminal Justice Standards and Goals,
Report of the Task Force on the Courts***

Standard 13.1 Availability of Publicly Financed Representation in Criminal Cases

Public representation should be made available...in all criminal cases....

***Georgia Indigent Defense Council, Guidelines for the Operation of Local
Indigent Defense Programs***

Guideline 1.1 Nature of Cases and Proceedings for Which Counsel Should Be Provided

Counsel shall be provided to all persons eligible as herein defined whenever such a person is accused of a felony by indictment, warrant or warrantless arrest or a misdemeanor, other than a traffic offense or violation of a municipal ordinance, for which such a person could be imprisoned under the State law of Georgia.

Guideline 1.2 Time of Entry

Counsel shall be appointed for every eligible person in custody within 72 hours of arrest or detention. Counsel shall make contact with the person promptly after actual notice of appointment.

A person released from custody within 72 hours who has not been appointed counsel shall be notified at least ten (10) days prior to the next critical stage of the proceedings against him/her of the right to receive court-appointed counsel and the procedure to be followed to have eligibility determined and counsel appointed.

Guideline 1.3 Appointment of Counsel

The Administrator of the indigent defense program or designee shall within 72 hours of detention:

- (a) Appoint counsel for those who are indigent and without counsel ;
- (b) Clearly advise detained persons of their right to have counsel and that if they cannot afford a lawyer, one will be appointed to represent them;
- (c) Allow or assist a person claiming to be indigent and without counsel to immediately complete an Application for Appointment of Attorney and Certificate of Financial Resources for a determination of indigency or not.

2. Duration of Representation

Commentary. Two NLADA standards require vertical representation of the client. At the same time, these standards also address one important implementation of vertical representation: when representation ends. The Guidelines for Legal Defense Systems call for vertical representation in each case through postconviction. This principle may seem to contradict the NLADA standards relating to appellate services, which separate responsibility for trial and appellate representation. The NLADA contracting guidelines provide that once an attorney is assigned to a case, he or she shall complete the representation in that case either through trial or through the appellate process.

NLADA Guidelines for Legal Defense Systems in the United States

5.11 Continuity of Representation

Defender offices should provide for continuous and uninterrupted representation of eligible clients from initial appearance through sentencing up to, but not including, the appellate and postconviction stages by the same individual attorney. Defender offices should urge changes in court structure and administration to reduce fragmentation and to facilitate continuous representation.

If necessary, the procedures for early representation, including initial contact, should permit a limited exception to continuous representation. However, the defender office should implement procedures for early case assignment and for informing the client of the name of the attorney who will represent him after the initial period covered by the exception.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-12 Duration of Representation

The contract shall specify that the Contractor has the responsibility to complete any and all cases once representation is commenced under terms of the contract. Representation commenced by the Contractor in trial court shall be continued through all trial court proceedings if provided by the contract; representation commenced by or taken to an appeal court by the Contractor shall be continued until the appeals process is terminated by an act of the appeals court which is accepted as final on the merits by defense counsel and his or her client.

Nothing in this Guideline shall prohibit a Contractor or attorney from withdrawing from a case in which a court has recognized a conflict of interest for the attorney or in which defendant is found to be ineligible for services as defined in Guideline III-3.

3. Early Intervention

Commentary. Effective representation requires early entry into the case. Almost all the national standards advocate in general terms early entry by defense counsel. However, only two state standards specify when counsel is appointed. Neither of these latter standards provides for pre-arrest/custody representation.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-6.1. Initial provision of counsel

Upon request, counsel should be provided to persons who have not been charged or taken into custody but who are in need of legal representation arising from criminal proceedings. Counsel should be provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest. In capital cases, two qualified trial attorneys should be assigned to represent the defendant. The authorities should promptly notify the defender, the contractor for services, or the official responsible for assigning counsel whenever the person in custody requests counsel or is without counsel.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.1. Availability of Publicly Financed Representation in Criminal Cases

¶1 Public representation should be made available to eligible defendants (as defined in Standard 13.2) in all criminal cases at their request, or the request of someone acting for them, beginning at the time the individual either is arrested or is requested to participate in an investigation that has focused upon him as a likely suspect.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 2. Right to Representation, Services, and Facilities

...

- (b) A needy person who is entitled to be represented by an attorney under subsection (a) is entitled:
 - (1) to be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney and including revocation of probation or parole;

Section 4. Determination of Financial Need

- (a) The determination whether a person covered by section 2 is a needy person shall be deferred until his first appearance in court or in a suit for payment or reimbursement under section 9, whichever occurs earlier. Thereafter, the court shall determine, with respect to each proceeding, whether he is a needy person.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-18. Standards of Recommendation

...The contract shall provide that counsel under contract shall be available to eligible defendants at their request, or the request of someone acting on their behalf, beginning at questioning, arrest, formal charging, or indictment. The Contracting Authority or the Contractor, as appropriate, shall ensure that attorneys provided by the contract shall be accessible to defendants before formal court appointment.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 2.5 Early Representation

- a. It is the responsibility of the Assigned Counsel Program, along with other components of the criminal justice system, to ensure that counsel is provided to the accused at the earliest possible stage in the proceedings.
- b. Upon request, counsel shall be appointed for persons who have not been taken into custody and who require representation for criminal proceedings.
- c. Assigned counsel shall contact their new clients as soon as possible after appointment.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 1.2 Time of Entry

Counsel shall be appointed for every eligible person in custody within 72 hours of arrest or detention. Counsel shall make contact with the person promptly after actual notice of appointment.

A person released from custody within 72 hours who has not been appointed counsel shall be notified at least ten (10) days prior to the next critical stage of the proceedings against him/her of the right to receive court-appointed counsel and the procedure to be followed to have eligibility determined and counsel appointed.

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

7. Interview Schedule:

For client defendants who are in custody, the FIRM shall provide initial interviews with clients within 24 hours of the time when appointments are made on normal working days (Monday through Friday), or by the next working day if the appointment is made on a weekend or holiday.

For client defendants who are not in custody, the FIRM shall provide initial interview with clients within 72 hours of the time when appointments are made.

An initial contact should be made whenever possible, prior to release of defendant from custody.

4. Appearance at All Stages

Commentary. Early representation, appearance at all stages, and duration of representation are different facets of the principle to provide defense services where and when needed. This can include even postconviction proceedings. National standards encourage defense service providers to make counsel available at every stage of the case.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-6.2. Duration of representation

Counsel should be provided at every stage of the proceedings, including sentencing appeal, certiorari and postconviction review.... Counsel initially provided should continue to represent the defendant throughout the trial court proceedings and should preserve the defendant's right to appeal, if necessary.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 2.6 Duration and Continuity of Representation

- a. The duration of representation by counsel assigned under these Standards shall be until all appropriate avenues of relief, direct and collateral, are exhausted or until counsel is replaced by subsequent or substitute counsel.
- b. There shall be continuity of representation by assigned counsel at the trial stage. There shall be continuity of representation by assigned counsel on appeal, which shall be provided by different counsel than at the trial stage, except when the best interests of the clients dictate otherwise.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.1. Availability of Publicly Financed Representation in Criminal Cases

...The representation should continue during trial court proceedings and through the exhaustion of all avenues of relief from conviction.

Standard 13.4. Public Representation of Convicted Offenders

Counsel should be available at the penitentiary to advise any inmate desiring to appeal or collaterally attack his conviction. An attorney also should be provided to represent: an indigent inmate of any detention facility at any proceeding affecting his detention or early

release; an indigent parolee at any parole revocation hearing; and an indigent probationer at any proceeding affecting his probationary status.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 2. Right to Representation, Services, and Facilities

- (a) A needy person who is being detained by a law enforcement officer without charge or judicial process, or who is charged with having committed or is being detained under a conviction of a serious crime, is entitled:
 - (1) to be represented by an attorney to the same extent as a person having his own counsel;
 - ...
- (b) A needy person who is entitled to be represented by an attorney under subsection (a) is entitled:
 - (1) to be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney and including revocation of probation or parole;
 - (2) to be represented in any appeal; and
 - (3) to be represented in any other postconviction proceeding that the attorney or the needy person considers appropriate, unless the court in which the proceeding is brought determines that it is wholly frivolous.

Section 17. Representation in State and Federal Courts

This Act applies only to representation in or with respect to the courts of this state. It does not prohibit the Defender General, a deputy defender general, or other public defender from representing a needy person in a Federal court of the United States, if:

- (1) the matter arises out of or is related to an action pending or recently pending in a court of criminal jurisdiction of the state; or
- (2) representation is under a plan of the United States District Court as required by the Criminal Justice Act of 1964 (18 U.S.C. 3006A) and is approved by the legislature.

5. Termination or Removal of Attorney

Commentary. Once established, the attorney–client relationship should continue until either of the two parties discontinues it. Only for good cause can a third party intervene to end the relationship. Among standards, only the ABA Defense Services Standards and the Washington standards include these principles.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-6.3. Removal

Representation of an accused establishes an inviolable attorney–client relationship. Removal of counsel from representation of an accused, therefore, should not occur over the objection of the attorney and the client.

Washington Defender Association, Standards for Public Defense Services

Standard Sixteen. Cause for Termination or Removal of Attorney

Contracts for defense services shall include the grounds for termination of the contract by the parties. Termination of an attorney’s contract should only be for cause. Good cause shall include the failure of the attorney to render adequate representation to clients; the willful disregard of the rights and best interests of the client; and the willful disregard of the standards herein addressed.

The representation in an individual case establishes an inviolable attorney–client relationship. Removal of counsel from representation therefore normally should not occur over the objection of the attorney and the client.

6. Conflict of Interest Procedures

Commentary. Conflicts between an attorney's duty to represent a client and an attorney's personal interests or the interests of another client are not uncommon. Such conflicts are, perhaps, the most frequent cause of termination of the attorney–client relationship before case completion. Thus, procedures are needed to identify as early as possible the possibility of conflicts that might later require withdrawal. See, generally, the several Florida court rules pertaining to appointment of special public defenders in conflict cases.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-13 Conflicts of Interest

The contract should avoid creating conflicts of interest between Contractor or individual defense attorney and clients. Specifically:

- (a) expenses for investigations, expert witnesses, transcripts and other necessary services for the defense should not decrease the Contractor's income or compensation to attorneys or other personnel; and
- (b) contracts should not, by their provisions or because of low fees or compensation to attorneys, induce an attorney to waive a client's rights for reasons not related to the client's best interest; and
- (c) contracts should not financially penalize the Contractor or individual attorneys for withdrawing from a case which poses a conflict of interest to the attorney.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense: Guidelines Relating to the Representation of Indigent Defendants Accused of a Criminal Offense

Guideline 4.1. Conflicts

- (a) Counsel should adhere to the Rules of Professional Conduct regarding conflicts of interest.
- (b) Counsel should be cognizant of the existence of any potential and actual conflicts of interest which would impair counsel's ability to represent a client, such as if the representation of one client's interests are materially adverse to those of a current or former client.
- (c) Except for preliminary matters such as arraignment or an initial hearing, counsel should not represent a client when a conflict of interest exists between co-defendants

or multiple defendants such that the representation of one client *will be directly adverse* to the other client.

- (d) Counsel should not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another current or former client or a third person, or by the lawyer's own interests, unless:
 - (i) The lawyer reasonably believes the representation will not be adversely affected; and
 - (ii) The client consents after consultation, which consent should be documented by counsel in counsel's file. When the representation of multiple clients in a single matter is undertaken, the consultation should include explanation of the implications of the common representation and the advantages and risks involved.
- (e) Counsel who has formerly represented a client should not thereafter use information relating to the former representation to the disadvantage of a former client unless the information has become generally known or the ethical obligation of confidentiality otherwise does not apply.
- (f) Counsel should not withdraw solely on the basis of a personality conflict with the client or a difference of opinion as to how to proceed in the case, unless required by the Rules of Professional Conduct.
- (g) The filing or existence of a habeas corpus petition or grievance against counsel in regard to his/her quality of representation shall not create a conflict of interest per se. Withdrawal by counsel from the representation of a client under such circumstances should occur if ordered by the court upon motion by the client or if counsel is of the opinion that the filing or existence of the habeas corpus petition or grievance will interfere with counsel's ability to adequately represent the client.
- (h) Counsel should withdraw upon the filing of a civil lawsuit against counsel by a client alleging malpractice, a finding of probable cause in connection with a grievance complaint, or if counsel has been scheduled to testify at a habeas corpus trial in which (1) counsel is the subject of the claim of ineffective assistance of counsel which has been raised in the petition; and, (2) the pleadings have been closed.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-3-11. Conflict cases

- (a) If a conflict of interest will not permit the public defender to represent a defendant, the court shall appoint the designated conflicts office for that county or an assigned attorney who has entered into a contract to represent defendants in conflict cases. If a conflicts office has not been designated for that county, if a contract attorney has not been designated to handle conflicts cases, or if the nature of the conflict requires it, the court shall appoint a qualified attorney from the panel. Each court-appointed attorney in conflict cases shall work independently of the public defender.

- (b) Requests for investigative, expert, and other services by court-appointed attorneys shall be made in accordance with K.A.R. 107-7-1.

105-10-1a(b). Public defense system at trial level

...

- (b) If the director has provided notice pursuant to K.A.R. 105-10-3, to the administrative judge of the judicial district in which a case is filed, of the board’s designation of a conflicts office for a county, the designated conflicts attorney office shall be appointed and shall provide indigent felony and related defense services at the trial level for those cases that cannot be handled by the public defender office due to potential conflicts of interest, with the exception of those cases that the designated conflicts attorney office cannot handle due to a potential conflict of interest.

105-21-3. Withdrawing from cases

Any public defender may withdraw from any court-appointed case when that defender determines that there exists a possible conflict of interest in further representation of the defendant.

***New York City Indigent Defense Organization Oversight Committee,
General Requirements for All Organized Providers of Defense Services to
Indigent Defendants***

IX. Compliance with Standards of Professional Responsibility

...

B. Evaluation Criteria

1. Does the defense organization maintain adequate procedures and sufficient data-processing capacity for identifying and avoiding conflicts of interest?

Specific Guideline:

No defense organization should permit its lawyers to represent co-defendants in the same case or otherwise accept appointment to any case which potentially places the organization or any of its lawyers in danger of violating standards of professional responsibility.

...

3. If the defense organization permits its lawyers to engage in legal work outside the scope of its contract with the City, does it maintain adequate procedures to ensure that:

...

- (c) no conflicts of interest exist between each lawyer’s legal work unrelated to

the contract and the interests of any client assigned to the defense organization?

Specific Guidelines:

- (a) *The defense organization must ensure that its lawyers devote at least 80% of their time to work assigned under the defense organization's contract with the City.*
 - (b) *No lawyer employed by a defense organization may accept a non-contract representation which the defense organization, or any of its other lawyers, would be barred from accepting under these General Requirements, or the Code of Professional Responsibility.*
 - (c) *The defense organization must obtain and maintain sufficient information—including at least the case caption, the names of parties, interested parties and relevant witnesses, the general nature of the case, its procedural history and the names of other participating counsel—with respect to each case in which any of the defense organization's lawyers proposes to perform any legal work outside the contract to enable it to assess compliance with these General Requirements.*
4. Does the defense organization prohibit its lawyers from undertaking fee-generating representation of the defense organizations' clients or accepting any fee-generating matters arising from cases initially assigned under its contract with the City?
 5. Does the defense organization prohibit referrals of present or former assigned clients to private lawyers?
 6. Does the defense organization have adequate procedures to ensure that its lawyers do not otherwise abuse the attorney–client relationship to create fee-generating opportunities?
 7. Does the defense organization have adequate procedures for receiving and responding to client complaints?
 8. Does the defense organization maintain adequate procedures for identifying and resolving ethical issues?
 9. Does the defense organization maintain adequate malpractice insurance coverage?

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

Model Contract for Counsel Services

...

9. Conflict of Interest:

If at any time after an appointment has been made, the FIRM discovers a conflict of interest pursuant to the North Dakota Code of Professional Responsibility, the FIRM shall promptly notify either the judge who made the appointment or the judge of the court in which the matter is pending . If the judge agrees that there is a conflict of interest, the judge shall revoke the appointment and appoint other counsel for the indigent person from within the FIRM where possible, or by outside assigned counsel. If outside counsel is appointed in the event of a conflict of interest, no deductions may be made from compensation to be received by the FIRM for monies paid to appointed counsel.

C. Financial Eligibility

The basic holding of both *Gideon v. Wainwright* (felony matters) and *Argersinger v. Hamlin* (misdemeanors) is that financial inability to pay for criminal defense counsel should not be a bar to justice. Where defendants cannot pay for an attorney when facing loss of liberty or life, the state must.

Client eligibility issues include these:

1. Financial criteria
2. Eligibility determination
3. Contribution and reimbursement requirements
4. Publicly provided support services for non-indigent clients

1. Financial Criteria

Commentary. Although all persons who are financially unable to obtain adequate representation without suffering hardship must be provided representation at public expense, translating this principle into practical working guidelines is difficult. While the ABA Defense Services Standards make no effort to define need or hardship, some state standards set specific criteria, such as income levels defined by the federally established poverty level (Nebraska, North Dakota). Most states, however, specify client eligibility financial standards in their state legislation. See, e.g., Wisconsin Statutes Annotated §977.07(2) and Wyoming Statutes §7-6-103(c), Rules of Criminal Procedure, Rule 44(d).

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-7.1. Eligibility; ability to pay partial costs

Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship. Counsel should not be denied because of a person's ability to pay part of the cost of representation, because friends or relatives have resources to retain counsel, or because bond has been or can be posted.

NLADA Guidelines for Legal Defense Systems in the United States

1.5 Financial Eligibility Criteria

Effective representation should be provided to anyone who is unable, without substantial financial hardship to himself or to his dependents, to obtain such representation. This determination should be made by ascertaining the liquid assets of the person which exceed the amount needed for the support of the person or his dependents and for the payment of current obligations. If the person's liquid assets are not sufficient to cover the anticipated costs of representation as indicated by the prevailing fees charged by competent counsel in the area, the person should be considered eligible for publicly provided representation. The accused's assessment of his own financial ability to obtain competent representation should be given substantial weight.

- (a) Liquid assets include cash in hand, stocks and bonds, bank accounts and any other property which can be readily converted to cash. The person's home, car, household furnishings, clothing and any property declared exempt from attachment or execution by law, should not be considered in determining eligibility. Nor should the fact of whether or not the person has been released on bond or the resources of a spouse, parent or other person be considered.
- (b) The cost of representation includes investigation, expert testimony, and any other costs which may be related to providing effective representation.

1.6 Method of Determining Financial Eligibility

The financial eligibility of a person for publicly provided representation should be made initially by the defender office or assigned counsel program subject to review by a court upon a finding of ineligibility at the request of such person. Any information or statements used for the determination should be considered privileged under the attorney–client relationship.

A decision of ineligibility which is affirmed by a judge should be reviewable by an expedited interlocutory appeal. The person should be informed of this right to appeal and if he desires to exercise it, the clerk of the court should perfect the appeal. The record on appeal should include all evidence presented to the court on the issue of eligibility and the judge’s findings of fact and conclusions of law denying eligibility.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 2.3 Financial Eligibility

- a. Any person who cannot retain private counsel without substantial hardship to that person, or to his or her family, shall be eligible to receive the assistance of assigned counsel in all situations in which a constitutional, statutory or other right to counsel exists.
- b. Rules, regulations and procedures concerning the determination of initial eligibility and/or continuing eligibility shall not interfere with assigned counsel’s independence to advocate for his or her clients on any relevant matter, including the question of their financial status. Individual assigned counsel shall not have responsibility for determining initial or continuing eligibility of clients.
- c. Rules, regulations and procedures concerning the determination of initial eligibility and/or continuing eligibility shall not require assigned counsel to make any disclosures of facts concerning his or her clients’ financial status beyond those disclosures mandated by the binding ethical rules of the jurisdiction.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 2. Right to Representation, Services, and Facilities

...

- (c) A needy person’s right to a benefit under subsection (a) or (b) is not affected by his having provided a similar benefit at his own expense, or by his having waived it, at an earlier stage.

Section 4. Determination of Financial Need

...

- (b) In determining whether a person is a needy person and the extent of his ability to pay, the court may consider such factors as income, property owned, outstanding obligations, and the number and ages of his dependents. Release on bail does not necessarily disqualify him from being a needy person. In each case, the person, subject to the penalties for perjury, shall certify in writing or by other record such material factors relating to his ability to pay as the court prescribes.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.2. Payment for Public Representation

¶2 The test for determining ability to pay should be a flexible one that considers such factors as amount of income, bank account, ownership of a home, a car, or other tangible or intangible property, the number of dependents, and the cost of subsistence for the defendant and those to whom he owes a legal duty of support. In applying this test, the following criteria and qualifications should govern:

1. Counsel should not be denied to any person merely because his friends or relatives have resources adequate to retain counsel or because he has posted, or is capable of posting, bond.
2. Whether a private attorney would be interested in representing the defendant in his present economic circumstances should be considered.
3. The fact that an accused on bail has been able to continue employment following his arrest should not be determinative of his ability to employ private counsel.
4. The defendant's own assessment of his financial ability or inability to obtain representation without substantial hardship to himself or his family should be considered.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 1.5 Financial Eligibility

Eligible accused persons include all applicants for an attorney with a net income below the Poverty Guidelines as established and revised annually by the United States Department of Health and Human Services and published in the Federal Register. The local committee may set and revise the eligibility standards in accordance with, but no lower than, the Poverty Guidelines.

The following special needs of a family unit may be deducted from net income in determining eligibility:

- (1) child care expenses for working custodial parents,
- (2) legally required support payments to dependents, including alimony for the support of a child/children,
- (3) unusual, excessive, or extraordinary medical or other expenses.

“Net income” shall include only a client’s take-home pay, which is the gross income earned by a client minus those deductions required by law or as a condition of employment.

“Family unit” includes the defendant, his/her spouse, if living together, any minors who are unemployed and unmarried, and any infirm or permanently disabled person living with the defendant and for whom the defendant has assumed financial responsibility. The income of a minor who is attending school full time, but has after-school employment or does odd jobs, shall not be attributed to that of the family unit. Other persons, if living within the same household, may be deemed members of the family unit.

In the event an accused person is discovered to have been ineligible at the time of the appointment of an attorney, the court shall be notified. The court may discharge the appointed attorney and refer the matter to the private bar. The attorney should be paid for the time spent on the case and recoupment sought from the ineligible person.

Regardless of the prima facie eligibility on the basis of income, a person who has sufficient assets that are easily converted to cash by sale or mortgage may not be qualified for representation if it would not impose a substantial financial hardship to convert them to cash.

Counsel may be appointed for any accused person who is unable to obtain counsel due to special circumstances such as emergency, hardship, or documented refusal of the case by members of the private bar because of financial inability to pay for counsel.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

C. Eligibility for Appointment of Counsel

The comprehensive plan shall include the applicable rules and procedures for the determination of eligibility for the appointment of counsel at public expense, and shall contain the following provisions:

1. *Substantial hardship.* Counsel will be provided to all persons who are financially unable to obtain adequate representation without substantial hardship to themselves or their families.
 - a. *Ability to Post Bail.* Counsel will not be denied to any person merely because the person is able to obtain pretrial release through a surety bond, property bond, or a cash deposit.
 - b. *Employment.* Counsel will not be denied to any person merely because the person is employed.

2. *Determining Eligibility.* The determination of eligibility for the appointment of counsel will include an estimation as to the costs of retaining private counsel and a determination as to whether the person's disposable income and liquid assets are adequate to cover the costs of retaining private counsel.
 - a. *Costs of Private Counsel.* The determination of the costs of retaining private counsel shall be based upon the nature of the criminal charge, the anticipated complexity of the defense, the estimated cost of presenting a legal defense, and the fees charged by lawyers in the community for providing defense services in similar cases.
 - b. *Income.* Income shall include all salaries and wages after taxes, including interest, dividends, social security, unemployment compensation, workers' compensation, pension, annuities, and contributions from other family members.
 - c. *Expenses.* Expenses shall include, but are not limited to, all living expenses, business or farm expenses, including food, utilities, housing, child support and alimony obligations, education or employment expenses, child care, medical expenses, and transportation.
 - d. *Disposable Income.* Disposable income shall be determined by assessing monthly income and subtracting monthly expenses.
 - e. *Liquid Assets.* Liquid assets shall include, but are not limited to, cash, savings and checking accounts, stocks, bonds, certificates of deposits, and equity in real and personal property exceeding the statutory allowances in I.C. 34-2-28-1 that can be readily converted to cash.
3. *Confidentiality.* If the accused is questioned about indigency in circumstances where the attorney-client privilege does not apply, the accused shall be advised that any statements made or information given may be used against him or her.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-4-1. Determination of eligibility

- (a) At the commencement of proceedings against any defendant, the defendant may make application for legal representation at state expense by submitting, to the court, an affidavit of indigency on forms provided by the board. The court shall determine if the defendant is indigent, based upon consideration of the following factors, as defined in K.A.R. 105-4-2:
 - (1) The defendant's liquid assets;
 - (2) The defendant's household income;
 - (3) The defendant's reasonable and necessary expenses incurred to support the defendant's household;
 - (4) The anticipated cost of private legal representation; and

- (5) Any transfer of property by the defendant without adequate monetary consideration after the date of the alleged commission of the offense.
- (b) An eligible indigent defendant is a person whose combined household income and liquid assets equal less than the sum of the defendant's reasonable and necessary living expenses plus the anticipated cost of private legal representation.
- (c) The court may also consider any special circumstances affecting the defendant's eligibility for legal representation at state expense.
- (d) If the court determines that the defendant is financially able to employ counsel, after counsel has been appointed, the court shall require the defendant to reimburse the board in accordance with the provisions of K.S.A. 1982 Supp. 22-4510 for all or part of the expenditures made on the defendant's behalf.

105-4-2. Definition of terms

Terms used to determine eligibility for indigents' defense services shall have the following meanings:

- (a) Liquid assets. The defendant's liquid assets shall be defined as cash in hand, stocks and bonds, accounts at financial institutions, real property or homestead having a net value greater than \$50,000, and any other property that can be readily converted to cash, with the following exceptions.
 - (1) The defendant's car, clothing, and household furnishings; and
 - (2) Any other property, except a homestead having a net value greater than \$50,000, which is exempt from attachment or levy of execution by K.S.A. 60-2301, et seq.

The net value of the homestead shall be determined as the fair market value less the mortgage, other encumbrances, and the reasonable cost of sale. The net value of any property transferred after the date of the alleged commission of the offense shall be included in the determination of the defendant's liquid assets.

- (b) Household income. The defendant's household income shall be defined as the defendant's income and the income of all other persons related by birth, marriage or adoption who reside with the defendant. Income shall include the total cash receipts, before taxes, from all resources, including money wages and the net receipts from nonfarm or farm self-employment. Further, income shall include regular payments from a governmental income maintenance program, alimony, child support, public or private pensions, annuities, and income from dividends, interest, rents, royalties, or periodic receipts from estates or trusts.
- (c) The defendant's reasonable and necessary living expenses. The board shall calculate a table which establishes the amounts the board will allow as the defendant's reasonable and necessary expenses incurred to support the defendant and the defendant's household. The table shall represent 125% of the federal poverty income guidelines that are adopted in accordance with 42 USC 9847 and are published in the Federal Register. The board shall cause this table of reasonable and necessary living expenses to be published in the Kansas Register in May of 1984 and at such times thereafter as the federal poverty income guidelines are revised. Revisions in the

federal poverty income guidelines shall not be adopted until considered and approved by the board.

- (d) **Transfer of property.** If the defendant has transferred property after the date of the alleged commission of the offense, the court shall determine the reason for the transfer of property and shall determine whether adequate monetary consideration was received. If adequate monetary consideration was not received, the court shall presume that the transfer was made for the purpose of establishing eligibility unless the defendant furnishes clear and convincing evidence that the transfer was made exclusively for another purpose. If a transfer was made either for the purpose of establishing eligibility or without adequate monetary consideration, and the property is reconveyed to the defendant or an adjustment is made by which the defendant receives full value, the defendant shall, if otherwise qualified, be eligible to receive legal representation at state expense.

105-4-5. Partial indigency

- (a) The court shall find any defendant to be partially indigent if the defendant is able to pay some part of the cost of legal representation and if the payment or payments does not impose manifest hardship on the defendant or the defendant's household. Any defendant may be found to be partially indigent if the defendant's combined household income and liquid assets are greater than the defendant's reasonable and necessary living expenses but less than the sum of the defendant's reasonable and necessary living expenses plus the anticipated cost of private legal representation.
- (b) A defendant found to be partially indigent may be ordered by the court to pay, to the clerk of the district court, a sum not more than the amount expended by the board of behalf of the defendant.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

VII. Nebraska Commission on Public Advocacy Standards to Determine Indigency

These rules shall apply to any party who has a right to be represented by an attorney of the Commission on Public Advocacy. The eligibility for appointment of an attorney at public expense shall be determined in conformance with these rules.

A. Definition of Terms

The following definitions shall apply to these rules:

1. **Income** shall mean salary, wages, interest, dividends, rental income, and other earnings and cash payments such as amounts received from pensions, annuities, social security, and public assistance programs.
2. **Indigent** for purposes of this rule shall mean:
 - (a) A party who is:

- (i) Receiving an annual gross income of 125% or less of the current federally established poverty level; or
- (ii) Residing in a public mental health facility or is the subject of a proceeding in which admission or commitment to such a facility is sought, provided that where the County Board of Mental Health or the judge has reason to believe the party is not indigent, a determination of indigency shall be made in accordance with these rules; or
- (iii) Serving a sentence in a correctional institution and has no available funds; or
- (iv) Held in custody in jail and has no available funds; or
- (b) A party who is unable to retain legal counsel without prejudicing the party's ability to provide economic necessities for the party or the party's family.

B. Affidavit of Indigency

A party who desires to proceed as an indigent represented by an attorney appointed by the court shall complete an affidavit under oath concerning his or her financial resources (FORM 1). The party shall be advised of the penalties for perjury. The defendant has an ongoing duty to update the affidavit as his or her financial status changes.

C. Determination of Indigency

If the court finds that the party has not effectively waived his or her right to counsel, and the party has not arranged to obtain counsel, the court shall receive the affidavit of indigency and may question the party under oath. After reviewing the information contained in the affidavit and, if applicable, the party's testimony, the court shall determine whether the party is indigent under these rules. The court shall record its finding on the affidavit of indigency (FORM 1) and file it with the papers in the case. The county or prosecuting attorney shall have no standing in the determination of indigency or the appointment of counsel.

D. Assignment of Counsel/Notice of Assignment

If the court finds that a party is indigent, the court shall appoint an attorney or the Commission on Public Advocacy to provide representation for the party. The Clerk of the Court shall promptly complete and transmit a notice of assignment of counsel (FORM 2) and shall file a copy in the case file.

E. Review of Indigency Determination

- (1) A party's indigency status may be reviewed in a formal hearing at any stage of a court proceeding if additional information regarding financial circumstances becomes available to the court.
- (2) A party has a right to reconsideration in a formal hearing of the findings and conclusions regarding the party's indigency.

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

1. Guideline for Determining Eligibility for Indigent Defense Services

Section A. Adults

Consideration should be given to:

1. income resources;
2. non-income resources;
3. expenses and liabilities; and
4. estimated cost of defense services

of the defendant in determining eligibility for defense services.

1. Income Resources

These guidelines for gross income levels are offered as income levels at or below which eligibility for defense services should be considered.

Household Size	1	2	3	4
Annual Gross Income	10,063	13,563	17,062	20,563
Monthly Gross Income	839	1,130	1,422	1,714
Weekly Gross Income	210	283	356	429
Household Size	5	6	7	8
Annual Gross Income	24,063	27,563	31,063	34,563
Monthly Gross Income	2,005	2,297	2,589	2,880
Weekly Gross Income	501	574	647	720

(Add \$3,500 for each additional member in households of more than eight.)

These income levels reflect 125% of the official poverty level threshold as defined by the Department of Health and Human Services (63 F.R. 9236, February 24, 1998). They are provided for information only and are updated annually to reflect 125% of the poverty level threshold as published by the Department of Health and Human Services. The income levels should be adjusted to meet local standards. For persons with incomes above these levels, consideration should be given to the exceptional factors in Section A.4.

The commission has undertaken to provide judges annually with the current income guidelines.

a. How to Determine Income Resources

The defendant's income resources include total cash receipts before taxes of the defendant and those persons who are legally responsible for the defendant. Seasonal income should be considered on an annualized basis.

Spouse income should not be included in the calculation of defendant's income, but should be considered in determining the actual extent of defendant's living expenses and liabilities.

Consideration should be given to the following specific factors:

- a. money, wages and salaries before any deductions;
- b. income from self-employment after deductions for business or farm expenses;
- c. regular payments from social security, strike benefits from union funds, veteran's benefits, training stipends, alimony, child support and military family allotments or other regular support from an absent family member or someone not living in the household, or foster care payments;
- d. public or private employee pensions, and regular insurance or annuity payments;
- e. income from dividends, interest, rents, royalties, estates or trusts;
- f. benefits from a governmental income maintenance program (AFDC, SSI, unemployment compensation, or state or county general assistance or home relief);
- g. food or rent received in lieu of wages;
- h. money which is received from sale of real or personal property, or received from tax refunds, gifts, one-time insurance payments or compensation for injury;
- i. non-cash benefits (Food Stamps, etc.); and
- j. payments from rental of Indian Trust Land and Tribal per capita payments authorized by the Indian Claims commission.

The following factors should not be included in determining defendant's income:

- a. bail funds;
 - b. spouse income.
- b. How to Determine Household Size

All individuals who are actually dependent on defendant for financial support should constitute a single household for purposes of assessing income levels for eligibility for defense services.

2. Non-Income Resources

These guidelines for non-income financial resource levels are offered as resource levels at or below which eligibility for defense services should be considered.

For persons with non-income resources above these levels, considerations should be given to the exceptional factors in Section A.4.

- a. Homestead Exemption

Only equity in homestead property exceeding the statutory allowances in Sections 28-22-02 and 47-18-01, NDCC, should be considered. Statutory homestead exemption property should not be considered.

All claimed homestead property must be contiguous property.

Mobile Homes should be considered as homestead property.

b. Personal Property Exemption

Only equity in personal property exceeding the statutory allowance in Sections 28-22-03 and 28-22-05, NDCC, should be considered. Personal property exempted by statute should not be considered.

c. Other Real Property and Personal Property

The following factors should be considered in making a determination of financial eligibility:

- Equity in homestead property in excess of the statutory allowances in Sections 28-22-02 and 47-18-01, NDCC
- All equity in non-homestead real property
- Personal property in excess of the statutory allowance in Sections 28-22-03 and 28-22-05, NDCC

The following factors should not be included in assessing non-income resources:

- Indian Trust Land

3. Expenses and Liabilities

The defendant's expenses and liabilities include all living expenses, business or farm expenses, fixed debts and obligations (including federal, state and local taxes).

Consideration should be given to the following specific factors:

- a. food
- b. utilities
- c. housing
- d. child support and alimony obligations
- e. education or employment expenses
- f. child care
- g. medical expenses
- h. transportation

Spouse income should be considered in determining the extent of defendant's actual living expenses and liabilities.

4. Exceptional Factors

A defendant whose income resources or non-income resources exceed these guidelines may still be eligible to receive legal assistance based on the following factors:

- a. Current income prospects, taking into account seasonal variations in income;
- b. Age or physical infirmity of household members;
- c. The estimated cost of obtaining private legal representation with respect to the particular matter for which assistance is sought;
- d. The nature of the criminal charge; and
- e. The anticipated complexity of the defense.

2. Eligibility Determination

Commentary. Only four sets of standards discuss by whom and how client eligibility is determined. These include the ABA and NAC among the four national standards and two states, Georgia and North Dakota. These standards do not endorse a single approach, citing the defender, the court, and the defense system administration, among other possibilities. The North Dakota guidelines are notable for setting out procedures for privately retained counsel to raise indigency questions.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-7.3. Determination of eligibility

Determination of eligibility should be made by defenders, contractors for services, assigned counsel, a neutral screening agency, or by the court. When the eligibility determination is not made by the court, confidentiality should be maintained, and the determinations should be subject to review by a court at the request of a person found to be ineligible. A questionnaire should be used to determine the nature and extent of the financial resources available for obtaining representation. If at any subsequent stage of the proceedings new information concerning eligibility becomes available, eligibility should be redetermined.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.3. Initial Contact with Client

The first client contact...should be governed by the following:

2. If, at the initial appearance, no request for publicly provided defense services has been made, and it appears to the judicial officer that the accused has not made an informed waiver of counsel and is eligible for public representation, an order should be entered by the judicial officer referring the case to the public defender, or to appointed counsel. The public defender or appointed counsel should contact the accused as soon as possible following entry of such an order.
3. Where, pursuant to court order or a request by or on behalf of an accused, a publicly provided attorney interviews an accused and it appears that the accused is financially ineligible for public defender services, the attorney should help the accused obtain competent private counsel in accordance with established bar procedures and should continue to render all necessary public defender services until private counsel assumes responsibility for full representation of the accused.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 1.4 Determination of Financial Eligibility

The financial eligibility of a person applying for publicly provided counsel should be determined by the Administrator of the indigent defense program or designee.

Upon a determination of indigency the Administrator or designee shall immediately notify the public defender, contract attorney or the panel attorney designated to represent the person, the indigent accused, the sheriff, the clerk and the district attorney of the appointment of counsel for the indigent accused. The original authorization of appointment shall be filed with the indictment, warrant or petition in the case; a copy of the authorization shall be forwarded to the clerk, the public defender, contract attorney or panel attorney appointed to represent the indigent defendant, the indigent defendant, the sheriff and the district attorney.

For jurisdictions in which defendants are brought before a judicial officer within 72 hours of arrest, are advised of their right to appointed counsel, are permitted to orally request appointment of counsel, are questioned as to their financial eligibility, and are appointed a lawyer immediately if eligible, the Council will waive the requirement that an application be made in writing. Notice should be given as specified above.

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

IV. Guidelines for Determining Eligibility for Indigent Defense Services

...

In order to aid case processing, and meet the court's constitutional responsibilities, the following policing should be considered:

1. Close questions regarding defendant's indigency should be resolved in favor of eligibility. Close questions between partial eligibility and full eligibility should be resolved in favor of full eligibility. This will assist case processing, protect constitutional rights, and will be balanced by more active recoupment procedures.
2. Early appointment of counsel is desirable. Counsel should be appointed at the earliest feasible time (as soon as possible and no later than the initial appearance on the criminal charge, and definitely within three working days of the arrest) at the request of the defendant or on the court's own motion.
3. The eligibility determinations for defense services based on financial resources should not impose an extensive time burden on court officials.
4. The attached information forms should be used as the means of providing the court with all relevant information for a review of the appointment decision (See Attachments immediately following p. 1.10). No formula is suggested. Judges are encouraged to recognize general indications of poverty in welfare recipients or

previous appointment of defense counsel as indicated on the short form application. The additional financial information is available for consultation in unusual cases at the request of the judge or counsel.

5. The administrative costs of making eligibility determinations should be considered.
6. Defendants should be reminded of the penalties for giving false information in the eligibility determination process.
7. Early in the proceedings, defendants must be notified by the judge presiding in the case and by appointed defense counsel that all defendants are subject to recoupment for the fees and expenses of counsel, and of the established rate of these expenses at the end of the proceeding, including juvenile proceedings. See Section 29-07-01.1, NDCC.
8. Before an eligibility determination is made, the judge should inquire closely regarding the defendant's efforts to obtain the service of a private attorney.
9. Any indication of anticipatory transfer of assets by defendant to create the conditions for eligibility for defense services should be scrutinized and dealt with decisively.
10. Except in exceptional circumstances, any anticipated change to indigent defense counsel from private counsel midway in a case should be avoided by a finding of eligibility for appointed defense counsel and appointment of the same counsel and recourse to partial eligibility payments or recoupment procedures.
11. The judge may wish to inquire periodically through out the proceedings regarding substantial changes in defendant's financial status. However, this information should not be permitted to disrupt the flow of court proceedings, but should be considered in the civil collection process at the end of the court proceedings.

9. Guidelines for Attorney Withdrawal in Criminal Cases

Application of Guidelines

These guidelines apply to district courts and the Supreme Court when considering...a privately retained attorney's motion for a declaration of indigency status which is accompanied by a request by the moving attorney to be appointed by the court as indigent defense counsel.

Purpose of Guidelines

It is of primary importance to the members of the bar and to the public that a lawyer who undertakes representation of a client in criminal proceedings, whether initially retained by the defendant or appointed by the court, continue to represent the client at least through the trial stage of the proceedings, unless the continued representation would result in the violation of a disciplinary rule. Continuity of counsel in criminal proceedings should be mandated in order to protect the rights of the defendant by avoiding wherever possible the adverse effect and possible prejudice to the client caused by an attorney's withdrawal.

Guidelines

In order to eliminate the delay in criminal cases and expense associated with the substitution of counsel prior to trial, the following policies should be adopted:

...

2. A motion for withdrawal which is based upon the indigency status of the defendant and accompanied by a request for court appointed counsel should not be considered by the court as a circumstance which justifies the removal of counsel and the substitution of court appointed counsel, nor should a motion for the declaration of indigency status on behalf of the defendant justify the appointment by the court of the moving counsel as assigned counsel, unless either motion is filed in writing with the court at least five days before the preliminary hearing or the waiver thereof.
3. When a motion to withdraw as counsel is filed in writing with the court at least five days before the preliminary hearing or the waiver thereof, and the defendant meets the financial eligibility requirements for indigent defense services, the court should appoint new counsel to provide indigent defense services for the defendant. If the court has contracted for indigent defense services, the case may be assigned under the provisions of the contract.
4. When a motion for the declaration of indigency status on behalf of the defendant is filed in writing with the court at least five days before the preliminary hearing or the waiver thereof; the motion includes a request that the moving counsel be appointed by the court as assigned counsel; and the defendant meets the financial eligibility requirements for indigent defense services, the court in its discretion may appoint the moving counsel or appoint new counsel to provide indigent defense services for the defendant.
5. Privately retained counsel involved in criminal proceedings should be allowed to file in writing with the court a motion for the declaration of indigency status on behalf of the defendant anytime during the interval after five days before the preliminary hearing or the waiver thereof and the start of the trial. If the defendant at the time of the hearing on the motion meets the financial eligibility requirements for indigent defense services:
 - a) The defendant should be eligible for payment by the appropriate court of expenses, approved by the court in advance, incurred in defending the defendant after the date of the court's declaration of the defendant's indigency. Payment of the expenses for defense services for the defendant should be provided pursuant to the Guidelines for Payment of Counsel Fees and Expenses for Defense Services.
 - b) Counsel should be required to continue to provide legal services to the defendant through the trial without cost to either the public or the defendant.

4. Model Contract for Counsel Services for Indigent Defendants

(16) Non-Privileged Information:

The FIRM shall advise all clients serviced by this contract that information regarding their financial circumstances which is probative of determining indigency is not

privileged information, unless the information is probative of the guilt or innocence of the client in which case the information shall be protected by the lawyer–client privilege.

The FIRM has the continuing responsibility to bring to the attention of the judge who is presiding in the matter any non-privileged information regarding the financial resources of defendants which bears on their eligibility for counsel services under this contract.

3. Contribution and Reimbursement Requirements

Commentary. Defendant eligibility for defense services is not always a black/white proposition. Some defendants can pay a portion of the defense costs without suffering “substantial hardship” but cannot afford all the costs. Most national standards and three of the state standards (Georgia, Indiana, North Dakota) include provisions for defendant contribution to the costs of public defense.

A related question is whether a defendant who has received publicly funded defense services should later be required to pay for the services should his or her financial condition improve. Only the ABA Defense Services Standards speak to this issue. The North Dakota guidelines do, however, provide for recoupment in the event that financial eligibility is later found to have been erroneous. See also, Gwinnett Judicial Circuit Internal Operating Procedure 98-5, G2.2(c), “Eligibility of Accused,” which provides for appointment when eligibility is unclear and reimburses for “all or a portion of the actual costs” if later found ineligible.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-7.2. Reimbursement, notice and imposition of contribution

- (a) Reimbursement of counsel or the organization or the governmental unit providing counsel should not be required, except on the ground of fraud in obtaining the determination of eligibility.
- (b) Persons required to contribute to the costs of counsel should be informed, prior to an offer of counsel, of the obligation to make contribution.
- (c) Contribution should not be imposed unless satisfactory procedural safeguards are provided.

NLADA Guidelines for Legal Defense Systems in the United States

1.7 Partial Eligibility

If the accused is determined to be eligible for defense services in accordance with approved financial eligibility criteria and procedures, and if, at the time that the determination is made, he is able to provide a limited cash contribution to the cost of his defense without imposing a substantial financial hardship upon himself or his dependents, such contribution should be required as a condition of continued representation at public expense.

- (a) The defender office or assigned counsel program should determine the amount to be contributed under this section, but such contribution should be paid directly into the general fund of the state, county, or other appropriate funding agency. The contribution should be made in a single lump sum payment immediately upon, or shortly after, the eligibility determination.

- (b) The amount of contribution to be made under this section should be determined in accordance with predetermined standards and administered in an objective manner; provided, however, that the amount of the contribution should not exceed the lesser of (1) ten (10) percent of the total maximum amount which would be payable for the representation in question under the assigned counsel fee schedule, where such a schedule is used in the particular jurisdiction, or (2) a sum equal to the fee generally paid to an assigned counsel for one trial day in a comparable case.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 2.4 Contribution and Recoupment

- a. Persons eligible for representation by assigned counsel (Standard 2.3) shall not be asked to contribute toward, nor to reimburse the jurisdiction for, the cost of assigned counsel.
- b. Jurisdictions that do require payment by eligible persons of some portion of the cost of assigned counsel shall establish a procedure for determining the amount of contribution to be paid. This procedure shall be implemented prior to or early in representation by assigned counsel, and shall include a hearing on the ability of the person to pay.
- c. Any payment by or on behalf of a person represented by assigned counsel toward the cost of representation shall be made to a fund or through a mechanism established for that purpose, and not directly to assigned counsel. Assigned counsel shall not be responsible for collection of payment.
- d. Payment toward the costs of representation by assigned counsel shall never be made a condition of probation or other sentence-related supervision.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 4. Determination of Financial Need

...

- (c) To the extent that a person covered by section 2 is able to provide for an attorney, the other necessary services and facilities of representation, and court costs, the court may order him to provide for their payment.

***National Advisory Commission on Criminal Justice Standards and Goals,
Report of the Task Force on the Courts***

Standard 13.2. Payment for Public Representation

¶1 An individual provided public representation should be required to pay any portion of the cost of the representation that he is able to pay at the time. Such payment should be no more than an amount that can be paid without causing substantial hardship to the individual or his family. Where any payment would cause substantial hardship to the individual or his family, such representation should be provided without cost.

***Georgia Indigent Defense Council, Guidelines for the Operation of Local
Indigent Defense Programs***

Guideline 1.6 Recovery from Defendant of Payment for Legal Representation

If the accused is determined to be eligible for defense services in accordance with approved financial eligibility criteria and procedures, and if, at the time that the determination is made, he/she is able to provide a cash contribution to the cost of his/her defense without imposing a substantial financial hardship upon defendant or dependents, such contribution may be required as a condition of continued representation at public expense. The indigent defense administrator or designee should determine the amount to be contributed. The contribution shall be paid directly to the fund for indigent defense of the affected county. A defendant who disagrees with a required contribution shall be provided a hearing by the court. If a defendant enters a *nolo contendere*, first offender, or guilty plea or is convicted the court may impose as a condition of probation repayment of all or a portion of the county's cost for providing legal representation if it does not impose a substantial financial hardship upon defendant or dependents, with payment to be made through the probation department to the fund for indigent defense of the affected county.

***Indiana Public Defender Commission, Standards for Indigent Defense
Services in Non-Capital Cases***

Standard D. Payment by Accused of Defense Costs

The comprehensive plan shall contain the policies and procedures for ordering indigent persons in criminal cases to pay some or all of the costs of defense services under I.C. 88-9-11.5, and shall specify the procedures for determining the actual costs to the county for defense services provided to the accused.

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

1. Guidelines for Determining Eligibility for Indigent Defense Services

Section C. Partial Eligibility

Defendants may be found to be partially eligible for defense services. However, consideration should be given to avoiding complex financial or collection arrangements and any payment responsibility which could disrupt case processing responsibilities of the court.

Specific consideration should be given to the following factors:

- a. Collection of defendant's contribution by prepayment should be considered to avoid administrative burdens on court personnel. Percentage payment requirements should be discouraged to avoid financial uncertainty and administrative problems. Lump sum payments should be based on present ability to pay.
- b. All payments should be made directly to the county or state which pays for appointed counsel. No payment directly to counsel should be permitted.
- c. Defendant should be notified that partial payment is not a waiver of recoupment procedures.

3. Guidelines for Defendant Reimbursement of Indigent Defense Costs

The Commission strongly encourages judges to closely examine the financial status of defendants when appointment of counsel, based upon alleged indigency, is requested or considered. The hasty appointment of counsel for defendants who have financial resources to partially or entirely bear the cost of privately retained counsel results in an inefficient allocation of indigent defense resources and compromises the ability to provide constitutionally required counsel services for those who are in fact indigent. Appropriate appointment of counsel should reduce the need for aggressive reimbursement efforts. However, if reimbursement of indigent defense costs is undertaken, all such efforts should be in compliance with applicable statutory requirements.

Model Agreement for Collection Agency Services for Defendant Reimbursement of Indigent Defense Costs

_____, ("COLLECTOR") and _____,
State's Attorney of _____ County ("CLIENT") agree that the
CLIENT's accounts placed with the COLLECTOR are subject to the terms and
conditions of the following agreement.

1. Prior to CLIENT's decision to initiate collection effort, or the Court's direction to do so, COLLECTOR will assist CLIENT in gathering information concerning the employment status, resources and assets of potential accounts.

2. Collection effort will be commenced and continue on accounts during the entire period such accounts are held by COLLECTOR. Collection activities must be in compliance with federal, state and local laws or regulations, including the fact that COLLECTOR shall, if required, at all times be licensed by the proper state authority.
3. Collections made by COLLECTOR on CLIENT's designated accounts for _____ county will be deposited within _____ days in a trust account maintained in a reputable bank acceptable to CLIENT. Such collections, less COLLECTOR fees held in trust by COLLECTOR, are the property of _____ county and are not available for any other use by COLLECTOR or COLLECTOR's other clients.

Collections made by COLLECTOR on CLIENT's designated accounts for the state of North Dakota will be deposited immediately in a trust account maintained in a reputable bank accepted to CLIENT. Such collections, less COLLECTOR fees held in trust by COLLECTOR, are the property of the state or North Dakota and re not available for any other use by COLLECTOR or COLLECTOR's other clients.

4. All collections made by COLLECTOR on CLIENT's accounts for _____ county and the state of North Dakota will be remitted respectively to the _____ county treasurer and the state treasurer within ____ days, less COLLECTOR's collection fee, accompanied by remittance advice, consisting of the: account number, name, date payment was received by COLLECTOR, gross amount of collection, collection fee due COLLECTOR, and net amount remitted. A copy of the remittance advice will be sent simultaneously to CLIENT.
5. CLIENT agrees to provide COLLECTOR with information on all direct payments received by CLIENT from accounts placed for collection with COLLECTOR. COLLECTOR will prepare a statement containing the account number, name, gross amount of direct payment to CLIENT and collection fee due COLLECTOR. This statement must be combined with the appropriate remittance advice listing collections made by COLLECTOR. COLLECTOR shall deduct the collection fee due COLLECTOR on payments made direct to CLIENT from the amount due CLIENT on collections made by COLLECTOR.
6. Status reports on all accounts must be supplied to CLIENT by COLLECTOR quarterly, beginning _____, and upon request.
7. CLIENT agrees to pay the COLLECTOR as its sole compensation a contingent fee equal to (a) _____ percent on first assignment: (b) _____ percent on accounts requiring the following types of special collection effort: legal action, forwarding to other Collection Agencies; or (c) _____ percent on all second assignments.

Costs incurred by COLLECTOR in instituting legal action may be recovered by COLLECTOR if such costs have been added to the balance originally due by decision of the court, prior to remitting to CLIENT the proceeds of collections made on the account as a result of legal action.

In the event CLIENT credits a customer's account with the full balance thereof by way of an adjustment, such accounts must be returned by COLLECTOR to CLIENT

and no fee will be paid to COLLECTOR. In the event the amount of any credit adjustment is less than the outstanding balance, no contingent fee is payable to the COLLECTOR hereunder with respect to the amount of such adjustment only.

Collector agrees that it will not settle any customer account for less than the total amount of the balance due without first obtaining written authorization from CLIENT.

8. COLLECTOR shall keep CLIENT advised, when requested, of the status of legal actions instituted hereunder, and shall furnish copies of summons, pleadings, orders, citations, judgments, and all other papers filed by either party in the legal action when requested to do so by CLIENT.

In the event any action, complaint, or counterclaim is instituted or interposed by the debtor against CLIENT, COLLECTOR shall immediately advise CLIENT of same, and forward copies of all pleadings or other papers by it or its attorneys.

9. Audits of COLLECTOR may be performed from time to time by CLIENT or persons retained by client and may include a review of collection effort, maintenance of trust account, adequacy of cash controls, promptness of recording and remitting payments, compliance with this agreement and any other normal audit procedures and tests.
10. Comparative Profit & Loss and Balance Sheet Statements on the business of the COLLECTOR, properly certified by an independent auditor, must be supplied to CLIENT by COLLECTOR no later than 90 days after the close of the COLLECTOR's calendar or fiscal year, if requested by the CLIENT.
11. Accounts paid by CLIENT with COLLECTOR for collection may be withdrawn by CLIENT at any time, by either oral or written request. Upon receipt of such requests, COLLECTOR shall return the account along with all documents and records pertaining to such account. COLLECTOR also agrees to cause any suit instituted by it to be settled or dismissed, as CLIENT may direct. Bankrupt accounts must be returned immediately to CLIENT by COLLECTOR with proper notation. No compensation will be paid COLLECTOR on any returned or withdrawn accounts.
12. COLLECTOR hereby agrees to indemnify and hold CLIENT harmless from any loss, damage, attorney's fees and court costs which CLIENT may suffer due to any efforts by COLLECTOR to collect referred accounts. COLLECTOR agrees to save CLIENT harmless from any liability resulting from acts, errors, or omissions by COLLECTOR.
13. COLLECTOR will provide CLIENT with written evidence of insurance naming CLIENT as an additional insured and containing a provision that the carrier will notify CLIENT at least 10 days in advance of the termination or cancellation of coverage or any material change in coverage, in carriers, and limits acceptable to CLIENT, in the following areas:

A. Personal Injury Liability Insurance, Including Contractual Liability

(To include, but not limited to, false arrest, detention, accusation, imprisonment or malicious prosecution. Also libel, slander, defamation or violation of rights of

privacy, wrongful entry or eviction, other invasion of right of private occupancy, or abuse of process.)

- B. Comprehensive General Liability Insurance, Including Contractual Liability
- C. Workmen's Compensation and Occupational Disease Insurance, Including Employers Liability Insurance

(To comply with laws of the State(s) in which the work is to be performed or elsewhere as may be required. Employers Liability Insurance must be provided with a limit of not less than \$50,000.00.)

- D. Automobile Liability Insurance (owned or non-owned)
- E. Employee Dishonesty Bond

14. This agreement is effective as of the date shown in effect until terminated as hereinafter provided.

Either party may terminate this agreement by giving the other party at least 30 days prior written notice of date of termination; provided, however, that CLIENT may terminate this agreement immediately in the event COLLECTOR violates any of the terms or provisions of this agreement, or if CLIENT in its sole judgment, determines there has been an adverse change in COLLECTOR's financial condition.

Termination or cancellation of this agreement by either party does not affect the collection, enforcement or validity of any accrued obligations owing between the parties. In the event of termination, COLLECTOR shall promptly turn over to CLIENT all accounts placed with COLLECTOR, together with all documents and records pertaining to such accounts. In the event COLLECTOR refuses to turn over such documents and records, CLIENT has the right to enter the premises of the COLLECTOR for the purpose of recovering such documents and records. COLLECTOR shall also promptly turn over to CLIENT the amount of all collections made on CLIENT accounts previously remitted to CLIENT, less the applicable collection fee.

15. Except as otherwise provided herein or by law, neither this agreement nor any of its rights, duties or obligations, or payments due or to become due, hereunder, may at any time be assigned, sold, or pledged by the COLLECTOR.

COLLECTOR has the right to forward any accounts to other collection agencies. However, CLIENT is not responsible for any cost incurred either by COLLECTOR or by any person designated by COLLECTOR with respect to the collection of such accounts. CLIENT liability hereunder is limited to the fee payable to COLLECTOR as specified in paragraph 7 above. In the event CLIENT is required to pay such costs, the amount thereof must be deducted from the contingent fees payable to the collector hereunder.

In the event accounts are forwarded by COLLECTOR to other agencies, then COLLECTOR agrees to be responsible to CLIENT for the amounts collected by such other agencies.

16. Nothing contained in this agreement requires CLIENT to place any set number or type of accounts with COLLECTOR and CLIENT is expressly given the right to

place as many or as few accounts with COLLECTOR as it may from time to time determine, including the right to place no accounts even though this agreement may be still in force. This agreement does not give COLLECTOR the exclusive right to collect CLIENT's accounts and CLIENT is free to enter into such other agreements as it may choose for the collection of its accounts.

17. COLLECTOR at the request of CLIENT shall state in writing the names of all of its employees, agents and attorneys working on any of CLIENT's accounts at the time of such request. CLIENT at its sole discretion may then request that certain employees, agents and attorneys of COLLECTOR not perform any further work on CLIENT's accounts, which request must be granted by COLLECTOR.
18. Nothing contained herein creates an employer-employee relationship, a partnership or joint venture between parties and COLLECTOR's only relationship with CLIENT is that of an independent contractor.

4. Publicly Provided Support Services for Non-Indigent Clients

Commentary. Some standards authorize public funding of defense support services to clients of privately retained counsel. This is consistent with standards that provide for client contribution to the costs of defense services. Only the ABA Defense Services Standards and the Indiana standards explicitly provide for public support of non-indigent clients.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-1.4. Supporting services

...[S]upporting services necessary for providing quality legal representation should be available to the clients of retained counsel who are financially unable to afford necessary supporting services.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

N. Court Authorized Expenditures for Non-Indigent Persons

The comprehensive plan shall authorize expenditures for investigative, expert, or other services for a person who has retained private counsel for trial or appeal when the person is unable to pay for the services and such services are necessary to prepare and present an adequate defense. Such services are eligible for reimbursement from the public defense fund.

D. Right to Counsel

The *Gideon-Argersinger* requirement that defendants in criminal cases be provided counsel when they cannot afford private counsel and face potential incarceration requires a clear offer of counsel. Most standards do not address how or when the information should be communicated to arrestees. Failure to address this issue has led to excessive delay in assigning counsel to clients in some jurisdictions. If the counsel offer is refused, there must be an explicit refusal; otherwise, there later may be a claim of non-waiver. Two additional related topics are telephone access to counsel and facilities for private discussion between the defendant and counsel.

The standards in this section address the following topics:

1. Pre-assignment communication
2. Waiver of right to counsel
3. Facilitating attorney–client communication

1. Pre-Assignment Communication

Commentary. Procedures for implementing the right to counsel begin with informing the defendant of that right. Because of the critical nature of this step, the failure of most sets of standards to include this step is somewhat surprising. While most of the national standards include a statement relating to the right to counsel, only the Georgia guidelines among all the state standards do so.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-8.1. Providing counsel to persons in custody

- (a) A person taken into custody or otherwise deprived of liberty should immediately be informed, preferably by defense counsel, of the right to legal representation. An offer of counsel should be made in words easily understood, and it should be stated expressly that one who is unable to pay for representation is entitled to counsel.
- (b) Custodial authorities should provide access to a telephone, the telephone number of the defender, assigned counsel or contract for services program, and any other means necessary to establish communication with a lawyer.
- (c) The defender, assigned counsel or contract for services program should ensure that information on access to counsel is provided to persons in custody. An attorney or representative from the appropriate program should be available to respond promptly to a person in custody who requests the services of counsel.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 2.7 Waiver Safeguards

- a. All persons eligible for representation by assigned counsel shall be informed of that right.
- b. Any person who is represented by appointed counsel and who expresses a desire to proceed pro se shall be fully informed, on the record, of the dangers of proceeding without counsel. Eligible, unrepresented persons shall receive a renewed offer of counsel at every stage of the proceedings against them.
- c. The legal representation plan shall include a designation of responsibility for ensuring that these safeguards are implemented.

Standard 2.8 Standby Counsel

- a. If a person eligible for representation by assigned counsel waives counsel on the record, in favor of self-representation, standby counsel shall be appointed.

- b. Standby counsel shall be available to advise the pro se defendant on preparation and presentation of his or her case, and shall be prepared to represent the defendant if the waiver of counsel is withdrawn at any point.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 3. Notice and Provision of Representation

- (a) If a person who is being detained by a law enforcement officer without charge or judicial process, or who is charged with having committed or is being detained under a conviction of a serious crime, is not represented by an attorney under conditions in which a person having his own counsel would be entitled to be so represented, the law enforcement officer, [magistrate], or court concerned shall:

- (1) clearly inform him of the right of a needy person to be represented by an attorney at public expense; and
- (2) if the person detained or charged does not have an attorney, notify the appropriate public defender that he is not so represented.

This shall be done upon commencement of detention, formal charge, or postconviction proceeding, as the case may be. As used in this subsection, the term “commencement of detention” includes the taking into custody of a probationer or parolee.

- (b) Upon commencement of any later judicial proceeding relating to the same matter, the presiding officer shall clearly inform the person so detained or charged of the right of a needy person to be represented by an attorney at public expense.

...

- (e) Information given to a person under this section is effective only if:
 - (1) it is in writing or otherwise recorded;
 - (2) he records his acknowledgment of receipt and time of receipt, or, if he refuses to make this acknowledgment, the person giving the information records that he gave the information and that the person informed refused so to acknowledge it; and
 - (3) the material so recorded under paragraphs (1) and (2) is filed with the court next concerned.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.3. Initial Contact with Client

The first client contact and initial interview by the public defender, his attorney staff, or appointed counsel should be governed by the following:

1. The accused, or a relative, close friend, or other responsible person acting for him, may request representation at any stage of any criminal proceedings. Procedures should exist whereby the accused is informed of this right, and of the method for exercising it. Upon such request, the public defender or appointed counsel should contact the interviewee.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 1.3 Appointment of Counsel

The Administrator of the indigent defense program or designee shall within 72 hours of detention:

- (a) Appoint counsel for those who are indigent and without counsel ;
- (b) Clearly advise detained persons of their right to have counsel and that if they cannot afford a lawyer, one will be appointed to represent them;
- (c) Allow or assist a person claiming to be indigent and without counsel to immediately complete an Application for Appointment of Attorney and Certificate of Financial Resources for a determination of indigency or not.

2. Waiver of Right to Counsel

Commentary. The right to counsel, like most other rights, may be waived. Formal waiver of the right to counsel on the record is required to document the fact of waiver. Three of the national standards (ABA, NLADA, Model Act) establish procedures for ensuring that any waiver is knowing and is documented.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-8.2. In-court waiver

- (a) The accused's failure to request counsel or an announced intention to plead guilty should not of itself be construed to constitute a waiver of counsel in court. An accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed before a judge and a thorough inquiry into the accused's comprehension of the offer and capacity to make the choice intelligently and understandingly has been made. No waiver of counsel should occur unless the accused understands the right and knowingly and intelligently relinquishes it. No waiver should be found to have been made where it appears that the accused is unable to make an intelligent and understanding choice because of mental condition, age, education, experience, the nature or complexity of the case, or other factors. A waiver of counsel should not be accepted unless it is in writing and of record.
- (b) If an accused in a proceeding involving the possibility of incarceration has not seen a lawyer and indicates an intention to waive the assistance of counsel, a lawyer should be provided before any in-court waiver is accepted. No waiver should be accepted unless the accused has at least once conferred with a lawyer. If a waiver is accepted, the offer should be renewed at each subsequent stage of the proceedings at which the accused appears without counsel.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 2.7 Waiver Safeguards

- a. All persons eligible for representation by assigned counsel shall be informed of that right.
- b. Any person who is represented by appointed counsel and who expresses a desire to proceed pro se shall be fully informed, on the record, of the dangers of proceeding without counsel. Eligible, unrepresented persons shall receive a renewed offer of counsel at every stage of the proceedings against them.
- c. The legal representation plan shall include a designation of responsibility for ensuring that these safeguards are implemented.

***National Conference of Commissioners on Uniform State Laws, Model
Public Defender Act***

Section 7. Waiver

A person who has been appropriately informed under section 3 may waive in writing, or by other record, any right provided by this Act, if the court, at the time of or after waiver, finds of record that he has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise according to law. The court shall consider such factors as the person's age, education, and familiarity with the English language, and the complexity of the crime involved.

3. Facilitating Attorney–Client Communication

Commentary. Among standards studied, only the ABA Defense Function Standards address the necessity of private interviews between the attorney and the client, including telephone access to counsel and facilities.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-2.1. Communication

Every jurisdiction should guarantee by statute or rule of court the right of an accused person to prompt and effective communication with a lawyer and should require that reasonable access to a telephone or other facilities be provided for that purpose.

Standard 4-3.1. Establishment of Relationship

...

- (b) To ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions between counsel and accused in jails, prisons, courthouses, and other places where accused persons must confer with counsel.
- (c) Personnel of jails, prisons, and custodial institutions should be prohibited by law or administrative regulations from examining or otherwise interfering with any communication or correspondence between client and defense counsel relating to legal action arising out of charges or incarceration.

E. Plan for Defense Services or Public Defender

Most standards that provide guidance for the administration of a criminal defense services system require a comprehensive plan that ranges from protecting independence through providing for a case management system. The standards in this section address the following topics:

1. System/plan requirement
2. Protection of independence
3. Governing board
4. Facilities
5. Support services
6. Training
7. Attorney supervision
8. Recruitment and hiring
9. Case overload and case management system
10. Related standards

See also the Federal Office Management Assessment Guide (1995) , which is used by the Defender Service Division of the Administrative Office of the United States Courts to evaluate federal public defender offices.

1. System/Plan Requirement

Commentary. Several standards require the adoption of a written plan that describes how the jurisdiction will provide defense services. Included below are standards promulgated by the American Bar Association, the National Legal Aid and Defender Association, and the states of Georgia, Indiana, and Washington.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-1.2. Systems for legal representation

- (a) The legal representation plan for each jurisdiction should provide for the services of a full-time defender organization when population and caseload are sufficient to support such an organization. Multi-jurisdictional organizations may be appropriate in rural areas.
- (b) Every system should include the active and substantial participation of the private bar. That participation should be through a coordinated assigned-counsel system and may also include contracts for services. No program should be precluded from representing clients in any particular type or category of case.
- (c) Conditions may make it preferable to create a statewide system of defense.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 3.1 Establishment of Legal Representation Plan

- a. Provision of assigned counsel to eligible persons shall be made according to a written plan consistent with these Standards.
- b. Jurisdictions that rely in whole or in part upon assigned counsel for the provision of defense services shall consider whether and how to combine assigned counsel with one or more other methods of providing representation. Three alternative systems are set out in Standards 3.1.A through 3.1.C below.

Standard 3.1.A Assigned Counsel in All Eligible Cases

Jurisdictions which have no defender office and which do not contract with any entity to provide defense services shall establish an assigned counsel plan, consistent with these Standards, for affording quality representation to all eligible persons.

Standard 3.1.B Mixed Delivery System Including Assigned Counsel

- a. Jurisdictions which choose to utilize a defender office and/or contracting entity in conjunction with assigned counsel to provide defense services to eligible persons shall establish a coordinated plan for delivery of defense services.

- b. The plan shall delegate to assigned counsel a substantial portion of all eligible cases, as well as those cases which the defender office and/or contracting entity cannot handle due to conflicts of interest.
- c. None of the defense entities in such a system shall be precluded from providing representation in any particular classification of case.

Standard 3.1.C Assigned Counsel for Conflicts Only

Jurisdictions which choose to utilize a defender office and/or contracting entity as the primary method of providing defense services to eligible persons, and rely on assignment of private counsel for cases which pose a conflict of interest to the primary entity (or entities), shall establish a coordinated plan for the assignment of counsel in those conflict cases.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 4.3 Proposals for an Indigent Defense Program by the Local Governing Committee

A proposal for the establishment of a public defender system, a panel of private attorneys, a legal aid and defender society, a contract system or a combination of the above shall comply with these guidelines and shall provide for:

- (1) The independence of counsel;
- (2) Early entry by counsel into a case;
- (3) A procedure to determine indigency of persons in custody and appointing them counsel within 72 hours of incarceration;
- (4) A procedure for determining that attorneys representing indigents are competent in the practice of criminal law; and
- (5) A rate of compensation and schedule of allowable expenses to be paid for indigent defense services; and include the following:
 - (a) A resolution from the county government authority of each county to be served by the program stating the intent of the county to participate in the proposed indigent defense program within these guidelines;
 - (b) A statement that the local governing committee wishes to set up one or more of the above specified indigent defense programs within these guidelines;
 - (c) A narrative description of the proposed operation of the program;
 - (d) A completed proposal form;
 - (e) All budget data required on the proposal form;
 - (f) Copies of all written procedures and guidelines governing the operation of the program.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

B. Comprehensive Plan

The county public defender board shall adopt a comprehensive plan for indigent defense services...and shall submit the plan to the Indiana Public Defender Commission.

Washington Defender Association, Standards for Public Defense Services

Standard Two. Duties and Responsibilities of Counsel

The legal representation plan shall require that defense services be provided to all clients in a professional, skilled manner consistent with minimum standards set forth by the American Bar Association, applicable state bar association standards, the Rules of Professional Conduct, case law and applicable court rules defining the duties of counsel and the rights of defendants in criminal cases. Counsel's primary and most fundamental responsibility is to promote and protect the best interests of the client.

2. Protection of Independence

Commentary. All seven sets of national standards for the administration of defense services stress the importance of ensuring the independence of the defense agency and its attorney from outside pressures. Each includes both explicit statements about the importance of independence and specific provisions for its achievement. The latter include requirements that

- Case assignment be made by system administrators, not judges or elected officials,
- A board of governors administer the program with a membership that excludes members with potential conflicts, and
- Fixed-term, merit appointment for the defender and merit appointments for the staff be set.

Only three of the 10 jurisdictions with defense services administration standards have explicitly included provisions for ensuring independence of the defense function. Of these, the New York City standards are the most detailed.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-1.3. Professional independence

- (a) The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs.
- (b) An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board. Provisions for size and manner of selection of boards of trustees should assure their independence. Boards of trustees should not include prosecutors or judges. The primary function of boards of trustees is to support and protect the independence of the defense services program. Boards of trustees should have the power to establish general policy for the operation of defender, assigned-counsel and contract-for-service programs consistent with these standards and in keeping with the standards of professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction.

Standard 5-4.1

Selection of the chief defender and staff should be made on the basis of merit.... The chief defender and staff should be compensated at the rate commensurate with their

experience and skill sufficient to attract career personnel and comparable to that provided for their counterparts in prosecutorial offices. The chief defender should be appointed for a fixed term of years and be subject to renewal. Neither the chief defender nor staff should be removed except upon a showing of good cause. Selection of the chief defender and staff by judges should be prohibited.

NLADA Guidelines for Legal Defense Systems in the United States

2.18 Administration of Defense System Funds

(a) Defender Systems

The defender system should be an independent agency and, as such, should prepare its own budget and submit its budget directly to the appropriating authority. Its budget should not be presented as part of the judicial or executive branch budgets, nor should it be subject to diminution or alteration by any branch of government other than the appropriating authority. The Defender Commission should review and advise the Defender Director on the budget before its submission and provide support for the budget request.

The defender system should operate under an annual or biennial lump sum appropriation which would enable the Defender Director to reallocate funds without prior approval of the appropriating authority. The payment of the defender on a case-by-case reimbursement basis, the direct provision of in-kind services or facilities to the defender system by the government, and other substitutes for providing a complete and sufficient budget are explicitly rejected as means of funding defender systems.

(b) Assigned Counsel Programs

The financial administration of assigned counsel program funds should be in the form of an open-ended budget whereby compensation would be paid in accordance with caseload and the nature and extent of the services rendered.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 2.2 Independence from Judiciary and Funding Source

- a. The Assigned Counsel Program and individual assigned counsel shall be free from political influence and shall be subject to judicial supervision only to the extent that privately retained attorneys are.
- b. The Assigned Counsel Program shall operate under and enforce a clear policy protecting the integrity of the relationship between assigned counsel and his or her client.
- c. Assigned counsel shall reject any attempts at interference with the conduct of a particular case.

NLADA Guidelines and Awarding Governmental Contracts for Criminal Defense Services

Guideline II-1 Purposes

The Contracting Authority should appoint a Policy Board if it has appointment powers, or should request that an appropriate authority appoint a Policy Board if it lacks the power of appointment itself. Policy Boards should be constituted to ensure the independence of the Contractor....

Guideline II-2 Members

The Policy Board should consist of from three to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which groups should be represented.

Policy Board members should be appointed using the following criteria:

- (a) Appointees should be persons who will ensure the independence of Contractor.
- (b) Policy Board members should represent a diversity of factions in order to insure insulation from partisan politics.
- (c) No single branch of government should have a majority of votes on the Policy Board.

...

- (g) The Policy Board should not include judges, prosecutors, or law enforcement officials.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 10. Office Of Defender General

...

- (d) Whenever appropriate, the Defender General may contract with private or public legal aid or other non-profit organizations that are equipped to provide the services to needy persons covered by this Act or to carry out any other function of the Office of Defender General. Each contract must provide (1) that the services performed shall meet the professional standards that this Act prescribes for services performed by the Office of the Defender General, and (2) that the services are subject to the Defender General's supervision and control.

***National Advisory Commission on Criminal Justice Standards and Goals,
Report of the Task Force on the Courts***

Standard 13.8. Selection of Public Defenders

¶1 The method employed to select public defenders should insure that the public defender is as independent as any private counsel who undertakes the defense of a fee-paying criminally accused person. The most appropriate selection method is nomination by a selection board and appointment by the Governor. If a jurisdiction has a Judicial Nominating Commission as described in Standard 7.1, that commission also should choose public defenders. If no such commission exists, a similar body should be created for the selection of public defenders.

Standard 13.9. Performance of Public Defender Function

¶2 The public defender should seek to maintain his office and the performance of its function free from political pressures that may interfere with his ability to provide effective defense services. He should assume a role of leadership in the general community, interpreting his function to the public and seeking to hold and maintain their support of and respect for this function.

***Georgia Indigent Defense Council, Guidelines for the Operation of Local
Indigent Defense Programs***

Guideline 2.8 Independence of Counsel

Any indigent program shall operate independently and be structured to preserve independence.

Independent counsel shall be politically autonomous and free from influence, guidance or control from any other authority in the discharge of his/her professional duties, within the bounds of the law and the Code of Professional Responsibility.

***Indiana Public Defender Commission, Standards for Indigent Defense
Services in Non-Capital Cases***

A. County Public Defender Board

A county with a population over 12,000 persons shall establish a county public defender board. Counties subject to I.C. 33-9-15 shall establish a county public defender board pursuant to this statute. Counties excluded from I.C. 33-9-15 shall establish a county public defender board under I.C. 33-1-3 with powers and duties consistent with I.C. 33-9-15. A lawyer who provides representation to indigent persons shall not be appointed to a county public defender board.

**New York City Indigent Defense Organization Oversight Committee,
General Requirements for All Organized Providers of Defense Services to
Indigent Defendants**

I. Professional Independence

A. Performance Standard: In order to guarantee the integrity of the attorney-client relationship, defense organizations and the lawyers they employ should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as all other practicing lawyers.

B. Evaluation Criteria

1. Does the defense organization have an independent governing board which is charged, *inter alia*, with supporting and protecting the professional independence of the organization's lawyers?

Specific Guidelines:

- (a) *The defense organization should be governed by a board comprised of members selected in a manner independent of political influence and judicial supervision.*
- (b) *A majority of the governing board should be composed of lawyers admitted to practice in the State of New York.*
- (c) *Membership of the governing board should not include judges, prosecutors, law-enforcement officials or representatives of city government.*
- (d) *The governing board should be of sufficient size and diversity to reflect generally the racial, ethnic and gender composition of the community that the defense organization serves.*

3. Governing Board

Commentary. A major step to ensuring independence of the defense function is the establishment of a governing board to provide policy direction and to act as a buffer against outside pressures. Requirements for a governing board are set forth by the ABA Defense Services Standards, three NLADA standards, and those for Georgia and Indiana.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-1.3. Professional independence

...

- (b) An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board. Provisions for size and manner of selection of boards of trustees should assure their independence. Boards of trustees should not include prosecutors or judges. The primary function of boards of trustees is to support and protect the independence of the defense services program. Boards of trustees should have the power to establish general policy for the operation of defender, assigned-counsel and contract-for-service programs consistent with these standards and in keeping with the standards of professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction.

NLADA Guidelines for Legal Defense Systems in the United States

2.10 The Defender Commission

A special Defender Commission should be established for every defender system, whether public or private.

The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented.

Commission members should be selected under the following criteria:

- (a) The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director.
- (b) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics.
- (c) No single branch of government should have a majority of votes on the Commission.

- (d) Organizations concerned with the problems of the client community should be represented on the Commission.
- (e) A majority of the Commission should consist of practicing attorneys.
- (f) The Commission should not include judges, prosecutors, or law enforcement officials.

Members of the Commission should serve staggered terms in order to ensure continuity and avoid upheaval.

2.11 Functions of the Defender Commission

The primary function of the Defender Commission should be to select the State Defender Director. The Commission should also:

- (a) Assist the State Defender Director in drawing up procedures for the selection of Assistants or Deputies;
- (b) Receive possible client complaints, initiate statistical studies of case disposition, and monitor the performance of the Defender Director;
- (c) Maintain a continuing dialogue with the State Defender Director in order to provide input and advice;
- (d) Assist in ensuring the independence of the defender system by serving as a buffer and educating the public regarding constitutional requirements and the functions of the defenders;
- (e) Serve as liaison between the legislature and the defender system upon request of the Defender Director; and
- (f) Remove the Defender Director from office in the event that good cause is shown.

The Commission should not interfere with the discretion, judgment and zealous advocacy of defender attorneys in specific cases.

The Commission should meet on a regular basis and should be presided over by a chairperson elected by its members.

The Commission should serve without pay, and should be reimbursed for travel and other reasonable expenditures incurred as a result of membership.

A majority of commission members should constitute a quorum, and any resolution, policy adoption, or motion should require a vote of a majority of those present. However, selection of the Defender Director should require the vote of each member due to the importance of that decision. Voting by proxy should be prohibited.

2.12 Qualifications of the Defender Director and Conditions of Employment

The Defender Director should be a member of the bar of the state in which he is to serve. He should be selected on the basis of a non-partisan, merit procedure which ensures the selection of a person with the best available administrative and legal talent, regardless of political party affiliation, contributions, or other irrelevant criteria.

The Defender Director's term of office should be from four to six years in duration and should be subject to renewal. The director should not be removed from office in the course of a term without a hearing procedure at which good cause is shown.

2.13 The Governing Body for Assigned Counsel Programs

An assigned counsel program should be operated under the auspices of a general governing body. The majority of the members of the governing body should be attorneys but should not be judges or prosecuting attorneys. Its composition should conform to the criteria established for the Defender Commission.

The functions of the governing body should include the following: design ing the general scheme of the system; specifying the qualifications for the position of administrator of the system; defining the function of the admin istrator and authorizing sufficient staff to support that function; prescribing salaries and terms of employment; adopting appropriate rules or procedures for the operation of the governing body itself, as well as general guidelines for the operation of the system; acting as a selection committee for the appointment of an administrator, or in the alternative, providing for a special sel ection committee; exercising general fiscal and organizational control of the system; seeking and maintaining proper funding of the system; ensuring the independence of the administrator and assigned counsel; and encouraging the public, the courts, and the funding source to recognize the significance of the defense function as a vital and independent component of the justice system.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline II-1 Purposes

The Contracting Authority should appoint a Policy board if it has appointment powers, or should request that an appropriate authority appoint a Policy Board if it lacks the power of appointment itself. Policy boards should be constituted to ensure the independence of the contractor and to provide the Contracting Authority with expertise and support in such matters as criminal defense functions, determination of attorneys fees and salary levels, determination of reasonable caseload standards, interpretation of standards governing the provision of public defense services, response to community and client concerns, and implementation of the contract defense system.

Guideline II-3 Duties

Duties of the Policy Board shall be to:

- (a) advise the contracting Authority about, and approve, the terms and minimum requirements of any contract for defense services;
- (b) advise the Contracting Authority on fee schedules, rate of reimbursement, prevailing attorney fees and other issues related to the cost of public defense services;

- (c) supervise the contract bidding and award process, if not retained by the Contracting Authority;
- (d) select the contract defender...to whom contract will be let, if not retained by the Contracting Authority; and
- (e) establish and apply minimum qualifications for lawyers whose services are provided by the Contractor, if this function is not assigned to the contractor as a condition of the contract.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 3.2.1 Creation of Board

- a. The Assigned Counsel Program shall be operated under the aegis of a general governing body, the Board.
- b. The majority of the members shall be attorneys but none shall be judges, prosecutors or law enforcement officials.
- c. Members shall not receive a salary but shall be reimbursed for reasonable, actual and necessary expenses.
- d. Terms of office shall be staggered.

Standard 3.2.2 Functions of Board

- a. The Board shall establish policy and exercise general supervision over the operations of the Assigned Counsel Program.
- b. The Board shall also hire an Administrator.
- c. The Board shall refrain from interference in the conduct of individual cases.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 2.1 The Function of Local Governing Committees

The local governing committee shall be constituted as defined in O.C.G.A. §17-12-30 et seq.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

A. County Public Defender Board

A county with a population over 12,000 persons shall establish a county public defender board. Counties subject to I.C. 33-9-15 shall establish a county public defender board

pursuant to this statute. Counties excluded from I.C. 33-9-15 shall establish a county public defender board under I.C. 33-1-3 with powers and duties consistent with I.C. 33-9-15. A lawyer who provides representation to indigent persons shall not be appointed to a county public defender board.

4. Facilities

Commentary. Standards that address the need for adequate physical facilities include the NLADA Guidelines for Legal Defense Systems, the Model Public Defender Act, and the National Advisory Commission Standards. Of these, the NLADA standards are the most detailed. The most significant difference among these standards is the omission of any reference to library facilities in the earlier Model Public Defender Act.

NLADA Guidelines for Legal Defense Systems in the United States

Guideline 3.4 Nonpersonnel Needs in Defender Offices

Defender offices should have a budget for operating expenses that provides for a professional quality office, library and equipment comparable to a private law firm of similar size. Facilities and resources should be at least comparable to, and in no event less than, that provided for other components of the justice system with whom the defender must interact, such as the courts, prosecution, and the police.

Defender office facilities should include separate offices for management, legal and social work staff, shared space for investigators, paraprofessionals and other support staff, secure space for confidential records, equipment and petty cash, and reasonable allocations of ancillary space related to staff size for reception and client waiting areas, conference rooms and library, mailroom and reproduction, supplies and storage. Separate toilet facilities should be provided for staff. Parking should be provided for staff who require the use of an automobile for field tasks.

Defender office budgets should include funds for procurement of experts and consultants, ordering of minutes and transcripts on an expedited basis and for the procurement of other necessary services. Defender offices should not be required to seek prior approval or post-expenditure ratification of payments for such services except in those limited cases where the expenditure is extraordinary.

Defender offices should be equipped with quality communications and reproduction equipment. Where data requirements so warrant, defender offices should have data processing facilities and services on lease or contract which are designed for defender requirements. If the defender office is included in a criminal justice information system, the system should be required to meet defender specifications regarding reporting frequency, data definition and format.

Defender offices should be exempt from governmental public bidding requirements for purchasing where the public bidding process cannot be completed for timely acquisition of services or equipment.

***National Advisory Commission on Criminal Justice Standards and Goals,
Report of the Task Force on the Courts***

Standard 13.14. Supporting Personnel and Facilities

¶3, 4, 5 The budget of a public defender for operational expenses other than the costs of personnel should be substantially equivalent to, and certainly not less than, that provided for other components of the justice system with whom the public defender must interact, such as the courts, prosecution, the private bar, and the police. The budget should include:

1. Sufficient funds to provide quarters, facilities, copying equipment, and communications comparable to those available to private counsel handling a comparable law practice.
2. Funds to provide tape recording, photographic and other investigative equipment of a sufficient quantity, quality, and versatility to permit preservation of evidence under all circumstances.

...

4. Sufficient funds or means of transportation to permit the office personnel to fulfill their travel needs in preparing cases for trial and in attending court or professional meetings.

Each defender lawyer should have his own office that will assure absolute privacy for consultation with clients.

The defender office should have immediate access to a library containing the following basic materials: the annotated laws of the State, the State code of criminal procedure, the municipal code, the United States Code Annotated, the State appellate reports, the U.S. Supreme Court reports, Federal courts of appeal and district court reports, citators governing all reports and statutes in the library, digests for State and Federal cases, a legal reference work digesting State law, a form book of approved jury charges, legal treatises on evidence and criminal law, criminal law and U.S. Supreme Court case reporters published weekly, loose leaf services related to criminal law, and, if available, an index to the State appellate brief bank. In smaller offices, a secretary who has substantial experience with legal work should be assigned as librarian, under the direction of one of the senior lawyers. In large offices, a staff attorney should be responsible for the library.

***National Conference of Commissioners on Uniform State Laws, Model
Public Defender Act***

Section 8. Use of State Facilities

An attorney representing a person under this Act is entitled to use any state, county, or municipal technical services and facilities for the development or evaluation of evidence that are available to the [state or local prosecutor].

Section 12. Personnel and Facilities

...

- (d) The [appropriate administrative authority] of the state shall provide appropriate facilities (including office space, furniture, equipment, books, postage, supplies, and interviewing facilities in jail) necessary to carry out the Defender General's responsibilities under this Act.

5. Support Services

Commentary. All the national standards and five state standards require support services to assist attorneys. Support services include investigation, experts, secretaries, social work staff, and other support staff. These services are to be available at every stage of the proceedings.

Most standards state that support services must be included in the budget for the defense service organization and be included as part of the defense organization's permanent staff. The Model Public Defender Act, however, provides for judicial authorization and for the state Defender General to employ support services staff. Both the Kansas and Washington standards also provide for court authorization of expert witnesses' fees. The Kansas standards also provide for court review of investigative expenses.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-1.4. Supporting services

The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process.

NLADA Guidelines for Legal Defense Systems in the United States

Guideline 3.1 Assigned Counsel Fees and Supporting Services

...

Funds should be available in a budgetary allocation for the services of investigators, expert witnesses and other necessary services and facilities.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-8 Support Staff and Forensic Experts

The contract should provide for employment of secretaries, social work staff, mental health professionals, forensic experts and support staff to perform tasks not requiring legal credentials or experience and tasks for which support staff and forensic experts possess special skills. Such skills are particularly important to ensuring effective performance of defense counsel at the bail, pretrial release, investigation and sentencing stages, and in the preparation of dispositional plans.

- (a) *Secretaries.* The contract should provide an adequate number of secretaries to ensure competent representation to clients and adequate assistance to attorneys.
- (b) *Social Service Personnel.* The contract should provide an adequate number of social service personnel....
- (c) *Mental Health Professionals.* The contract should specifically include funds for confidential hiring of mental health professionals to perform evaluations and to assist at trial, unless mental health professionals are provided to the contractor to perform mental evaluations by court order or otherwise upon request.
- (d) *Forensic and Other Experts.* The contract should specifically include funds for confidential hiring of forensic and other experts and for the use of forensic experts at trial.

Guideline III-9 Investigators

The contract should specify that adequate investigation services necessary to provide competent representation shall be available to the Contractor. No contract clause should interfere with the contracting attorney’s selection, supervision, or direction of investigators.

Guideline III-10 Compensation

The contract shall provide that the Contractor compensate:

- (a) its staff, employees, subcontractors and retained forensic experts at rates commensurate with their training, experience and responsibilities and with compensation paid to persons doing similar work in public agencies in the jurisdiction....

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 4.6 Support Services

The Assigned Counsel Program shall ensure that the many support services necessary for the effective defense of clients are available to assigned counsel at every phase of the cases to which counsel are assigned.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 2. Right to Representation, Services, and Facilities

- (a) A needy person who is being detained by a law enforcement officer without charge or judicial process, or who is charged with having committed or is being detained under a conviction of a serious crime, is entitled:

...

- (2) to be provided with the necessary services and facilities of representation (including investigation and other preparation), as authorized or later approved by the court. The attorney, services and facilities, and court costs shall be provided at public expense to the extent that the person, at the time the court determines need, is unable to provide for their payment without undue hardship.

Section 12. Personnel and Facilities

- (a) The Defender General may employ, in the manner and at the compensation prescribed by the [appropriate legislative authority], as many deputy defenders general, public defenders (including [district] public defenders), investigators, clerks, stenographers, and other persons as necessary to carry out his responsibilities under this Act. Persons employed under this section, other than civil service employees, serve at the pleasure of the Defender General.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.14. Supporting Personnel and Facilities

¶1 Public defender offices should have adequate supportive services, including secretarial, investigation, and social work assistance.

¶2 In rural areas (and other areas where necessary), units of local government should combine to establish regional defenders' offices that will serve a sufficient population and caseload to justify a supporting organization that meets the requirements of this standard.

¶3 ...The budget should include:

...

3. Funds for the employment of experts and specialists, such as psychiatrists, forensic pathologists, and other scientific experts in all cases in which they may be of assistance to the defense.

Standard 13.15. Providing Assigned Counsel

The public defender office should have responsibility for compiling and maintaining a panel of attorneys.... The public defender's office also should...support services for appointed lawyers, and it should monitor the performance of appointed attorneys.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 2.7

...

The contract shall avoid creating conflicts of interest between the Contractor or individual defense attorney and clients. Specifically:

- (a) expenses for investigations, expert witnesses, transcripts and other necessary services for the defense should not decrease the Contractor's income or compensation to attorneys.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

I. Support Services

The comprehensive plan shall provide for investigative, expert, and other services necessary to provide quality legal representation consistent with Standard 5-1.4 of the American Bar Association Standards for Criminal Justice, Chapter 5: *Providing Defense Services* (3rd ed. 1990).

J. Caseloads of Counsel

...

Support Staff Standards

Table 2

Paralegal Felony	One for every four attorneys
Paralegal Misdemeanor	One for every five attorneys
Investigator Felony	One for every four attorneys
Investigator Misdemeanor	One for every six attorneys
Secretary Felony	One for every four attorneys
Secretary Misdemeanor	One for every six attorneys

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-7-3. Limitations

- (a) Each claim for compensation shall be for investigative, expert or other services performed on or after the date of the order authorizing the services unless the judge

finds that timely procurement of necessary services could not await prior authorization.

- (b) Each claim shall not exceed the estimated cost set forth on the order authorizing the services.

105-7-4. Investigators

Each individual performing services as an investigator shall be compensated at a rate not to exceed \$20 per hour, unless a higher rate has been approved in advance by the director.

105-7-5. Psychiatric or psychological services

Each individual performing psychiatric or psychological services shall be compensated at a rate approved in advance by the director.

105-7-6. Interpreters

Each individual performing services as an interpreter for the defense shall be compensated at a rate not to exceed \$15 per hour, unless a higher rate has been approved in advance by the director. No more than one interpreter per defendant may be compensated for services performed at the same stage of the proceeding.

105-7-7. Other services

Each individual performing other allowable defense services shall be compensated at a rate approved in advance by the director.

105-7-8. Maximum compensation

Any claim in excess of \$300, in any one case, for investigative, expert, or other services and any claim in excess of \$1,000 for psychiatric or psychological services shall require approval of the director.

105-7-9. Services not compensable

The following services shall not be compensable unless approved by the director:

- (a) polygraph examinations;
- (b) psychological stress evaluation exams;
- (c) psychiatric or other services arising out of proceedings to determine competency to stand trial;
- (d) other expert tests unless the results are admissible as evidence; and
- (e) any other expert services not necessary for an adequate defense of the case.

New York City Indigent Defense Organization Oversight Committee, General Requirements for All Organized Providers of Defense Services to Indigent Defendants

VII. Support Services

A. Performance Standard: Quality criminal defense representation requires that lawyers be supported by adequate clerical and word-processing services and equipment, have access to an adequate and up-to-date library, and be able to call upon other professional services when necessary in individual cases.

B. Evaluation Criteria

1. Clerical

- (a) Are lawyers supported by a full-time clerical staff with adequate word-processing equipment?
- (b) Does the defense organization employ sufficient staff capable of communicating with non-English speaking clients?
- (c) Does the defense organization have adequate filing and information-retrieval services and equipment?
- (d) Does the defense organization employ competent information services management?
- (e) Does the defense organization provide adequate working space to each lawyer, including private offices for interviewing clients?
- (f) Does each lawyer have adequate access to a personal computer?

Specific Guideline:

Each defense organization's office should, at a minimum, contain telephones, computer equipment, facsimile facilities, adequate copying and mailing facilities and adequate working space for each lawyer, including private offices for interviewing clients.

2. Library

- (a) Do lawyers have access to an up-to-date library, including computer-assisted legal research facilities?
- (b) If the defense organization does not have its own on-site library, does it make available to its lawyers at their offices annotated statutes, practice treatises, manuals and periodicals covering substantive issues of criminal law and procedure that are updated on at least an annual basis?
- (c) Does the defense organization maintain useful and easily accessible precedent files to avoid having to recreate recurring forms and motions?
- (d) Does the defense organization circulate relevant appellate decisions on criminal law and procedure to its lawyers on a timely basis?
- (e) Does each lawyer have ready access to the New York Law Journal?

3. Support Services

- (a) Do lawyers have sufficient access, when client needs require, to the services of professionals necessary to provide quality representation at all stages of the case?

Specific Guideline:

Lawyers should have access, as client needs require, to paralegals, experienced investigators, psychiatrists, forensic pathologists, social and mental health providers, interpreters and other professionals.

- (b) If supervisory approval is necessary for staff lawyers to obtain professional services, do adequate procedures exist to ensure a timely decision?
- (c) Do lawyers and investigators have use of up-to-date audio and videotape recording, photographic and other investigative equipment to permit preservation of all needed evidence?
- (d) Do appellate defense organizations employ sufficient paralegal staff to do the work of preparing records so that lawyers may devote their time to developing legal issues, writing briefs and arguing appeals?
- (e) Does the defense organization have an effective procedure for recommending eligible clients for diversionary programs and alternatives to incarceration?

Washington Defender Association, Standards for Public Defense Services

Standard Four. Responsibility for Expert Witness Fees

Reasonable compensation for expert witnesses necessary to preparation and presentation of the defense case shall be provided. Expert witness fees should be maintained and allocated from funds separate from those provided for defender services. Requests for expert witness fees under Court Rule 3.1 f should be made through an *ex parte* motion. The defense should be free to retain the expert of its choosing and in no cases should be forced to select experts from a list pre-approved by either the court or the prosecution.

Standard Six. Investigators

Public defender offices, assigned counsel, and private law firms holding contracts to provide representation for poor people accused of crimes should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every four attorneys.

Standard Seven. Support Services

The legal representation plan should provide for adequate numbers of investigators, secretaries, paralegals, social work staff, mental health professionals and other support services. These professionals are essential to ensure the effective performance of defense counsel during trial preparation, in the preparation of dispositional plans, and at sentencing.

1. Secretaries At least one full-time secretary should be employed for every four staff attorneys. Fewer secretaries may be necessary, however, if the agency has access to

word processing or overload secretaries, or other additional staff performing clerical work.

2. **Social Work Staff** Social work staff should be available to assist in developing release, treatment, and dispositional alternatives.
3. **Mental Health Professionals** Each agency should have access to mental health professionals to perform mental health evaluations.

6. Training

Commentary. All the national standards include training, professional development, and continuing legal education requirements, except for NLADA's Guidelines for Contract Services. This latter set of standards assumes that defense contracts will be awarded to experienced attorneys with prior training.

Four state standards also include training requirements. All the national standards except for the ABA Defense Services Standards and the Washington standards provide for new attorney training (the latter for attorneys in offices with more than seven lawyers). See also NLADA's Defender Training and Development Standards in the Appendix of this volume.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-1.5. Training and professional development

The legal representation plan should provide for the effective training, professional development and continuing education of all counsel and staff involved in providing defense services. Continuing education programs should be available, and public funds should be provided to enable all counsel and staff to attend such programs.

NLADA Guidelines for Legal Defense Systems in the United States

Guideline 5.6 Accreditation and Specialization

An accreditation program for defender offices and assigned counsel programs should be developed within the appropriate national professional organization to encourage compliance with national standards and to promote the general improvement of defense services.

A certification program for criminal law specialists should be considered.

Guideline 5.7 Training Staff Attorneys in a Defender System

The training of defenders should be systematic, comprehensive and at least equal in scope to that received by prosecutors. Every defender office should provide an orientation program for new staff attorneys. Intensive entry-level training should be provided at the state or local level and, to the extent possible, defender hiring practices should be coordinated to facilitate an entry-level training program during which newly hired attorneys are not assigned to regular office duties.

In-service training programs for defender attorneys should be provided at the state and local level so that all attorneys are kept abreast of developments in criminal law, criminal procedure and the forensic sciences. As a part of in-service training, defender attorneys

should be required to read appellate slip opinions, loose-leaf services and legal periodicals.

Every defender office should seek to enroll staff attorneys in national and statewide training programs and courses that have relevance to the development of trial advocacy skills.

Defender offices should provide training for investigative staff.

Guideline 5.8 Training Assigned Counsel

A single person or organization should assume the responsibility for training of assigned counsel panel members. Where there is an administrator, that individual should bear the responsibility.

Training programs should take into consideration the prior experience and skills of the attorneys. Special programs should be established for those less experienced attorneys who wish to qualify for the assigned counsel panel.

Formal training programs stressing lectures, demonstrations, and supervised participant involvement should be regularly scheduled. Joint sponsorship of such programs by defender organizations, local bar groups, and/or national organizations should be encouraged.

Reasonable attendance at training programs should be required of attorneys in order to remain on the panel.

If the operating budget is not sufficient, funds should be requested from outside sources to initiate formal training or to further develop formal training programs.

Assigned counsel should be encouraged to periodically attend other criminal law -related seminars in addition to the regular formal training programs.

Facilities for training programs should include audio and video tapes. Further, a national organization should consider providing, as a service, such tapes to defender offices and bar associations concerned with training attorneys who regularly accept appointments in criminal cases.

In addition to formal training programs, those responsible for the adequacy of assigned counsel performance should make the following resources available: an apprenticeship program, an initial hand-out or package of materials, an evaluation procedure, a motion and brief bank, a complete law library, information on experts, a newsletter, access to other attorneys for consultation, and law student assistance.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 4.2 Orientation

The Administrator shall ensure that lawyers new to the Program receive a mandatory orientation on Program policies and procedures before they are assigned cases.

Standard 4.3.1 Entry-Level Training

- a. The Administrator shall be responsible for preparing, in accordance with Board specifications, an entry-level training program.
- b. Entry-level training shall be mandatory for all attorneys unless they come under exceptions specified by the Board, or the Administrator acting at its direction.

Standard 4.3.2 In-Service Training

- a. The Board shall establish regulations requiring attorneys to attend a specified number of training units per year in order to remain on a Program roster.
- b. The Administrator shall be responsible for preparing, in accordance with Board directives, periodic in-service training programs to provide systematic, comprehensive instruction in substantive law and courtroom skills. He or she shall also determine, upon request, whether training offered by entities other than the Program may be counted toward the training units required by the Board.
- c. The Administrator shall ensure that attorneys remaining on a Program roster have attended the number of training units required by the Board.
- d. The Board and Administrator shall encourage attorneys to participate in training sessions beyond the mandatory units.

Standard 4.4.1 Mentoring

- a. The Board shall establish a policy with regard to the provision of mentors more experienced, competent attorneys to advise less experienced attorneys on a Program roster.
- b. Mentors shall be compensated for mentoring services according to Board specifications.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.15. Providing Assigned Counsel

...The public defender's office also should provide initial and inservice training to lawyers on the panel....

Standard 13.16. Training and Education of Defenders

The training of public defenders and assigned counsel panel members should be systematic and comprehensive. Defenders should receive training at least equal to that received by the prosecutor and the judge. An intensive entry-level training program should be established at State and national levels to assure that all attorneys, prior to representing the indigent accused, have the basic defense skills necessary to provide effective representation.

A defender training program should be established at the national level to conduct intensive training programs aimed at imparting basic defense skills to new defenders and other lawyers engaged in criminal defense work.

Each State should establish its own defender training program to instruct new defenders and assigned panel members in substantive law procedure and practice.

Every defender office should establish its own orientation program for new staff attorneys and for new panel members participating in provision of defense services by assigned counsel.

Inservice training and continuing legal education programs should be established on a systematic basis at the State and local level for public defenders, their staff attorneys, and lawyers on assigned counsel panels as well as for other interested lawyers.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 10. Office Of Defender General

...

- (e) The Defender General shall supervise the training of all public defenders, and for this purpose he may establish a training course.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

M. Training and Professional Development

The comprehensive plan shall provide for effective training, professional development and continuing education of all counsel and staff involved in providing defense services at county expense.

New York City Indigent Defense Organization Oversight Committee, General Requirements for All Organized Providers of Defense Services to Indigent Defendants

III. Training

- A. Performance Standard: All lawyers employed by defense organizations should receive initial training and continuing legal education sufficient to ensure that their skills and knowledge of criminal law and procedure enable them to provide quality representation.
- B. Evaluation Criteria
 - 1. Does the defense organization require all inexperienced lawyers to attend its own or outside training programs to acquaint them with all relevant aspects of criminal defense work, including substantive law, criminal procedure, collateral consequences of criminal convictions, ethics and professionalism?

2. Does the defense organization conduct internal seminars and workshops covering recent developments in criminal law and procedure and collateral consequences such as deportation and forfeiture?
3. Does the defense organization require trial lawyers to attend a trial advocacy course provided by the defense organization itself or a recognized provider of continuing legal education?
4. Does the defense organization require lawyers to attend an annual continuing legal education course regarding substantive and procedural issues provided by the defense organization itself or a recognized provider of continuing legal education?
5. Does the defense organization conduct moot courts for trial proceedings and appellate arguments?
6. Does the defense organization require supervising lawyers to attend training programs that teach supervisory skills?
7. Does the defense organization provide training or orientation programs for professionals providing support services?
8. Does the defense organization encourage its lawyers to participate in the criminal justice activities and programs of bar and defender associations and to share the benefits of such participation with the entire staff?

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

Model Contract for Counsel Services for Indigent Defendants

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18. Continuing Legal Education:

Each attorney of the FIRM shall attend three hours of continuing legal education in the field of criminal law during each calendar year of the contract. Certification of this attendance must be provided to the presiding judge of the judicial district on December 31 of each year.

Washington Defender Association, Standards for Public Defense Services

Standard Nine. Training

Attorneys providing public defense services should participate in regular training programs on criminal defense law, including a minimum of seven hours of continuing legal education annually in areas relating to their public defense practice.

In offices of more than seven attorneys, an orientation and training program for new attorneys and legal interns should be held to inform them of office procedure and policy.

All attorneys should be required to attend regular in-house training programs on developments in criminal law, criminal procedure and the forensic sciences. Attorneys in civil commitment and dependency practices should attend training programs in these areas. Offices should also develop manuals to inform new attorneys of the rules and procedures of the courts within their jurisdiction.

Every attorney providing counsel to indigent accused should have the opportunity to attend courses that foster trial advocacy skills and to review professional publications and tapes.

7. Attorney Supervision

Commentary. Every organization with employees must provide for their supervision and discipline. However, only the several NLADA standards and three states provide supervisory standards. In addition, the Federal Office Management Assessment Guide requires that each defender office establish individual performance standards and conduct written performance evaluations. Employee queries of procedures are also provided for. See also, Gwinnett Judicial Circuit Internal Operating Procedure 98-5, G 2.1(c)(e), requiring the court and county indigent defense governing committee to monitor the work of appointed counsel and remove them when necessary.

NLADA Guidelines for Legal Defense Systems in the United States

Guideline 5.4 Supervision and Evaluation of Defender System Personnel

The professional performance of defender staff attorneys should be subject to systematic supervision and evaluation based upon publicized criteria. Supervision and evaluation efforts should be individualized, and should include monitoring of time and caseload records, review and inspection of case files and transcripts, in-court observation and periodic conferences.

Guideline 5.5 Monitoring and Evaluation of Assigned Counsel Program Personnel

All evaluations of panel attorneys should be conducted by the administrator of the program. The results of evaluations should be reported to the attorney upon request of the attorney or in the discretion of the administrator.

A system of performance evaluations based upon personal monitoring by the administrator, augmented by regular inputs from judges, prosecutors, other defense lawyers and clients, should be developed. Periodic review of selected cases should be made by the administrator.

The criteria of performance utilized in evaluations should be those of a skilled and knowledgeable criminal lawyer.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-16 Supervision and Evaluation

The contract should establish a procedure for internal systematic supervision and evaluation of the performance of the Contractor's staff based upon publicized criteria. Supervision and evaluation efforts should include monitoring of time and caseload records, review and inspection of transcripts, an evaluation of attorney case activity, in-court observations, and periodic conferences.

A system of performance evaluations should be based upon personal monitoring by the Contractor's Director or chief Attorney and should be augmented by regular, formalized comments by judges, prosecutors, other defense lawyers and clients. The criteria of performance employed should be those of a skilled and knowledgeable criminal lawyer.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 4.4 Supervision of Attorneys

- a. The Board shall establish policies regarding supervision of assigned counsel working within the Program. These policies shall include a procedure for handling complaints from clients and others.
- b. The Administrator shall be responsible for supervision.

Standard 4.4.1 Mentoring

- a. The Board shall establish a policy with regard to the provision of mentors more experienced, competent attorneys to advise less experienced attorneys on a Program roster.
- b. Mentors shall be compensated for mentoring services according to Board specifications.

Standard 4.4.2 Monitoring

- a. The Administrator, under the direction of the Board, shall establish a system for monitoring the performance of the attorneys on the Program roster(s). Monitoring shall be done by the Administrator or his or her designee.
- b. The standard against which Program attorneys are measured shall be that of a skilled, knowledgeable and conscientious criminal defense lawyer adhering to the performance standards established under Standard 2.9.
- c. The Administrator shall publicize the criteria used in monitoring, and shall inform monitored attorneys of results upon request, upon the decision to impose penalties (Standard 4.5.1), or to seek removal (Standard 4.5.2) and otherwise in the Administrator's discretion.
- d. The Administrator shall not have access to privileged work product, and shall not invade attorney-client confidentiality.

Standard 4.5 Disciplinary Policies and Procedures

- a. The Board shall establish policies and procedures for imposition of penalties, including removal from the Program roster, on attorneys for failure to observe Program policies and rules, including failure to provide the quality representation mandated by these Standards.
- b. No attorney shall be removed from a case in which representation has already begun except with the consent of the client and in accordance with the governing ethical and judicial rules of the jurisdiction.

Standard 4.5.1 Penalties Less than Removal

The Board may permit, and the Administrator may establish, a schedule of penalties less than removal from the Program roster(s) for failure to comply with Program rules, policies, or required performance. Such penalties shall be coupled with a requirement that the attorney correct the deficiencies in question.

Standard 4.5.2 Removal from Program Roster(s)

- a. Where an attorney has failed to correct deficiencies for which penalties under Standard 4.5.1 have been imposed, or where egregious deficiencies in performance have occurred, the Administrator shall give the attorney notice, in writing, that removal of the attorney from the roster is contemplated. Such notice shall be given within a period of time established by the Board (or as part of the legal representation plan).
- b. Where the alleged actions or inactions of the attorney involve a pattern of failing to provide competent representation to clients, or the Administrator has cause to believe that the attorney cannot provide competent representation to new clients, the Administrator may suspend assignments to the attorney immediately.
- c. After notice has been given, the Administrator (or the Board, or a Removal Committee of the Board if the Board has so directed) shall, unless the attorney consents in writing to removal, conduct a hearing to determine whether cause exists for removal of the Attorney from the Program roster(s). The decision to remove or retain the attorney shall be made in writing.
- d. Where the decision to remove is made by the Administrator or a Removal Committee, the attorney shall have the right to appeal the decision to the Board, whose decision shall be final.
- e. Where removal has been for failure to provide competent representation to one or more clients, the Administrator may seek, in court, substitution of counsel in cases already assigned to the attorney in question, if there is reason to believe competent representation is not being provided in those cases.
- f. Unless removed from pending cases by the court in which the cases are lodged, an attorney removed from the Program roster(s) shall complete work in cases to which he or she was already assigned at the time of removal, and shall be entitled to compensation in the usual manner. If substitution of counsel is granted, the Program shall compensate the attorney for work done up to the date of removal unless ordered by the court not to do so.

Standard 4.5.3 Reinstatement After Removal

- a. The Board shall establish a procedure for consideration of a removed attorney's application for reinstatement to the Program roster(s).
- b. The procedure should include a requirement that the attorney demonstrate that the deficiencies which led to removal will not be repeated.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 3.1 Competent and Effective Counsel

The public defender or contract lawyer selected should be competent and effective in his/her role.

...

The committee shall observe the performance of the public defender or contract lawyer in order to be assured that he/she is performing the role effectively.

Indicators of performance are:

- (a) Early entry into representation of indigents;
- (b) Vigorous and independent representation of the client;
- (c) Participation in training activities and continuing legal education;
- (d) Effective and reasonable use of time and resources.

Guideline 3.2 Competence and Effectiveness of Attorneys in a Local Panel Program

The local committee shall select only competent attorneys as panel attorneys and their effectiveness on the job should be monitored and assessed. Indicators of performance are:

- (a) Early entry into representation of indigents;
- (b) Vigorous and independent representation of the client;
- (c) Participation in training activities and continuing legal education;
- (d) Effective and reasonable use of time and resources.

New York City Indigent Defense Organization Oversight Committee, General Requirements for All Organized Providers of Defense Services to Indigent Defendants

Requirement II. Qualification of Lawyers

...

B. Evaluation Criteria

1. Qualification for Counsel

- (b) Specific Criteria for Assignment of Trial Counsel to Particular Categories of Cases

- (i) Misdemeanor Cases

...

- (2) Alternatively, does the defense organization require that all lawyers who do not have previous criminal litigation experience be...supervised by experienced counsel at their initial court appearances and at their first misdemeanor trial?

...

(d) Criteria for Supervising Lawyers

- (i) Does the defense organization require that trial supervising lawyers meet all qualifications for trial lawyers who handle felony cases and have sufficient experience, temperament and capability to discharge supervisory responsibilities?
- (ii) Does the defense organization require that appellate supervising lawyers meet all qualifications for appellate staff lawyers, that they have briefed and argued complex appeals, and that they have sufficient experience, temperament and capability to discharge supervisory responsibilities?

Requirement IV. Supervision

A. Performance Standard: Quality representation requires that defense organizations provide adequate supervision on a continuing basis for lawyers and professionals providing support services, with the amount of supervision varying inversely to the experience of the persons supervised. Even a defense organization composed entirely of experienced professionals should provide supervision to monitor compliance with client needs and the requirements of the courts.

B. Evaluation Criteria

1. Does the defense organization maintain a satisfactory ratio of supervising lawyers to staff lawyers?

Specific Guideline:

The defense organization should provide at least one supervising lawyer for every ten staff lawyers.

2. Do supervising lawyers have both the time and authority to assume responsibility for:
 - (a) assuring discharge of all duties to clients and the courts;
 - (b) quality control;
 - (c) troubleshooting;
 - (d) on-the-job training; and
 - (e) meaningful critique and evaluation of staff lawyers' performance?

Specific Guidelines:

(a) At a minimum, supervising lawyers should be available to:

- (i) *discuss cases, strategy and ethical considerations;*
 - (ii) *help prepare witnesses;*
 - (iii) *review written work prior to submission;*
 - (iv) *conduct simulated moot court oral advocacy sessions;*
 - (v) *accompany staff lawyers to court when necessary; and*
 - (vi) *provide critique, feedback and evaluation of staff lawyers' performance.*
- (b) *Supervising lawyers should supervise staff lawyers' compliance with the case management and quality control requirements of Section VIII.*
3. Does the defense organization require that all lawyers with supervisory responsibility have their own caseloads that ensure maintenance of skills and knowledge, but are light enough to allow time for supervisory responsibilities?
 4. Are law graduates and lawyers inexperienced in criminal defense work given intensive supervision?
 5. Does the defense organization comply with the additional supervisory requirements of any applicable court-approved student practice order under which law students and recent law graduates provide legal services?
 6. If the defense organization employs teams of lawyers with shared responsibility:
 - (a) is there an adequate mix of more and less experienced lawyers on each team?
 - (b) do the more experienced lawyers on the team have both the time and authority to discharge their supervisory responsibilities set forth in Evaluation Criterion IV.B.2?
 7. Do trial defense organizations maintain a system for early, frequent and meaningful supervisory review of case files concerning at least the following :
 - (a) pre-indictment issues, including decisions pertaining to whether evidence should be presented to the grand jury;
 - (b) pre- or post-indictment plea bargaining opportunities;
 - (c) adequacy of factual investigation;
 - (d) timely filing of all indicated motions and notices;
 - (e) preparation of witnesses and the client;
 - (f) quality of legal arguments;
 - (g) trial strategy;
 - (h) preparation of direct and cross-examination, voir dire, opening statement and summation;
 - (i) trial performance; and

- (j) postconviction issues and sentencing?
- 8. Do appellate defender organizations maintain a system for early, frequent and meaningful supervisory review of case files concerning at least the following :
 - (a) gathering and reviewing entire trial court record;
 - (b) communication with trial counsel and the client;
 - (c) identifying all potential appellate issues, including those raised by trial counsel or the client or that otherwise may not appear in the record;
 - (d) conducting appropriate legal research;
 - (e) filing post-judgment or appellate motions;
 - (f) writing and editing motions and briefs;
 - (g) preparing and presenting oral argument;
 - (h) seeking further appeals in the event of an adverse decision by the Appellate Division;
 - (i) briefing and arguing any further appeals?

Specific Guideline:

All appellate briefs, including those prepared by experienced lawyers, should be edited by an experienced colleague or a supervising lawyer.

- 9. Is there adequate supervision of professionals providing support services?

Requirement VI. Evaluation, Promotion and Discipline

A. Performance Standard: Quality representation requires that defense organizations provide lawyers and other professionals with meaningful ongoing evaluation of their work according to objective criteria and maintain and fairly administer objective criteria for promotion and discipline or discharge.

B. Evaluation Criteria

- 1. Do lawyers receive regular evaluations of their work according to objective standards?

Specific Guideline:

Defense organizations should require lawyers to comply with, and should evaluate lawyers' work according to, published criteria that conform to objective standards, such as the NLADA's Performance Guidelines for Criminal Defense Representation (trial lawyers) or the ABA's Standards for Appellate Counsel (appellate lawyers).

- 2. Do lawyers receive evaluations frequently during their first year and at least annually thereafter?

Specific Guideline:

Supervising lawyers should evaluate the performance of staff lawyers for the purposes of training, promotion and/or discipline on at least a monthly basis, and conduct a formal evaluation session with each staff lawyer at least twice during the lawyer's first year and at least annually thereafter.

3. Does the defense organization make known any available opportunities, and have an established procedure governed by objective criteria, for promoting lawyers?
4. Does the defense organization take effective action with respect to lawyers who do not perform according to established standards?
5. Does the defense organization have procedures for rewarding individual lawyers for performing meritorious work or handling extraordinarily complex cases?
6. Does the defense organization have procedures for evaluating the quality of work performed by professionals providing support services and for communicating such evaluations within the defense organization?

Washington Defender Association, Standards for Public Defense Services

Standard Ten. Supervision

Each agency or firm providing public defense services should provide one full-time supervisor for every ten staff lawyers or one half-time supervisor for every five lawyers. Supervisors should be chosen from among those lawyers in the office qualified under these guidelines to try Class A felonies. Supervisors should serve on a rotating basis, and except when supervising fewer than ten lawyers, should not carry caseloads.

Standard Eleven. Monitoring and Evaluation of Attorneys

The plan for public defense services should establish a procedure for systematic monitoring and evaluation of attorney performance based upon publicized criteria. Supervision and evaluation efforts should include review of time and caseload records, review and inspection of transcripts, in-court observations, and periodic conferences.

Performance evaluations made by a supervising attorney should be supplemented by comments from judges, prosecutors, other defense lawyers and clients. Attorneys should be evaluated on their skill and effectiveness as criminal lawyers or as dependency or civil commitment advocates.

8. Recruitment and Hiring

Commentary. Only two sets of administrative standards address recruitment and hiring of defender staff attorneys. The NLADA Guidelines for Legal Defense Systems call for active recruitment of qualified attorneys. The New York City standards include similar, more detailed criteria, which uniquely emphasize recruiting attorneys dedicated to public service. Compare these standards to those for attorney qualifications to participate in assigned counsel systems.

Virtually all comprehensive standards for the administration of defense services include requirements for counsel qualifications. In general, the standards require that counsel be familiar with criminal law and procedure, and that those requirements increase with the severity of the case. Such standards include the NLADA Assigned Counsel Standards and the standards from Indiana, Nebraska, New York City, and Washington state.

In addition to the standards provided here, similar counsel qualification requirements are included in state laws and court rules, including, for example, Tennessee Supreme Court Rule 13, Section 2; State of Michigan Sixth Circuit Court, Administrative Order 1996.2; and Arkansas Public Defender Commission, Minimum Standards (1997). Florida, which primarily uses public defender agencies, also provides by court order for the qualifications of private counsel who appear when there are conflicts of interest between the defender agency and the defendant. See, e.g., Second Judicial Circuit of Florida, “Conflict Attorney Policies” (1992); Eleventh Judicial Circuit, Circuit Conflict Committee, “Policies and Procedures” (1992); and Seventeenth Judicial Circuit, Administrative Order III-94-D-2, “In re: Appointment and Compensation of Special Public Defenders.” See also, Alameda County Bar Association Court Appointed Attorneys’ Program ¶¶F, “Experience Requirements for the Categories of Crime”; Cobb County (Georgia) Indigent Defense Program Guidelines; Gwinnett Judicial Circuit (Georgia) Internal Operating Procedure 98-5, Part X, “Panel Attorneys”; and Appellate Defender Commission, Michigan Appellate Assigned Counsel System Regulations.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-2.2. Eligibility to serve

Assignments should be distributed as widely as possible among the qualified members of the bar. Lawyers licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts should be encouraged to submit their names for inclusion on the roster of attorneys from which assignments are made. Each jurisdiction should adopt specific qualification standards for attorney eligibility, and the private bar should be encouraged to become qualified pursuant to such standards. Counsel should not seek to avoid appointment by a tribunal to represent a person except for good cause.

NLADA Guidelines for Legal Defense Systems in the United States

2.3 Ad Hoc Appointment of Counsel

Appointment of counsel on a random or *ad hoc* basis is explicitly rejected as an appropriate means of furnishing legal representation in criminal cases.

5.9 Recruitment, Hiring, Promotion and Removal of Defender Office Personnel

Defender offices should actively recruit the best qualified attorneys available for staff positions by advertising on the local, state and national levels, and by formulating and promulgating hiring criteria and policies. Recruiting should include special efforts to employ attorney candidates from minority groups which are substantially represented in the defender office's client populations.

A national referral and placement service should be instituted in order to facilitate nationwide defender recruitment and placement.

Defender staff attorney appointments should be made by the Defender Director, based upon merit, entirely free of political and other irrelevant factors. Upon appointment, staff attorneys should be required to make a time commitment of from two to five years to defender work.

Defender office investigative staff should be systematically recruited, selected and supervised to ensure that the investigative function is properly discharged.

Defender promotion policies should be tied to merit and performance criteria, and removal of staff attorneys should be only for cause, except during a fixed probationary period which an office may employ for newly hired attorneys.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 4.1.1 Qualifications of Attorneys

- a. The attorney qualifications established pursuant to Standard 4.1(b) shall include criteria reflecting the experience and training required for assignment in cases of different levels of seriousness, and a requirement that attorneys have the proficiency and commitment necessary to provide the quality representation mandated by Standard 2.1.
- b. The Program may allow the substitution of equivalent experience for specific experiential requirements, but may not compromise the proficiency and commitment requirements.
- c. An attorney applying for inclusion on a Program roster, or for reclassification (Standard 4.1.(d)), shall provide to the Administrator information needed for verification of all qualifications offered in support of the application.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 5. Competence to Defend

A person assigned the primary responsibility for representing a needy person must be licensed to practice law in this state and otherwise competent to counsel and defend a person charged with crime. Competence shall be determined by the court at the first court proceeding after the giving of primary responsibility.

Section 12. Personnel and Facilities

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- (b) A deputy defender general or public defender must be licensed to practice law in the state and competent to represent a person charged with crime. He may not otherwise engage in the practice of criminal law, except as provided in section 17.

Connecticut Public Defender Services Commission, Guidelines on Indigent Defense: Guidelines Relating to the Representation of Indigent Defendants Accused of a Criminal Offense

Guideline 2.1

- (a) Counsel should be familiar with substantive criminal law, criminal procedural law, the Connecticut Rules of Practice and the prevailing customs or practices of the court in which he/she practices.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 3.1 The Public Defender or Contract Lawyer Selected Shall Be Competent and Effective in His/Her Role

In selecting a public defender or contract lawyer the local committee should satisfy itself that the lawyer selected is competent, meaning:

- (a) Has an adequate educational background ;
- (b) Has demonstrated ability to perform competent trial work and the administration of an office;
- (c) He or she conducts their professional work in an ethical manner ;
- (d) Is a member in good standing of the State Bar of Georgia .

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

E. Appointment of Counsel

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2. *Class A or B Felony.* To be eligible to serve as appointed counsel in a case where the accused is charged with a Class A or B felony, an attorney shall:
 - a. be an experienced and active trial practitioner with at least two (2) years of criminal litigation experience; and
 - b. have prior experience as lead or co-counsel in at least two (2) felony jury trials which were tried to completion.
3. *Class C Felony.* To be eligible to serve as appointed counsel in a case where the accused is charged with a Class C felony, an attorney shall:
 - a. be an experienced and active trial practitioner with at least one (1) year of criminal litigation experience; or
 - b. have prior experience as lead or co-counsel in at least three (3) criminal jury trials which were tried to completion.

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5. *Other criminal cases.* To be eligible to serve as lead counsel in other criminal cases, an attorney shall have prior experience as lead or co-counsel in at least one (1) case of the same class or higher which was tried to completion.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

III. Operating Policies and Procedures

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C. Counsel Eligibility Standards

The following classes of attorneys are created to set the minimum standards for counsel in capital and non-capital cases at trial, appellate, and postconviction stages.

Class A: Counsel qualified as lead counsel in capital cases.

Class B: Counsel qualified as co-counsel in capital cases.

Class C: Counsel qualified to serve as counsel in serious violent felonies and drug defense cases as defined by section VI.2.

Class D: counsel qualified as appellate lead counsel.

Class E: Counsel qualified as appellate co-counsel.

Class F: Counsel qualified as postconviction counsel.

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3. Qualifications for C:
 - 3.1 Member of the Nebraska bar or admitted *pro hac vice*.
 - 3.2 Experienced and active in the area of criminal law with not less than three years criminal litigation experience.
 - 3.3 Has acted as lead or co-counsel in at least three jury trials to verdict of any class of felony or complex serious misdemeanor.
 - 3.4 Demonstrates proficiency and commitment exemplifying quality appropriate to serious criminal cases. This will be judged by a history of participation in criminal continuing legal education programs, membership and activity in professional associations supporting criminal defense practitioners, and reputation among criminal law practitioners.

***New York City Indigent Defense Organization Oversight Committee,
General Requirements for All Organized Providers of Defense Services to
Indigent Defendants***

II. Qualifications of Lawyers

- A. Performance Standard: Lawyers employed by defense organizations should have sufficient qualifications and experience to enable them to render quality representation to their clients. Trial counsel should be able to provide quality representation throughout each case, from initial assignment through final judgment and any necessary post-judgment proceedings. Appellate counsel should be able to provide quality representation from initial appointment through final determination on appeal.
- B. Evaluation Criteria
 1. Qualifications for Counsel
 - (a) General Criteria for Trial and Appellate Counsel
 - (i) Does the defense organization require all lawyers to be proficient in essential litigation skills, including:
 - (1) legal analysis;
 - (2) manual and computer-assisted legal research;
 - (3) persuasive writing;
 - (4) oral advocacy;
 - (5) communication with clients; and, as appropriate
 - (6) the use of social service and investigative support services.
 - (ii) Does the defense organization require that its lawyers keep up-to-date on developments in criminal practice and procedure?

(b) Specific Criteria for Assignment of Trial Counsel to Particular Categories of Cases

(i) Misdemeanor Cases

- (1) Does the defense organization require that all lawyers assigned to handle misdemeanor cases as lead or sole counsel have a minimum level of previous trial experience in the field of criminal law?
- (2) Alternatively, does the defense organization require that all lawyers who do not have previous criminal litigation experience be trained in accordance with the Evaluation Criteria of Section III and supervised by experienced counsel at their initial court appearances and at their first misdemeanor trial?

Specific Guideline:

Each staff lawyer assigned by the defense organization to handle misdemeanor cases as lead or sole counsel must have appeared in court, either as lead or sole counsel or as co-counsel to an experienced criminal law practitioner, on at least five criminal cases within the previous three years, involving at least:

- (i) three negotiated pleas or other non-trial dispositions; and*
- (ii) one litigated motion in which oral testimony was taken and a decision was rendered; and*
- (iii) one trial that proceeded to verdict.*

(ii) Felony Cases

- (1) Does the defense organization require that all lawyers have a minimum level of previous trial experience, and evaluate the degree of seriousness and complexity of that prior experience, before certifying lawyers as qualified to handle felony cases?
- (2) Alternatively, does the defense organization require that, in addition to being qualified to handle misdemeanor cases, lawyers have participated in a specified number of actual felony trials, where other counsel was lead counsel, during which they handled a significant portion of the trial responsibilities, before certifying them as qualified to handle felony cases.
- (3) Does the defense organization require that lawyers conducting their first felony trial be supervised by more experienced counsel?

Specific Guidelines:

(a) Each staff lawyer assigned by the defense organization to handle felony cases without supervision must have had court experience in at least thirty criminal cases during the previous five years, involving at least:

- (i) fifteen negotiated pleas, dismissals, or other non-trial dispositions, at least five of which occurred post-indictment;*

- (ii) *five hearings in which oral testimony was taken and a decision was rendered; and*
- (iii) *two post-indictment jury trials that proceeded to verdict in which the lawyer was lead counsel.*
- (b) *Alternatively, each staff lawyer assigned by the defense organization to handle felony cases without supervision must have had court experience in at least ten criminal cases as lead or sole counsel and twenty non-criminal cases including at least five jury trials as lead or sole counsel.*
- (c) *In addition, any lawyer assigned to handle a felony case who has not previously handled a felony case must be supervised by a lawyer who has previously handled felony cases.*

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2. Recruitment and Hiring

- (a) Does the defense organization maintain and publish hiring criteria designed to attract qualified applicants?
- (b) Does the defense organization conduct a fair and active recruiting program, in conformity with the published hiring criteria, that endeavors to attract qualified lawyers and law graduates?
- (c) Does the defense organization value commitment to public interest work and defense of indigents accused of crime in addition to standards of excellence, such as experience, law school grades, clerkships, writing samples and references?
- (d) Does the defense organization's evaluation of applicants include assessment of interpersonal management skills, including but not limited to :
 - (i) the ability to work with others;
 - (ii) the ability to be supervised; and
 - (iii) the ability to manage time so as to maintain professional standards?
- (e) Does the recruitment and hiring process seek to achieve racial, ethnic and gender diversity?
- (f) Does the recruitment and hiring process seek to attract sufficient numbers of lawyers who are capable of communicating with non-English speaking clients?
- (g) Are lawyer compensation levels sufficient to attract and retain both supervising lawyers and staff lawyers who can and will discharge the responsibilities set forth above?

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Principle 3

To ensure the preservation, protection and promotion of the client’s rights and interests, counsel must:

1. be proficient in the applicable substantive and procedural law;

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Standard 1.1—Prerequisites For Representation

Counsel shall only accept an appointment or retainer if counsel is able to provide quality representation and diligent advocacy for the client.

Implementation

1. Counsel should be proficient in applicable substantive and procedural law and stay current with changes in constitutional, statutory, evidentiary law and local or statewide court rules.
2. Counsel should have appropriate experience, skills and training.
 - a. Counsel should obtain formal and informal training in the relevant areas of practice and should consult with others in the field, including non-attorneys.
 - b. Less experienced counsel should observe and when possible serve as co-counsel to more experienced attorneys. More experienced counsel should mentor less experienced attorneys.

Washington Defender Association, Standards for Public Defense Services

Standard Fourteen. Qualifications of Attorneys

1. In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services should meet the following minimum professional qualifications:
 - a. Satisfy the minimum requirements for practicing law in Washington as determined by the Washington Supreme Court; and
 - b. Complete seven hours of continuing legal education within each calendar year in courses relating to their public defense practice.
2. Trial attorneys’ qualifications according to severity or type of case:
 - b. **Adult Felony Cases Class A.** Each staff attorney representing a defendant accused of a Class A felony as defined in RCW 9A.20.020 shall meet the following requirements:

- i. Minimum requirements set forth in Section 1, and
 - ii. Either:
 - a. has served two years as a prosecutor; or
 - b. has served two years as a public defender; or
 - c. has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in five felony cases that have been submitted to a jury.
- c. **Adult Felony Cases Class B Violent Offense or Sexual Offense.** Each attorney representing a defendant accused of a Class B violent offense or sexual offense as defined in RCW 9A.20.020 shall meet the following requirements:
- i. Minimum requirements set forth in Section 1, and
 - ii. Either:
 - a. has served one year as prosecutor; or
 - b. has served one year as public defender; and
 - c. has been trial counsel alone or with other counsel and handled a significant portion of the trial in two Class C felony cases that have been submitted to a jury.
- d. **Adult Felony Cases All Other Class B Felonies, Class C Felonies, Probation or Parole Revocation.** Each staff attorney representing a defendant accused of a Class B felony not defined in c above or a Class C felony, as defined in RCW 9A.20.020, or involved in a probation or parole revocation hearing shall meet the following requirements:
- i. Minimum requirements set forth in section 1, and
 - ii. Either:
 - a. Has served one year as a prosecutor; or
 - b. Has served one year as a public defender; or
 - c. has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in two criminal cases that have been submitted to a jury; and
 - iii. Each attorney shall be accompanied at his or her first felony trial by a supervisor.

9. Case Overload and Case Management Systems

Commentary. All the national standards and several state statutes deal specifically with the often chronic problem of case overload so severe that it threatens the ability of the office to provide competent representation. A few jurisdictions have acted to resolve this problem. For example, Michigan's appellate defender legislation limits the defender to accepting only that number of appointments that would allow for quality representation and is within the budget approved by the legislature. Similar restrictions or requirements have been required of appointed counsel and contract offices.

The NLADA Guidelines for Legal Defense Systems, the New York City General Requirements, and the Washington Defender Standards include requirements for the defense agency to establish a case management system. The NLADA guidelines were adopted before the use of computers for case management became commonplace and, as a result, are somewhat dated. The New York City General Requirements are largely aimed at ensuring that cases do not "fall through the

The Washington standards, in contrast, are directed at compiling caseload statistics for reporting purposes. This objective is also part of the NLADA guidelines. See also, Missouri State Public Defender Guidelines for Representation, G 1-4, "General Duties of Public Defenders," Subsection (e), which provides for extensive recordkeeping as part of each attorney's responsibilities.

Workload affects the productivity and effectiveness of a defense office more directly than any other variable. If attorneys are responsible for too many clients' cases, they cannot perform well. The standards that address caseload/workload generally build on the NAC standards promulgated in 1973. These numbers have endured and have become the basic starting point for adaptation in local jurisdictions or referencing in the national standards.

Workload standards estimate the average number of cases that an attorney can effectively handle. Because they represent an "average" caseload, care must be taken to review individual attorney performance. More common uses for workload measures are to evaluate the performance of an attorney unit (e.g., office) or to set limits on the number of cases accepted by the unit or even the individual attorney. All but one of the national standards (the Model Act) and all but two of the state standards explicitly provide for development of case workload standards. Several of the state standards even establish the workload number of each type of case for a single attorney. See also, Arkansas Public Defender Commission, Minimum Standards, "Public Defender; contract; terms," which authorizes inclusion of workload standards in public contracts and suggests specific case standards.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-5.3. Workload

- (a) Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Special consideration should be given to the workload created by representation in capital cases.
- (b) Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments. Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.

NLADA Guidelines for Legal Defense Systems in the United States

5.1 Establishing Maximum Pending Workload Levels for Individual Attorneys

In order to achieve the prime objective of effective assistance of counsel to all defender clients, which cannot be accomplished by even the ablest, most industrious attorneys in the face of excessive workloads, every defender system should establish maximum caseloads for individual attorneys in the system.

Caseloads should reflect national standards and guidelines. The determination by the defender office as to whether or not the workloads of the defenders in the office are excessive should take into consideration the following factors:

- (a) objective statistical data;
- (b) factors related to local practice; and
- (c) an evaluation and comparison of the workloads of experienced, competent private defense practitioners.

5.2 Statistics and Recordkeeping

Every defender office should maintain a central filing and record system with daily retrieval of information concerning all open cases. The system should include, at a minimum, an alphabetical card index system with a card containing detailed and current information on every open case, and a docket book or calendar which contains future court appearance activities.

Every Defender Director should receive, on a weekly or monthly basis, detailed caseload and dispositional data, broken down by type of case, type of function, disposition, and by individual attorney workload.

5.3 Elimination of Excessive Caseloads

Defender office caseloads and individual defender attorney workloads should be continuously monitored, assessed and predicted so that, wherever possible, caseload problems can be anticipated in time for preventive action.

Whenever the Defender Director, in light of the system's established workload standards, determines that the assumption of additional cases by the system might reasonably result in inadequate representation for some or all of the system's clients, the defender system should decline any additional cases until the situation is altered.

When faced with an excessive caseload, the defender system should diligently pursue all reasonable means of alleviating the problem, including:

- (a) Declining additional cases and, as appropriate, seeking leave of court to withdraw from cases already assigned;
- (b) Actively seeking the support of the judiciary, the Defender Commission, the private bar, and the community in the resolution of the case load problem;
- (c) Seeking evaluative measures from the appropriate national organization as a means of independent documentation of the problem;
- (d) Hiring assigned counsel to handle the additional cases; and
- (e) Initiating legal causes of action.

An individual staff attorney has the duty not to accept more clients than he can effectively handle and should keep the Defender Director advised of his workload in order to prevent an excessive workload situation. If such a situation arises, the staff attorney should inform the court and his client of his resulting inability to render effective assistance of counsel.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-12 Case and Work-Overload

The contract should provide that the Contractor may decline to represent clients at no penalty in the event that during the contract:

- (a) the caseload assigned to the Contractor exceeds the allowable caseloads specified through the process recommended in Guideline III-5; or
- (b) the Contractor is assigned more cases requiring an extraordinary amount of time and preparation than the Contractor can competently handle even with payment of extraordinary compensation as specified in Guideline III-11; or
- (c) the cases assigned to the Contractor exceed any number that the contract specified or that the Contractor and Contracting Authority reasonably anticipated at the time the contract was concluded.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 4.1.2 Workloads of Attorneys

- a. The Board, or at its direction the Administrator, shall develop standards relating to caseload/workload size limits for attorneys who desire to receive appointments from the Program, and procedures through which attorneys whose workloads have become excessive can be relieved of caseload responsibilities that they cannot competently meet.
- b. The Administrator shall provide notice to attorneys eligible for assignments of the caseload/workload standards and procedures established by the Board, and of the attorneys' obligation not to accept more work than they can effectively handle.
- c. The Administrator shall keep records of assignments made to individual attorneys in a manner that allows the Administrator to avoid assigning an excessive number of cases to any attorney.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.12. Workload of Public Defenders

The caseload of a public defender office should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.

For purposes of this standard, the term case means a single charge or set of charges concerning a defendant (or other client) in one court in one proceeding. An appeal or other action for postjudgment review is a separate case. If the public defender determines that because of excessive workload the assumption of additional cases or continued representation in previously accepted cases by his office might reasonably be expected to lead to inadequate representation in cases handled by him, he should bring this to the attention of the court. If the court accepts such assertions, the court should direct the public defender to refuse to accept or retain additional cases for representation by his office.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 2.7 Contract Attorney Program

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The contract should specify a maximum allowable caseload for each full-time attorney, or equivalent, who handles cases through the contract. Caseloads should allow each lawyer to give every client the time and effort necessary to provide effective representation. Attorneys employed less than full-time should handle a proportional caseload.

The contract shall provide that the Contractor may decline to represent clients at no penalty in the event that during the contract:

- (a) the caseload assigned to the Contractor exceeds the allowable caseloads specified; or
- (b) the Contractor is assigned more cases requiring an extraordinary amount of time and preparation than the Contractor can competently handle even with payment of extraordinary compensation; or
- (c) the cases assigned to the Contractor exceed any number that the contract specified or that the Contractor and Contracting Authority reasonably anticipated at the time the contract was concluded.

Guideline 6.1 Caseload Control in Programs

The local committee and the program's attorneys should prevent caseloads, by reason of their excessive size, from interfering with the rendering of quality representation or leading to the breach of professional obligations, using as a guide the "Standards for Providing Defense Services" of the American Bar Association.

With regards to programs employing contract defenders and/or public defenders, the local committee shall use the American Bar Association's Standard Three "Caseload Limits and Types of Cases" as a guide in reviewing its caseload. The caseload of contract defenders and public defenders should allow each lawyer to give each client the time and effort necessary to ensure effective representation. Caseload limits should be determined by the number and type of cases being accepted, the local prosecutor's charging and plea bargaining practices, the court's propensity for accepting negotiated or non-negotiated pleas, and court calendar controls.

It is recommended that the caseload of a full-time public defender shall not exceed the following:

- 150 Felonies per attorney per year; or
- 300 Misdemeanors per attorney per year; or
- 250 Juvenile Offender cases per attorney per year; or

- 60 Juvenile dependence clients per attorney per year; or
- 250 Civil Commitment cases per attorney per year; or
- 25 Appeals to appellate court hearing a case on the record and briefs per attorney per year.

These limits are not intended to be an aggregate. Attorneys whose representation involves handling cases within different categories listed above should adjust the caseload limitations proportionally.

In jurisdictions where attorneys also maintain private law practices, the local indigent defense committee should ensure that attorneys not accept or be assigned more cases than they can reasonably discharge. In these situations, the maximum number of cases should be determined after an examination of the percentage of time the lawyer devotes to public defense as compared to the attorney's total available time. If the caseload levels being contracted for approach the recommended levels, the attorney undertaking the work should not have a significant number of privately retained cases.

When an attorney's caseload exceeds the limitations set forth herein, the Georgia Indigent Defense Council may investigate the local indigent defense system to ensure that indigent defendants are receiving adequate legal services, bearing in mind the local prosecutor's and court's practices.

Programs where the caseload regularly exceeds the recommended limits should advise the Georgia Indigent Defense Council in writing, at the time of filing the application for funding, including a detailed explanation of the following:

- number and types of indigent defense cases handled by the county; and
- the number of attorneys assigned to indigent defense cases, including their individual caseloads and experience in handling indigent defense matters; and
- the number and type of support staff members assisting attorneys assigned to indigent defense cases; and
- the local prosecutor's charging and plea bargaining practices, including whether and why such practices may permit a defense attorney to adequately handle an increased caseload without detrimentally affecting the quality of representation; and
- the local court's propensity for accepting negotiated or non-negotiated pleas and calendar controls, including whether and why such practices and controls may permit a defense attorney to adequately handle an increased caseload without detrimentally affecting the quality of representation; and
- plans (if any exist), including time frame, for the hiring of or contracting with a sufficient number of indigent defense attorneys such as the county's indigent defense program caseloads do not exceed the suggested limitations set forth in Guideline 6.1.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

J. Caseloads of Counsel

The comprehensive plan shall insure that all counsel appointed under the plan are not assigned caseloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. In determining whether the caseloads are excessive, the following caseload guidelines are recommended.

1. *Caseloads for Public Defenders Without Adequate Support Staff.* Salaried or contractual public defenders in a county public defender office that does not have support staff consistent with Table 2 should generally not be assigned more than the number of cases in Table 1 in any one category in a 12-month period. The categories in Table 1 should be considered in the disjunctive. Thus, if a public defender is assigned cases from more than one category, the percentage of the maximum caseload for each category should be assessed and the combined total should generally not exceed 100%.

Table 1

Type of Case	Full Time	Part Time (50%)
TRIAL	20	10
Non-Capital Murder and all felonies	120	60
Non-Capital Murder; Class A, B, C felonies	100	50
Class D felonies only	150	75
Misdemeanors only	300	150
Juvenile delinquency	200	100
Other (e.g., probation violation, contempt, extradition)	300	150

2. *Caseloads for Public Defenders With Adequate Support Staff.* Salaried or contractual public defenders in a county public defender office with support staff consistent with Table 2 should generally not be assigned more than the number of cases in Table 3 in any one category in a 12-month period. The categories in Table 3 should be considered in the disjunctive. Thus, if a public defender is assigned cases from more than one category, the percentage of the maximum caseload for each category should be assessed and the combined total should generally not exceed 100%.

Table 2

Paralegal Felony	One for every four attorneys
Paralegal Misdemeanor	One for every five attorneys
Investigator Felony	One for every four attorneys
Investigator Misdemeanor	One for every six attorneys
Secretary Felony	One for every four attorneys
Secretary Misdemeanor	One for every six attorneys

Table 3

Type of Case	Full Time	Part Time (50%)
TRIAL		
Non-Capital Murder and all felonies	150	75
Non-Capital Murder; Class A, B, C felonies only	120	60
Class D felonies only	200	100
Misdemeanors only	400	200
Class D felonies and misdemeanors	300	150
Other (e.g., probation violation, contempt, extradition)	400	200

K. Excessive Caseloads

The comprehensive plan shall contain policies and procedures regarding excessive caseloads and shall, at a minimum, contain the following provisions:

1. *Individual Public Defenders.* Whenever a salaried or contractual public defender determines, in the exercise of his or her best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the attorney is required to inform the county public defender, if any, or other authorities designated by the plan to secure professional independence for indigent defense services in the county.
2. *Chief Public Defenders.* Whenever the chief public defender determines, in the exercise of his or her best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the chief public defender is required to inform the appropriate judges and refuse to accept the appointment of additional cases.

Kansas Board of Indigents’ Defense Services, Permanent Administrative Regulations

105-21-3. Withdrawing from cases

- (a) Any public defender may withdraw from any court-appointed case when that defender determines that there exists a possible conflict of interest in further representation of the defendant.
- (b) The public defender may refuse to accept court-appointed cases when it is determined jointly by the public defender and the director that the current active caseload would preclude the public defender from providing adequate representation to new clients.
- (c) When a decision is made to withdraw from a case or to not accept cases due to current caseloads, the public defender shall communicate this decision to the

administrative judge of the district, who shall appoint attorneys, in sequence, from the panel for a period established by the director.

Minnesota Office of the State Public Defender, Caseload Standards for District Public Defenders in Minnesota

Standard 2. Recommended Caseload Standards

The following caseload standards, per attorney, are recommended, with the understanding that each “type of case” line defines a full year’s work for an attorney:

Type of Case	Full-Time	One-Half Time
Felony	100-150 per year	50-60 per year
Gross Misdemeanor	250-300 per year	125-150 per year
Misdemeanor	400 per year	200 per year

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

III. Operating Policies and Procedures

A. Caseload Standards for the Commission

Attorneys working for the Commission will provide each client with quality representation in accordance with constitutional, statutory, and professional standards. The Chief Counsel will not accept cases and assign workloads which, by reason of the foregoing standards, would in any way interfere with the rendering of effective assistance of counsel, leading to a breach of professional responsibility. The Chief Counsel will accept cases taking into consideration an attorney’s duties under the Code of Professional Responsibility and cases will not be accepted when the caseload is such that preparation of cases would be inadequate in the circumstances. The Chief Counsel is admonished not to accept more assignments than the staff attorneys can reasonably discharge or to accept cases in which the representation will be materially limited by the attorney’s responsibilities to another client.

In accordance with these principles, the Chief Counsel will assess the non-capital workload as well as the death penalty workload to determine whether the workloads are excessive. Therefore, these caseload standards are a guideline which will be useful in determining whether the workload of a particular attorney is excessive.

...

2. Recommended Caseload Standards

The Commission recognizes that the cases it will accept will not likely fall into the general caseload statistical categories which compare the percentage of cases in which a plea is entered to the percentage of cases which go to trial. It is expected that the

commission's cases will be more likely to go to trial, compared to a normal caseload. This will reduce the number of cases each litigation attorney can handle. In addition the Commission also contemplates that travel, having to cover the entire state, will cause a reduction in the total caseload of the litigation attorneys. It is also assumed that the cases themselves will be more complex since the commission will be handling serious felony, with sizeable records; this too will reduce the normal caseload. These assumptions also hold true for the appellate attorneys. The more complex the cases and the larger the record, fewer appeals can be handled by the appellate attorneys. Therefore, the following yearly caseload standards, per attorney, are recommended, with the understanding that the Commission will be monitoring these standards very carefully over the next year, since there is no history to rely upon, making them subject to change:

- a. Litigation grant attorney—10 non-capital felonies to begin within the first two months, then approximately 4 cases per month—a yearly total of 50 cases.

***New York City Indigent Defense Organization Oversight Committee,
General Requirements for All Organized Providers of Defense Services to
Indigent Defendants***

V. Workloads

A. Performance Standard: Lawyers and other professionals employed by defense organizations should maintain manageable workloads in order to permit them to render quality representation to each individual client.

B. Evaluation Criteria

1. Is there a system for weighting and assigning cases in order to apportion workload equitably among lawyers?
2. Are there established limits on the number of cases in each category assigned to each lawyer?

Specific Guidelines:

- (a) *Individual trial lawyers should not be required to accept assignment in any one-year period of more than 150 felony cases or more than 400 misdemeanor cases, with the maximum number of misdemeanors proportionately reduced by the number of felonies assigned.*
 - (b) *Individual appellate lawyers should not be required to handle a caseload which exceeds 25 appeals in any one-year period.*
 - (c) *Individual supervising lawyers' personal caseloads should not exceed 10% of the maximum caseload, unless the ratio of staff lawyers to supervising lawyers is less than 10:1, in which case supervising lawyers' caseloads may be proportionally higher (e.g., 20% of the maximum caseload if the staff lawyer to supervising lawyer ratio is 5:1).*
3. Has the defense organization established objective limits on the number of cases that an individual trial lawyer has pending at any given time?

4. Are there procedures for reassigning cases to alleviate unanticipated increases in workloads that would exceed the workload limits set forth in Evaluation Criterion V.B.2?
5. Are there systems, limits and procedures to regulate the workloads of paralegals, investigators, social workers and other professionals?
6. Is there a contingency plan to alleviate an unanticipated increase in the defense organization's workload that would exceed its available resources?

VIII. Case Management and Quality Control

A. Performance Standard: Quality representation requires that defense organizations maintain adequate procedures for assuming responsibility for client matters when requested and for tracking and managing individual cases to ensure that quality is maintained at all stages and that all obligations to clients and the courts are met.

B. Evaluation Criteria

1. Case Management and Quality Control Criteria for Trial Organizations

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- (b) Does the defense organization have an adequate procedure for coordinating with the courts regarding assignment of cases?
- (c) Does the defense organization monitor cases to ensure that each client is represented at every court appearance?
- (d) Is there an adequate system to ensure continuity of representation of each client by the same lawyer or team of lawyers, and alternative coverage in the event that an assigned lawyer is unable to appear, and are clients advised of that system at the outset?
- (e) Does the defense organization meet each individual client's needs by ensuring that:
 - (i) each client is interviewed as soon as practicable, the nature of the representation is explained, and confidentiality is discussed?
 - (ii) each client is consulted on all major developments and tactical decisions?
 - (iii) a prompt and thorough factual investigation is conducted in each case and the client is thereafter kept informed of all developments in the case and given a candid estimate of the probable outcome?
 - (iv) any decision to plead guilty is fully informed and voluntary?
 - (v) a post-disposition strategy is designed to achieve the most favorable sentence, including non-incarcerative alternatives, that can reasonably be obtained under the facts and circumstances of the case?
 - (vi) the client is informed of the right to appeal from the judgment and from the sentence imposed?

- (f) Does the defense organization have an adequate system to ensure that all speedy-trial and release dates and all motion , notice, discovery and postconviction deadlines are met?
- (g) Does the defense organization ensure that organized and accessible case files are kept on each case from inception, and that such files contain all court papers and other documents necessary for supervising lawyers to review for quality of representation and for assignment of alternative coverage as necessary?
- (h) Does the defense organization ensure that its lawyers provide representation in accordance with objective performance standards for criminal defense representation?

Specific Guideline:

Defense organizations through their evaluation and promotion processes should require lawyers to comply with published criteria that conform to objective standards.

Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

Chapter 5. Maximum Caseload Standards for Defense Counsel

Background

The Indigent Defense Task Force recognizes that there have been, and will continue to be, a variety of providers of indigent defense in the State of Oregon. Because of that variety, it is not possible to determine an appropriate weighted caseload for all providers. The Task Force determined that the Metropolitan Public Defender (MPD) offers the model that is most efficient in terms of scale. The MPD is the largest office by volume of cases in the state, and is the most experienced in managing caseloads. The MPD has a high level of staff support and clerical support. These levels of staff and clerical support are not available in other settings and substantially increase the ability of counsel to handle cases. As a result, adjustments to factor in the lack of available resources are necessary in determining maximum caseloads in other settings.

In 1993, the MPD established a unit valuation system to determine the number of cases each attorney in the office could handle each year. The MPD system gave cases a unit value based on the anticipated time demands. Unit values range from 100 to 1. The MPD assumed in the valuation that a “mythical competent attorney” could effectively handle 600 units per year. The MPD, in its contract proposal of October, 1993, proposed these unit values and has worked with them under the contract that was awarded.

Established Unit Values

The first step in the process of determining a weighted caseload is to determine the *average* time demand expected of a particular type of case. This analysis assumes that

some cases will take more time and other cases will take less and seeks to determine what the average time is only in relation to other cases. In other words, a minimum unit value is determined and unit values are attributed to each type of case. In essence, unit values are a comparison of the expected time commitment for handling certain types of cases in relation to other types of cases. Obviously substantial felonies are expected to take more time than misdemeanors. The unit value analysis put forth by the MPD proposal seeks to compare time anticipated for relative types of cases.

Maximum Caseload Per Attorney Per Year

The second step in the analysis is to determine the maximum number of units that a criminal defense attorney working a full load, i.e., a full time equivalent (FTE) attorney, could handle over the course of a year. The MPD proposal assumed that the “mythical competent defense attorney” could handle 600 units per year. This meant that in applying the unit valuation tables, a full caseload for an attorney would be 6 felony level 11 cases in one year or at the other end of the spectrum, 600 drug diversion cases in one year.

Assumptions

As stated in the introductory paragraph of this Chapter, the MPD has a high level of staff support. This reaches the level of one investigator and one trial assistant per attorney for felony and juvenile cases and .5 investigator and .5 trial assistant per attorney for misdemeanor cases. Where office support staff is less, corresponding adjustments would have to be made in determining the maximum caseload of a public defender office. Because the private bar does not handle the volume that would create the efficiencies derived through the MPD system, the maximum caseload values have little relevancy to private bar providers.

Additional Reasons for Adjustments

The MPD has unique circumstances that do not exist outside Multnomah County. The physical proximity of jail, courthouse, District Attorney and defender office, combined with the physical proximity of crime scenes and witnesses, virtually eliminate travel.

The concentration of volume allows for specialization within the office. This reduces the need for legal research. It also reduces time committed to plea bargaining, as the volume of similar cases that have gone before establish the likely results and penalties.

All counties other than Multnomah County have less case volume and greater travel time. Inefficiencies increase as either volume decreases or travel increases. As a result, the maximum caseload standards in this report would be impossible to approach outside of Multnomah County.

Conclusion

The Committee believes that the MPD proposal is a reasonable one to adopt as a *maximum* caseload standard in that the MPD office proposal was developed in Oregon by the largest and best staffed public defender office, which is believed to have maximum caseload-handling capability. It is anticipated that adjustments would be appropriate for defender offices that do not have the same amount of support staff per lawyer or the same volume of cases. Further adjustments would have to be made for less than full-time

attorneys and private attorneys who are taking conflict cases as a part of their practice. The adoption of a unit valuation system and a maximum caseload per FTE defense attorney is meant to be a guide, subject to review.

Table of Unit Values and Corresponding Maximum Caseload Per Attorney Per Year for Large Volume Defense Practice (MPD) in Multnomah County

Case Year

	Unit Valuation	@ 600/Atty/Year
Felony Level 11	100	6
Felony Level 10	15	40
Felony Level 9	15	40
Felony Level 8	4	150
Felony Level 7	2.5	240
Felony Level 6	2.5	240
Felony Level 1-5—including contempt	2	300
Fugitive	1	600
Felony PV	1	600

Washington Defender Association, Standards for Public Defense Services

Standard Three. Caseload Limit and Types of Cases

The contract or other employment agreement shall specify the types of cases for which representation shall be provided and the maximum number of cases which each attorney shall be expected to handle. The caseload of public defense attorneys should allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation.

The caseload of a full-time public defense attorney or assigned counsel shall not exceed the following:

- 150 Felonies per attorney per year; or
- 300 Misdemeanors per attorney per year...

A case is defined by the Office of the Administrator for the Courts as: A filing of a document with the court naming a person as defendant or respondent.

Caseload limits should be determined by the number and type of cases being accepted and on the local prosecutor’s charging and plea bargaining practices. In jurisdictions where assigned counsel or contract attorneys also maintain private law practices, the contracting agency should ensure that attorneys not accept more cases than they can reasonably discharge. In these situations, the caseload ceiling should be based on the percentage of time the lawyer devotes to public defense.

Standard Eight. Reports of Attorney Activity and Vouchers

The legal representation plan shall require that the defense attorney or office maintain a case-reporting and management information system which includes number and type of cases, attorney hours and disposition. This information shall be provided regularly to the Contracting Authority and shall also be made available to the Office of the Administrator of the Courts. Any such system shall be maintained independently from client files so as to disclose no privileged information.

10. Related Standards

Commentary. Two final matters are (1) a mechanism for client complaints and (2) liability insurance.

The Washington standards are the only ones to include a requirement for a methodology to resolve client complaints. Most importantly, the standards set a one-week deadline for complaint disposition.

The NLADA Standards for Assigned Counsel and Guidelines for Criminal Defense Service Contracts require defense organizations to purchase liability insurance. The NLADA assigned counsel standards require participating attorneys to demonstrate that they have insurance, while the guidelines for contracting authorize inclusion in the contract of a requirement for liability insurance coverage. The guidelines also forbid the contract to limit governmental liability for malpractice by a contracting attorney.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-20 Insurance

The contract may require that the Contractor provide malpractice insurance for attorneys representing clients under terms of the contract. The contract shall not provide that the Contractor hold the government or Contracting Authority harmless for the attorneys' representation of defendants.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 3.5.1 Insurance for Board and Administrators

- a. The Program shall insure the Board and the Administrator for all insurable risks incident to the Program to a dollar amount specified by the Board.
- b. The funding agency shall indemnify the Board and the Administrator for all liability arising from their authorized activities pursuant to the Program.

Standard 3.5.2 Insurance for Program Attorneys

All attorneys seeking appointment under the Program shall provide evidence of being adequately insured for all insurable risks to the Program caused by their representation of clients under Program auspices, to a dollar amount specified by the Program.

Washington Defender Association, Standards for Public Defense Services

Standard Fifteen. Disposition of Client Complaints

The legal representation plan shall include a method to respond promptly to client complaints. Complaints should first be directed to the attorney, firm or agency which provided representation. If the client feels that he or she has not received an adequate response, the contracting authority or public defense administrator should designate a person or agency to evaluate the legitimacy of complaints and to follow up meritorious ones. The complaining client should be informed as to the disposition of his or her complaint within one week.

F. Mixed Systems

Most criminal defense standards are written for a single type of defense system, involving either public defenders, a contract attorney office, or assigned counsel. ABA Defense Services Standard 1-1.2 requires a mixed system consisting of a Defender Office coupled with a substantial involvement of the private bar either through assigned counsel plans or contracts for service. Other organizational approaches may exist, such as a public defender/conflicts office or assigned counsel plan. In some states, public defender offices represent defendants in the urban jurisdiction while assigned counsel appear elsewhere.

The following groups of standards are included in this section:

1. Statewide defense
2. Case allocation
3. Related provisions

1. Statewide Defense

Commentary. Three sets of national standards consider whether defense services should be organized at the state level. Only the ABA standards do not address this issue. The NLADA Guidelines for Legal Defense Systems explicitly prefer creation of a state-level defender organization. The Model Public Defender Act recommends the establishment of a new Office of Defender General in the executive branch. The national Advisory Commission standards take no position on the creation of a state system but do recommend that the state, rather than localities, fund defense services.

NLADA Guidelines for Legal Defense Systems in the United States

2.4 State Level Organization with Centralized Administration

Defender services should be organized at the state level in order to ensure uniformity and equality of legal representation and supporting services, and to guarantee professional independence for individual defenders. The defender system should provide services by means of city, county, or multi-county programs to every jurisdiction in the state.

- (a) Except in the case of pre-existing agencies, the planning and creation of local or regional defender offices should be undertaken by a state defender office which is responsible for providing all defender services.
- (b) The role of the State Defender Director with respect to offices throughout the state should be as follows:
 - (1) The State Defender Director should appoint Deputy Defenders to head the local and regional offices and should set general policy and guide lines regarding the operation of such offices and the handling of cases; however, the daily administration of the local and regional offices and the handling of individual cases should be the responsibility of the Deputy Defenders.
 - (2) The State Defender Director should ensure that on-site evaluations of each defender office or assigned counsel program in the state, whether organized as part of the state defender system or as a preexisting entity, are conducted not less than once a year. The State Defender Director should be authorized to contract with outside agencies where necessary for this purpose.
 - (3) The State Defender Director should visit all offices and programs around the state on a frequent basis.
 - (4) The Office of State Defender should provide initial training for all new defender staff attorneys and conduct seminars for the continuing education of the staff of all defender offices and coordinated assigned counsel programs in the state.

2.5 Preexisting Agencies in a State Defender System

The State Defender Director should be permitted to contract with pre existing qualified entities to provide defense services.

The State Defender Director should be responsible for ensuring compliance by contracted programs with national standards.

Where the on-going program has been determined to be in full compliance with national standards, it should be eligible to receive state funding for its program and the Office of the State Defender should provide any necessary back-up services.

Where the on-going defender or coordinated assigned counsel program fails to comply with national standards, that program should have 120 days in which to comply. If, upon reevaluation after that time, the program continues to fall short of national standards, the Office of State Defender should itself replace the prior program.

2.8 Regionalization of Defender Services

In states which have not yet established the Office of State Defender, local political subdivisions having a sufficient number of cases to occupy two or more attorneys on a full-time basis should be required to establish an organized defender system. If a local political subdivision lacks a sufficient number of cases to occupy the full-time services of at least two attorneys, it should be required to combine with other political subdivisions to establish a regional, organized defender system.

Statewide regulations should be established in conformity with national standards governing the staffing and budgetary requirements of local and regional defender offices to ensure provision of uniformly high quality defender services and to protect the independence of the office from political and judicial influence. Staffing requirements for regional offices should be related to travel time for attending court and jail facilities as well as to approved caseload standards.

In the absence of full state funding, participating local governments should allocate costs among themselves. Alternative bases for allocation should include, but not be limited to, population, caseload, and equal sharing.

5.12 Choice of Counsel in Defense Systems

In a mixed system where both defender and assigned counsel programs exist, the client should be given the option of selecting either system.

The initial assignment of attorneys in defender and assigned counsel programs should be an internal administrative function. However, to the extent administratively feasible and consistent with the overall effectiveness of the system, the client should be afforded an opportunity to choose a particular attorney.

Whenever an attorney-client relationship has been established between an eligible accused and his attorney, the defense system should not terminate or interfere with that relationship without great justification, and the attorney should resist efforts by the court to terminate or interfere with that relationship.

Whenever it reasonably appears to counsel for an eligible accused that he is unable, for any reason, to furnish effective representation to a particular client, he should withdraw from the case with the consent of the client and the approval of the court, and should

assist the client in securing new counsel. The defense system should not seek to prevent the individual attorney's withdrawal under these circumstances.

Whenever an eligible accused requests that different counsel be assigned to his case, the defense system should investigate the grounds for the request and should assign new counsel if (1) this constitutes the client's first such request, or (2) the investigation discloses that the attorney, for any reason, is unable to provide effective representation to the client. In all other cases the defense system should refuse to reassign the case, and should inform the client of his right to petition the court for reassignment of counsel.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 10. Office Of Defender General

- (a) The Office of Defender General is established in the executive branch of the state. The head of the office is the Defender General.
- (b) The Defender General shall be appointed by the Governor, with the advice and consent of the [appropriate state legislative body], for a term of 6 years and until his successor is appointed and qualified. To be qualified for appointment, a person must be licensed to practice law in the state. He may be removed from office only as judges of courts of general jurisdiction are removed and only for the reasons for which such judges are removed. The Defender General is entitled to compensation at the annual rate of [\$].
- (c) The Defender General has the primary responsibility for providing needy persons with legal services under this Act. He may provide these services personally, through deputies or assistants, through [district] public defenders employed under section 12 (a), or as provided by subsection (d). No other official or agency of the state may supervise the Defender General or assign him duties in addition to those prescribed by this Act. He may not practice law other than in the performance of his duties under this Act or engage in any other occupation, except as provided in section 17.

Section 11. Local Offices

The Defender General may establish as many branch or local offices as necessary to carry out his responsibilities under this Act. Each branch or local office shall be headed by a [district] public defender who is an assistant public defender selected by the Defender General. A [district] public defender is entitled to annual compensation not proportionately less than the compensation of the [county] prosecutor.

Section 16. Reports

- (a) An attorney who is assigned by a court to represent a needy person under section 3 (d) or 6 shall report to the Defender General on his representation of the needy person, as prescribed by the Defender General.

- (b) The Defender General shall submit an annual report to the [Governor] [legislature] showing the number of persons represented under this Act, the crimes involved, the outcome of each case, and the expenditures (totaled by kind) made in carrying out the responsibilities imposed by this Act.

***National Advisory Commission on Criminal Justice Standards and Goals,
Report of the Task Force on the Courts***

Standard 13.6. Financing of Defense Services

Defender services should be organized and administered in a manner consistent with the needs of the local jurisdiction. Financing of defender services should be provided by the State. Administration and organization should be provided locally, regionally, or statewide.

Standard 13.8. Selection of Public Defenders

¶1 The method employed to select public defenders should insure that the public defender is as independent as any private counsel who undertakes the defense of a fee-paying criminally accused person. The most appropriate selection method is nomination by a selection board and appointment by the Governor. If a jurisdiction has a Judicial Nominating Commission as described in Standard 7.1, that commission also should choose public defenders. If no such commission exists, a similar body should be created for the selection of public defenders.

¶2 An updated list of qualified potential nominees should be maintained. The commission should draw names from this list and submit them to the Governor. The commission should select a minimum of three persons to fill a public defender vacancy unless the commission is convinced there are not three qualified nominees. This list should be sent to the Governor within 30 days of a public defender vacancy, and the Governor should select the defender from this list. If the Governor does not appoint a defender within 30 days, the power of appointment should shift to the commission.

2. Case Allocation

Commentary. The NLADA Guidelines for Legal Defense Systems is the only set of standards to address the question of how cases are allocated in a mixed system.

NLADA Guidelines for Legal Defense Systems in the United States

2.2 Allocation of Cases

In a mixed defender and assigned counsel system, the percentage of cases handled by each component of the system should depend upon the relative sizes, expertise and availability of the defender staff and of the panel of private lawyers.

Cases should be allocated in accordance with a fair and well-promulgated plan. The administrator should be responsible for developing, promulgating and implementing this plan.

The plan should allocate a substantial share of cases to each component of the system and should not *a priori* preclude allocation of any specific type or types of cases from assignment to either component. Provision should be made for cases involving multiple defendants, conflicts of interest, and matters requiring special expertise.

3. Related Provisions

Commentary. The NLADA Guidelines for Legal Defense Systems include three miscellaneous standards relating to the following topics:

- Rural programs
- Planning capacity
- Use of law students

NLADA Guidelines for Legal Defense Systems in the United States

3.3 Projecting Defense System Personnel Needs

Defense system personnel needs should be projected by means of detailed resource planning. Such planning requires, at a minimum, detailed records on the flow of cases through the criminal justice process and on the resources expended on each case at each step in the process.

4.1 Task Allocation in the Trial Function: Specialists and Supporting Services

Defender organizations should analyze their operations for opportunities to achieve more effective representation, increased cost effectiveness and improved client and staff satisfaction through specialization. The decision to specialize legal and supporting staff functions should be made whenever the use of specialization would result in substantial improvements in the quality of defender services and cost savings in light of the program's management and coordination requirements; provided that attorney tasks should never be specialized where the result would be to impair the attorney's ability to represent a client from the beginning of a case through sentencing.

Proper attorney supervision in a defender office requires one full-time supervisor for every ten staff lawyers, or one part-time supervisor for every five lawyers.

Social workers, investigators, paralegal and paraprofessional staff as well as clerical/secretarial staff should be employed to assist attorneys in performing tasks not requiring attorney credentials or experience and for tasks where supporting staff possess specialized skills.

Defender offices should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every three staff attorneys in an office. Every defender office should employ at least one investigator.

Professional business management staff should be employed by defender offices to provide expertise in budget development and financial management, personnel administration, purchasing, data processing, statistics, record-keeping and information systems, facilities management and other administrative services if senior legal management are expending at least one person-year of effort for these functions or where administrative and business management functions are not being performed effectively and on a timely basis.

The primary responsibility for managing, evaluating and coordinating all services provided to a client should be borne by the attorney. The attorney should conduct the initial interview with the client and make an evaluation of the case prior to entry by specialists and supporting staff into the case with the exception of specific ministerial duties necessary to start the attorney's file.

Except where an assigned counsel plan provides such services, defender organizations should provide appointed counsel with specialist and supporting services in cases not involving a present or potential conflict of interest.

Defender offices should employ staff to gather and maintain information on all aspects of the available pre-trial diversion options and to assist defense counsel and defendants both in determining the suitability of any given program and in expediting the client's entry into a program when the client so desires.

4.2 Task Allocation and Supporting Services in Rural Programs

Defender programs in rural areas which are staffed by only two or three attorneys should meet standards prescribed for larger programs except that specialization should be avoided and case assignments and routine administrative and public relations duties should be rotated to ensure that each staff attorney is fully familiar with the operation of the program and with all components of the criminal justice system.

4.4 Use of Law Students

Although law schools throughout the nation should be encouraged to establish closely supervised clinical criminal law courses in cooperation with local defender offices, it is deplorable that law students are now filling gaps that should be filled by the practicing bar. Law student programs should not be viewed as a long-term answer to the problem of adequately meeting the needs of defendants in the criminal justice system.

Law students utilized as supporting personnel in defender agencies should be carefully supervised, given a broad range of experience and, where appropriate, adequately compensated for their work.

Law students functioning as subcounsel in criminal matters should be thoroughly prepared in criminal law and procedure, ethics, and court practice before being permitted to handle actual courtroom appearances.

A law student should be permitted to handle as lead counsel motions, hearings, and trials only after the student has been certified under a student practice rule and provided that the supervising lawyer has determined that, to the best of his knowledge and belief, the student will not bias either the court or the jury against the defendant. The student should not be permitted to handle the case unless the client has consented in writing to student representation; however, the consent of the trial judge should not be required. The client's consent should be indicated on the court record prior to any courtroom proceeding.

Law students should not conduct initial substantive client interviews without the presence of a supervising lawyer.

Law students should not handle as lead counsel criminal cases in which the charges against the accused involve complex legal, evidentiary, or tactical decisions, or where there is a likelihood of a substantial deprivation of liberty upon conviction.

The requirement of close supervision necessitates that the supervising lawyer have a complete understanding of the case, be available to the student prior to any court appearance for consultation and be physically present and immediately available for consultation during the time the student is presenting a matter in court.

G.Public Defender Offices

A public defender office is the most obvious component of any set of standards for criminal defense. Most, if not all, of the standards applicable to defense services generally are applicable here. This section includes standards that relate only to defender offices. Topics covered are the following:

1. Chief public defender
2. Prohibition on private practice
3. Compensation
4. Responsibility for the administration of criminal justice

1. Chief Public Defender

Commentary. The chief public defender may be either elected or appointed. Where the chief defender is appointed, the standards require that selection be based on merit. This is because the independence of defense services requires the exclusion of political factors between the head of the defender agency and the attorneys staffing it. Merit selection standards are thus included in three national standards and two state standards (Georgia and Kansas). Where the defender agency is a state agency (e.g., in Connecticut), merit selection may be implicit under civil service laws.

A second way to help ensure the independence of the chief defender is to provide for a fixed minimum term of office or, in the alternative, removal for good cause only (see also comparable provisions under Contract Systems).

Three national sets of standards and those of Georgia speak to the chief defender's term of office.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-4.1 Chief Defender and Staff

Selection of the chief defender and staff should be made on the basis of merit. Recruitment of attorneys should include special efforts to employ women and members of minority groups. The chief defender and staff should be compensated at the rate commensurate with their experience and skill sufficient to attract career personnel and comparable to that provided for their counterparts in prosecutorial offices.... Selection of the chief defender and staff by judges should be prohibited.... The chief defender should be appointed for a fixed term of years and be subject to renewal. Neither the chief defender nor staff should be removed except upon a showing of good cause.

NLADA Guidelines for Legal Defense Systems in the United States

2.13 The Governing Body for Assigned Counsel Programs

An assigned counsel program should be operated under the auspices of a general governing body. The majority of the members of the governing body should be attorneys but should not be judges or prosecuting attorneys. Its composition should conform to the criteria established for the Defender Commission.

The functions of the governing body should include the following: designing the general scheme of the system; specifying the qualifications for the position of administrator of the system; defining the function of the administrator and authorizing sufficient staff to support that function; prescribing salaries and terms of employment; adopting appropriate rules or procedures for the operation of the governing body itself, as well as general guidelines for the operation of the system; acting as a selection committee for the appointment of an administrator, or in the alternative, providing for a special selection

committee; exercising general fiscal and organizational control of the system; seeking and maintaining proper funding of the system; ensuring the independence of the administrator and assigned counsel; and encouraging the public, the courts, and the funding source to recognize the significance of the defense function as a vital and independent component of the justice system.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 10. Office Of Defender General

...

- (b) The Defender General shall be appointed by the Governor, with the advice and consent of the [appropriate state legislative body], for a term of 6 years and until his successor is appointed and qualified. To be qualified for appointment, a person must be licensed to practice law in the state. He may be removed from office only as judges of courts of general jurisdiction are removed and only for the reasons for which such judges are removed. The Defender General is entitled to compensation at the annual rate of [\$].

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.8. Selection of Public Defenders

¶3 A public defender should serve for a term of not less than four years and should be permitted to be reappointed.

¶4 A public defender should be subject to disciplinary or removal procedures for permanent physical or mental disability seriously interfering with the performance of his duties, willful misconduct in office, willful and persistent failure to perform public defender duties, habitual intemperance, or conduct prejudicial to the administration of justice. Power to discipline a public defender should be placed in the judicial conduct commission provided in Standard 7.4.

Standard 13.10. Selection and Retention of Attorney Staff Members

Hiring, retention, and promotion policies regarding public defender staff attorneys should be based upon merit. Staff attorneys, however, should not have civil service status.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 2.3 Public Defender Program

The local committee may elect to provide indigent defense services through a Public Defender Program. The Public Defender shall be selected by the local committee from qualified applicants for the office. The Public Defender shall have the authority to operate the Public Defender's Office on a day to day basis and shall select and manage the staff of the office. The local committee shall not interfere with professional decisions involving representation of clients or the operation of the office.

...

...Removal of the Public Defender short of the agreed term should be for good cause only. The Contract shall define "good cause" such as is required for removal of the Public Defender as: failure by the Public Defender to comply with the terms of the contract to an extent that the delivery of services to clients is impaired or rendered impossible, or a willful disregard by the Public Defender of the rights and best interest of clients under this contract such as leaves them impaired. The individual actions of the Public Defender taken in connection with one case alone shall not necessarily constitute "good cause" for removal.

A Public Defender should have a contract for at least a one-year term.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-10-3. Implementation Schedule for Public Defender System

The district court judge shall appoint the public defender, or any other attorney under the system established by the board, to represent all persons entitled to counsel who have not, before the system implementation date, had counsel appointed in the action pending before the court.

105-21-1. Qualifications

Each public defender shall be an attorney licensed to practice law in Kansas and shall be selected on the basis of merit. Primary qualifications shall be:

- (a) demonstrated commitment to the provision of quality legal representation for eligible persons charged with or convicted of criminal conduct;...

2. Prohibition on Private Practice

Commentary. Along with provisions for ensuring the independence of the defender system are provisions for minimizing conflicts of interest. Chief among them is a limitation on acceptance of outside cases.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-4.2. Restrictions on Private Practice

Defense organizations should be staffed with full-time attorneys. All such attorneys should be prohibited from engaging in the private practice of law.

NLADA Guidelines for Legal Defense Systems in the United States

2.9 Full-Time Defenders and Minimum Staff Size

Defender Directors and staff attorneys should be full-time employees, prohibited from engaging in the private practice of law. No defender office should be staffed by less than two full-time defenders. Where this cannot be accomplished by regionalization, it should be accomplished by merging the criminal and civil legal aid functions.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.7. Defender to be Full Time and Adequately Compensated

The office of public defender should be a full-time occupation. State or local units of government should create regional public defenders serving more than one local unit of government if this is necessary to create a caseload of sufficient size to justify a full-time public defender.

3. Compensation

Commentary. The prohibition on private practice leads directly to questions about the adequacy of the compensation paid to defender attorneys in attracting and retaining talented and dedicated counsel. The three national standards (NLADA, Model Act, and NAC) would peg defender salaries to a non-defender position (private bar, prosecutors, or judges). Provisions similar to these are also contained in the standards relating to contract services and assigned counsel. The New York City and Washington state standards also match defender salaries with those of prosecutors.

NLADA Guidelines for Legal Defense Systems in the United States

3.2 Defender System Salaries

The Defender Director's compensation should be set at a level which is commensurate with his qualifications and experience, and which recognizes the responsibility of the position. The Director's compensation should be comparable with that paid to presiding judges, be professionally appropriate when compared with the private bar, and be in no event less than that of the chief prosecutor.

The starting levels of compensation for staff attorneys should be adequate to attract qualified personnel. Salary levels thereafter should be set to promote the Defender Director's policy on retention of legal staff and should in no event be less than that paid in the prosecutor's office. Compensation should be professionally appropriate when analyzed or compared with the compensation of the private bar.

In order to attract and retain qualified supporting personnel, compensation should be comparable to that paid by the private bar and related positions in the private sector and should in no event be less than that paid for similar positions in the court system and prosecution offices.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 11. Local Offices

The Defender General may establish as many branch or local offices as necessary to carry out his responsibilities under this Act. Each branch or local office shall be headed by a [district] public defender who is an assistant public defender selected by the Defender General. A [district] public defender is entitled to annual compensation not proportionately less than the compensation of the [county] prosecutor.

***National Advisory Commission on Criminal Justice Standards and Goals,
Report of the Task Force on the Courts***

Standard 13.7. Defender to be Full Time and Adequately Compensated

...The public defender should be compensated at a rate not less than that of the presiding judge of the trial court of general jurisdiction.

Standard 13.11. Salaries for Defender Attorneys

Salaries through the first 5 years of service for public defender staff attorneys should be comparable to those of attorney associates in local private law firms.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

G. Compensation of Salaried or Contractual Public Defenders

The comprehensive plan shall provide that the salaries and compensation of salaried and contractual public defenders shall be substantially comparable to similar positions in the office of the Prosecuting Attorney. Compensation shall include, but is not limited to, reimbursement for reasonable office expenses and other reasonable, incidental expenses, e.g., photocopying, long-distance telephone calls, postage, and travel.

***New York City Indigent Defense Organization Oversight Committee,
General Requirements for All Organized Providers of Defense Services to Indigent Defendants***

II. Qualification of Lawyers

...

B. Evaluation Criteria

...

(2) Recruitment and Hiring

Specific Guidelines:

Defense lawyers should receive total compensation packages, including fringe benefits, comparable to compensation packages paid to Assistant District Attorneys in the First Department who are of equal seniority, experience and level of responsibility.

Washington Defender Association, Standards for Public Defense Services

Standard One. Compensation

Public defense attorneys and staff should be compensated at a rate commensurate with their training and experience. To attract and retain qualified personnel, compensation and benefit levels should be comparable to those of attorneys and staff in prosecutorial offices in the area.

For assigned counsel, reasonable compensation should be provided. Compensation should reflect the time and labor required to be spent by the attorney and the degree of professional experience demanded by the case. Assigned counsel should be compensated for out-of-pocket expenses.

Contracts should provide for extraordinary compensation over and above the normal contract terms for cases which require an extraordinary amount of time and preparation, including, but not limited to, death penalty cases. Services which require extraordinary fees should be defined in the contract.

4. Responsibility for Administration of Criminal Justice

Commentary. A final subset of defender standards addresses the relationship between defender agencies and both the private bar and the larger community outside the justice system. The intent of these standards is, of course, to increase support for the defense function.

ABA Standards for Criminal Justice: Prosecution Function and Defense Function

Standard 4-1.2. The Function of Defense Counsel

...

- (d) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, he or she should stimulate efforts for remedial action.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 10. Office Of Defender General

...

- (f) Whenever appropriate, the Defender General may appear in legislative or administrative proceedings for the purpose of assuring adequate representation to the persons covered by this Act.
- (g) The Defender General shall consult and cooperate with interested professional groups with respect to the causes of crime, the development of effective means for discouraging crime, the rehabilitation of convicted criminals, the administration of criminal justice, and the administration of the Office of the Public Defender.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.9. Performance of Public Defender Function

The relationship between the law enforcement component of the criminal justice system and the public defender should be characterized by professionalism, mutual respect, and integrity. It should not be characterized by demonstrations of negative personal feelings on one hand or excessive familiarity on the other. Specifically, the following guidelines should be followed:

1. The relations between public defender attorneys and prosecution attorneys should be on the same high level of professionalism that is expected between responsible members of the bar in other situations.
2. The public defender must negate the appearance of impropriety by avoiding excessive and unnecessary camaraderie in and around the courthouse and in his relations with law enforcement officials, remaining at all times aware of his image as seen by his client community.
3. The public defender should be prepared to take positive action, when invited to do so, to assist the police and other law enforcement components in understanding and developing their proper roles in the criminal justice system, and to assist them in developing their own professionalism. In the course of this educational process he should assist in resolving possible areas of misunderstanding.
4. He should maintain a close professional relationship with his fellow members of the legal community and organized bar, keeping in mind at all times that this group offers the most potential support for his office in the community and that, in the final analysis, he is one of them. Specifically:
 - a. He must be aware of their potential concern that he will preempt the field of criminal law, accepting as clients all accused persons without regard to their ability or willingness to retain private counsel. He must avoid both the appearance and fact of competing with the private bar.
 - b. He must, while in no way compromising his representation of his own clients, remain sensitive to the calendaring problems that beset civil cases as a result of criminal case overloads, and cooperate in resolving these.
 - c. He must maintain the bar's faith in the defender system by affording vigorous and effective representation to his own clients.
 - d. He must maintain dialogue between his office and the private bar, never forgetting that the bar more than any other group has the potential to assist in keeping his office free from the effects of political pressures and influences.

Standard 13.13. Community Relations

The public defender should be sensitive to all of the problems of his client community. He should be particularly sensitive to the difficulty often experienced by the members of that community in understanding his role. In response:

1. He should seek, by all possible and ethical means, to interpret the process of plea negotiation and the public defender's role in it to the client community.
2. He should, where possible, seek office locations that will not cause the public defender's office to be excessively identified with the judicial and law enforcement components of the criminal justice system, and should make every effort to have an office or offices within the neighborhoods from which clients predominantly come.
3. He should be available to schools and organizations to educate members of the community as to their rights and duties related to criminal justice.

H. Assigned Counsel Systems

Assigned counsel plans are simply lists of attorneys who have agreed to accept and who are qualified to represent clients in criminal cases. They are widely used, especially in rural areas. Plans can be either formal or informal. Formal plans are those administered by a full-time manager who supervises the list of attorneys eligible for court appointment; ensures that assignments are appropriate; reviews attorney qualifications; and protects the independence of plan attorneys. Informal plans, often referred to as “ad hoc,” are often no more than lists assembled by trial courts of local attorneys willing to take on criminal work. The judge responsible for court appointment controls the list and how it is used.

This section includes standards on the following topics:

1. Integrated defense system plan
2. Plan administrator
3. Attorney panel qualifications
4. Rotation of assignments
5. Attorney compensation
6. Attorney expenses
7. Related provisions

1. Integrated Defense System Plan

Commentary. Since assigned counsel plans are responsible for the representation of so many defendants, all the national standards (except those limited to contract services) specifically address the administration of these plans. Of the several state standards in this compendium, three (Georgia, Indiana, and Kansas) also address assigned counsel. Additional examples of assigned counsel standards include these:

- Arkansas Public Defender Commission, Minimum Standards, Attorney Qualifications Certification Criteria (1987)
- Alameda County Bar Association Court Appointed Attorneys' Program (1988)
- Massachusetts Supreme Judicial Court, Rule 3.10 (1993)
- Michigan Sixth Circuit Court of Appeals Administrative Order 1996-2, Plan for Appointing Lawyers to Represent Defendants (1996)
- Oregon Judicial Department, Policy Statement, Indigent Defense Programs (1990)
- Appellate Defender Commission, Michigan Appellate Assigned Counsel System Regulations (1985, revised 1999)

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-2.1. Systematic Assignment

The plan for legal representation should include substantial participation by assigned counsel. That participation should include a systematic and publicized method of distributing assignments. Except where there is a need for an immediate assignment for temporary representation, assignments should not be made to lawyers merely because they happen to be present in court at the time the assignment is made. A lawyer should never be assigned for reasons personal to the person making assignments.

NLADA Guidelines for Legal Defense Systems in the United States

2.3 Ad Hoc Appointment of Counsel

Appointment of counsel on a random or *ad hoc* basis is explicitly rejected as an appropriate means of furnishing legal representation in criminal cases.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 3.1 Establishment of Legal Representation Plan

- a. Provision of assigned counsel to eligible persons shall be made according to a written plan consistent with these standards.
- b. Jurisdictions that rely in whole or in part upon assigned counsel for the provision of defense services shall consider whether and how to combine assigned counsel with

one or more other methods of providing representation. Three alternative systems are set out in Standards 3.1.A through 3.1.C below.

Standard 3.1.A Assigned Counsel in All Eligible Cases

Jurisdictions which have no defender office and which do not contract with any entity to provide defense services shall establish an assigned counsel plan, consistent with these Standards, for affording quality representation to all eligible persons (Standard 2.1).

Standard 3.1.B Mixed Delivery System Including Assigned Counsel

- a. Jurisdictions which choose to utilize a defender office and/or contracting entity in conjunction with assigned counsel to provide defense services to eligible persons shall establish a coordinated plan for delivery of defense services.
- b. The plan shall delegate to assigned counsel a substantial portion of all eligible cases, as well as those cases which the defender office and/or contracting entity cannot handle due to conflicts of interest.
- c. None of the defense entities in such a system shall be precluded from providing representation in any particular classification of case.

Standard 3.1.C Assigned Counsel for Conflicts Only

Jurisdictions which choose to utilize a defender office and/or contracting entity as the primary method of providing defense services to eligible persons, and rely on assignment of private counsel for cases which pose a conflict of interest to the primary entity (or entities), shall establish a coordinated plan for the assignment of counsel in those conflict cases.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 13. Court Assigned Attorneys

If a court assigns an attorney under section 3 (d) or 6, it shall prescribe a reasonable rate of compensation for his services based on the complexity of the issues, the time involved, and other relevant considerations, and shall determine the direct expenses, necessary to representation, for which he should be reimbursed. Payment or reimbursement shall be made out of the [appropriate fund] of the state.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.5. Method of Delivering Defense Services

Services of a full-time public defender organization, and a coordinated assigned counsel system involving substantial participation of the private bar, should be available in each jurisdiction to supply attorney services to indigents accused of crime. Cases should be

divided between the public defender and assigned counsel in a manner that will encourage significant participation by the private bar in the criminal justice system.

Standard 13.15. Providing Assigned Counsel

The public defender office should have responsibility for compiling and maintaining a panel of attorneys from which a trial judge may select an attorney to appoint to a particular defendant. The trial court should have the right to add to the panel attorneys not placed on it by the public defender. The public defender's office also should provide initial and inservice training to lawyers on the panel and support services for appointed lawyers, and it should monitor the performance of appointed attorneys.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 2.2 Method of Providing Counsel

The local governing committee shall propose to the Council a plan for a local indigent defense program, either a public defender system, a panel of private attorneys, a legal aid and defender society, a contract system or a combination of the above to provide adequate legal defense for indigents accused of felonies, or misdemeanors.

Guideline 2.4 Panel Attorney Program

The local committee may elect to provide indigent defense services through a panel attorney program using qualified attorneys in good standing with the State Bar of Georgia selected by the committee. The appointment of attorneys and the assignment of cases should be made as follows:

- (a) Appointments of private attorneys shall be made on an impartial and equitable basis ;
- (b) The cases shall be distributed among the attorneys to ensure balanced workloads through a rotation system ;
- (c) More difficult or complex cases shall be assigned to attorneys with sufficient levels of experience and competence to afford adequate representation ;
- (d) Less experienced attorneys should be assigned cases which are within their capabilities, but should be given the opportunity to expand their experience under supervision; and
- (e) Cases in which the death penalty is sought shall be assigned only to attorneys of sufficient experience, skill and competence to render effective assistance of counsel to defendants in such cases. The American Bar Association "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" may be referred to as a suggestion for the determination of the experience, skill and competence of the attorneys.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

H. Compensation of Assigned Counsel

The comprehensive plan shall provide that counsel appointed on a case-by-case basis for trial or appeal shall submit a claim for services and reimbursement for expenses.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-3-1. Panel of Attorneys

- (a) The administrative judge of each district shall compile a list of volunteer attorneys eligible for assignment to represent indigent defendants for each county in the district. The list shall be known as the panel for indigent defense services.
- (b) The administrative judge shall revise the panel annually, as incoming attorneys register with the clerk of the district court and when removal or withdrawal of attorneys from the panel or any other cause makes revision appropriate.
- (c) Each attorney on the voluntary panel shall accept felony appointments for a minimum period of one year, with renewable one-year service terms thereafter. The administrative judge may waive this requirement for good cause shown.
- (d) In compiling the list, the administrative judge shall consider the criteria contained in K.A.R. 105-3-2, the training, the resources and the experience of each attorney. The judge may consider any other relevant factor or factors relating to the attorney's ability to provide effective assistance of counsel to indigent defendants.
- (e) An administrative judge may refuse to place an attorney on a panel. Should the administrative judge refuse to place an attorney on a panel, that judge shall promptly notify the attorney and the board of this decision. The decision shall become effective upon notice to the attorney and shall remain effective until the board or administrative judge places the attorney on the panel.
- (f) An attorney who is refused placement on a panel may inform the board that the attorney wishes to appear and offer evidence for placement on the panel at a hearing before the board. Any such evidence shall be reviewed by the board for determination of whether or not the administrative judge abused that individual's discretion in refusing to place the attorney on the panel. The hearing shall be conducted as a summary proceeding.

2. Plan Administrator

Commentary. Most of the national standards that address assigned counsel systems require that there be an administrator. The only state standard providing for administration of the assigned counsel system at trial (Georgia) places that responsibility with the Public Defender Office. Michigan places it for appellate purposes with the Michigan Appellate Assigned Counsel Administrator (Michigan Supreme Court Administrative Order 1989-3, In re the Appointment of Appellate Assigned Counsel). These standards are detailed with the standards relating to financial eligibility procedures and informing clients of right to counsel.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-2.1 Systematic Assignment

...

Administration of the assigned-counsel program should be by a competent staff able to advise and assist the private attorneys who provide defense services.

NLADA Guidelines for Legal Defense Systems in the United States

2.14 Qualifications, Conditions of Employment, and Role of the Administrator

An assigned counsel program should be administered by a qualified attorney licensed to practice in the jurisdiction where the system operates. In addition, the qualifications of the administrator should include, but not be limited to, the following: extensive experience in the field of criminal defense; experience in administration; ability to work cooperatively with other elements of the criminal justice system while retaining an independence of attitude to promote and protect the proper rendering of defense services; ability to maintain proper relations with the private bar; and, where the assigned counsel program co-exists with a defender system which has a separate administrator, the ability to maintain a cooperative working relationship with the defender system.

The functions of the administrator should include, but not be limited to, the following: developing and executing operational policy and control of the system; assisting the governing body in discharging its responsibilities; further assisting the governing body in the development of the budget, and in planning and establishing fee schedules and fiscal controls; acquiring such staff as is necessary to carry out the mission of the system; designing the internal operational and administrative controls necessary for the orderly disposition of cases; designing and implementing orientation and training programs for assigned counsel; and developing access to supporting services.

The administrator should have the authority to select the attorneys who will comprise the assigned counsel panel; to suspend or dismiss panel members for cause, subject to the review of the governing body; to hire and discharge such staff as is necessary to operate

the system; to monitor the quality of the services being rendered and to take appropriate measures to maintain a competent level of services; to approve expenditures for the acquisition of supporting services; and to approve the payment of attorney fee vouchers. However, requests for fees exceeding the recommended maximum, or appeals from the administrator's action, should be received by a panel of attorneys appointed by the governing board.

The following terms of employment should apply to the assigned counsel administrator. The administrator's salary should be sufficient to attract a capable person and should be at least as high as that of the chief prosecutor in the area served. The administrator and staff should be allowed reasonable expenses to participate in continuing education programs and bar association and defender association functions. The administrator should serve for a definite term of years which should be no less than three nor greater than six years and should be eligible for reappointment for successive terms. The administrator should not be subject to removal from office in the course of a term without good cause being shown and should be afforded a hearing before the governing body.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 3.3.1 Position of Administrator

The Board shall appoint an Administrator who shall implement policy and manage the Assigned Counsel Program, except when the legal representation plan requires that the Director of the defender office also act as Administrator, and the plan provides for the independence of the Director/Administrator from the judiciary and funding source (Standard 2.2).

Standard 3.3.2 Qualifications of Administrator

- a. The Administrator shall be an attorney licensed to practice in the jurisdiction or jurisdictions in which the Assigned Counsel Program operates. The experience of the Administrator shall include extensive work in the criminal defense field and in administration. He or she shall have a reputation for integrity and commitment to program principles.
- b. The Administrator shall be appointed on merit alone and shall be dismissed only for good cause found upon a hearing before the Board.

Standard 3.3.3 Employment Status and Pay of Administrator

- a. The office of Administrator shall be a full-time position whenever feasible ; a full-time Administrator shall not engage in the private practice of law.
- b. The Administrator shall be appointed for a stated term of office and shall be compensated at a rate not less than the local presiding judge, chief prosecutor and, where applicable, the chief defender.

Standard 3.3.4 Functions of Administrator

The Administrator shall implement Program policy and manage Program operations.

Standard 3.4 Budget and Funding

- a. The Board, in consultation with the Administrator, shall submit a complete and sufficient budget to the funding authority.
- b. The funding authority has a constitutional and policy-based duty to fund the Program in a manner and in an amount consistent with provision of quality representation (Standard 2.1) and sound administration.
- c. The Administrator shall maintain records and accounts of expenditures in accordance with accepted accounting practices.

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts

Standard 13.15. Providing Assigned Counsel

The public defender office should have responsibility for compiling and maintaining a panel of attorneys from which a trial judge may select an attorney to appoint to a particular defendant. The trial court should have the right to add to the panel attorneys not placed on it by the public defender. The public defender's office also should provide initial and inservice training to lawyers on the panel and support services for appointed lawyers, and it should monitor the performance of appointed attorneys.

3. Attorney Panel Qualifications

Commentary. The first responsibility of the administrator is to establish a panel of private attorneys willing to accept criminal case assignments. The two national standards (ABA and NLADA) and three state standards (Georgia, Indiana, and Kansas) provide guidance for this task by suggesting that there be an application process that screens attorneys to ensure that they have sufficient experience and training for the job. The NLADA and ABA standards also stress the necessity of adopting performance standards. See also, Gwinnett Judicial Circuit Internal Operating Procedure 98-5, G 10.1 *et seq.*, “Panel Attorneys.”

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-2.2. Eligibility to Serve

Assignments should be distributed as widely as possible among the qualified members of the bar. Lawyers licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts should be encouraged to submit their names for inclusion on the roster of attorneys from which assignments are made. Each jurisdiction should adopt specific qualification standards for attorney eligibility, and the private bar should be encouraged to become qualified pursuant to such standards. Counsel should not seek to avoid appointment by a tribunal to represent a person except for good cause.

NLADA Guidelines for Legal Defense Systems in the United States

2.15 Establishing the Assigned Counsel Panel

In establishing the assigned counsel panel, the administrator should solicit all members of the practicing bar in the area to be served by the system. The administrator should appoint all of those attorneys who display a willingness to participate in the program and manifest the ability to perform criminal defense work at a competent level. Provision should also be made for attorneys who are willing to learn criminal defense work, or to become more proficient in such work, to be inducted into the program upon completion of an appropriate training regime.

Standards of performance and conduct should be developed and disseminated among all panel members and potential panel members. In the event that those standards are disregarded or breached, it should be cause for either admonishment, suspension or removal from the panel.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 2.9 Standards for Performance of Counsel

- a. The Assigned Counsel Program shall identify, and enforce adherence to, minimum standards for the performance of counsel and shall assist counsel in meeting, and striving to exceed, those standards.
- b. Assigned counsel shall meet, and strive to exceed, minimum standards for the performance of counsel.

Standard 4.1 Establishment and General Operation of Assigned Counsel Roster

...

- b. The Board, or at its direction the Administrator, shall establish standards detailing the qualifications attorneys must have before being assigned cases at each level under paragraph (a), as described in Standard 4.1.1.

Standard 4.1.1 Qualifications of Attorneys

- a. The attorney qualifications established pursuant to Standard 4.1(b) shall include criteria reflecting the experience and training required for assignment in cases of different levels of seriousness, and a requirement that attorneys have the proficiency and commitment necessary to provide the quality representation mandated by Standard 2.1.
- b. The Program may allow the substitution of equivalent experience for specific experiential requirements, but may not compromise the proficiency and commitment requirements.
- c. An attorney applying for inclusion on a Program roster, or for reclassification (Standard 4.1.(d)), shall provide to the Administrator information needed for verification of all qualifications offered in support of the application.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 2.4 Panel Attorney Program

The local committee may elect to provide indigent defense services through a panel attorney program using qualified attorneys in good standing with the State Bar of Georgia selected by the committee. The appointment of attorneys and the assignment of cases should be made as follows:

...

- (c) More difficult or complex cases shall be assigned to attorneys with sufficient levels of experience and competence to afford adequate representation ;
- (d) Less experienced attorneys should be assigned cases which are within their capabilities, but should be given the opportunity to expand their experience under supervision; ...

Guideline 2.5 Selection and Conduct of Panel Attorneys

The local committee shall select the attorneys who will serve on the panel of attorneys to receive appointments of indigent cases.

Standards of performance and conduct shall be developed and disseminated by the local committee among all panel members and potential panel members. In the event that those standards are disregarded or breached, it would be cause for either admonishment, suspension or removal of the attorney from the panel.

These standards of performance and conduct shall include, but not be limited to the following:

- (a) A panel member should make contact with the defendant as soon as possible after the assignment;
- (b) A panel member should actively represent his/her client at every stage of the criminal proceeding;
- (c) A panel member should represent his/her client vigorously within the bounds of the law and ethical conduct;
- (d) A panel member should at all times perform his/her role as counsel independently; and
- (e) A panel member should responsibly manage and account for his/her time in rendering services under the program.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

E. Appointment of Counsel

The comprehensive plan shall provide for the appointment of trial counsel meeting the following qualifications.

...

- 2. *Class A or B Felony.* To be eligible to serve as appointed counsel in a case where the accused is charged with a Class A or B felony, an attorney shall ;
 - a. be an experienced and active trial practitioner with at least two(2) years of criminal litigation experience; and
 - b. have prior experience as lead or co-counsel in at least two (2) felony jury trials which were tried to completion.

3. *Class C Felony.* To be eligible to serve as appointed counsel in a case where the accused is charged with a Class C felony, an attorney shall:
 - a. Be an experienced and active trial practitioner with at least one (1) year of criminal litigation experience; or
 - b. Have prior experience as lead or co-counsel in at least three (3) criminal jury trials which were tried to completion.
- ...
5. *Other criminal cases.* To be eligible to serve as lead counsel in other criminal cases, an attorney shall have prior experience as lead or co-counsel in at least one (1) case of the same class or higher which was tried to completion.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-3-2. Eligibility to Serve

- (a) Each licensed attorney engaged in private practice of law shall be eligible to serve on the panel if the following criteria are met.
 - (1) Each attorney on the voluntary panel representing an indigent defendant shall have completed 12 hours of continuing legal education in the area of criminal law within three years of appointment or have graduated from an accredited law school during the three years immediately before appointment.
 - (2) Each attorney assigned to the defense of any felony classified as a non-drug grid offense with a severity level of 3 or 4, or any felony classified as a drug grid offense with a severity level of 1, 2, or 3, shall have tried to a verdict, either as defense counsel or prosecutor, five or more felony jury trials.
 - (3) Each attorney assigned to the defense of any felony classified as an off-grid offense or a non-drug grid offense with a severity level of 1 or 2 shall have tried to a verdict, either as defense counsel or prosecutor, five or more jury trials involving the following:
 - (A) non-drug offenses of severity levels 1 through 4 or drug grid offenses of severity levels 1 through 3; or
 - (B) any off-grid offenses
 - ...
 - (7) ...
 - (B) Except for appointment of an attorney to provide representation for an indigent person accused of a capital felony or a homicide pursuant to K.S.A. 21-3401, 21-3402, or 21-3403, an indigent person who has been convicted of a capital murder and who is under a sentence of death in the direct review of the judgment or an indigent person who has been convicted of capital murder and

who is under a sentence of death in postconviction proceedings, the judge may waive any of the above conditions if the attorney selected by the judge has sufficient training, resources, and experience to undertake the case in question.

4. Rotation of Assignments

Commentary. A corollary standard to panel establishment is the rotation of assignments among panel members to ensure equity and avoid charges of favoritism. The ABA Defense Services Standards and the NLADA Guidelines for Legal Defense Systems both provide for exceptions to panel rotation when necessary. The Kansas Standards also provide for emergency appointment, when required, outside the normal rotation.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-2.3. Rotation of Assignments and Revision of Roster

- (a) As nearly as possible, assignments should be made in an orderly way to avoid patronage and its appearance, and to assure fair distribution of assignments among all whose names appear on the roster of eligible lawyers. Ordinarily, assignments should be made in the sequence that the names appear on the roster of eligible lawyers. Where the nature of the charges or other circumstances require, a lawyer may be selected because of his or her special qualifications to serve in the case, without regard to the established sequence.

NLADA Guidelines for Legal Defense Systems in the United States

2.16 Assignment of Cases to Panel Members

Although methods of assigning cases may vary with local procedures and conditions, the administrator, in designing the system and making assignments, should adhere to the following goals:

- (a) The cases should be distributed in an equitable way among the panel members to ensure balanced workloads through a rotating system with allowances for variance when necessary;
- (b) The more serious and complex cases should be assigned to attorneys with a sufficient level of experience and competence to afford proper representation; and
- (c) Apprentice members of the panel should only be assigned cases which are within their capabilities; however, they should be given the opportunity to expand their experience gradually under supervision.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 2.4 Panel Attorney Program

The local committee may elect to provide indigent defense services through a panel attorney program using qualified attorneys in good standing with the State Bar of Georgia selected by the committee. The appointment of attorneys and the assignment of cases should be made as follows:

...

- (b) The cases shall be distributed among the attorneys to ensure balanced workloads through a rotation system;

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-3-1. Rotation of Appointments

All appointments shall be made in an orderly manner to avoid patronage, or the appearance of patronage, and to ensure fair distribution of appointments among all whose names appear on the panel. Names on the panel shall be in alphabetical order and appointments shall be made in sequence with the following exceptions:

- (a) When the court determines there is a conflict of interest, the next listed attorney shall be appointed.
- (b) When the court determines the attorney lacks sufficient experience in a serious felony case, the next qualified attorney shall be appointed.
- (c) When the court determines an emergency appointment of counsel is required, the first available attorney may be appointed; or
- (d) When the court determines the attorney is unavailable to promptly handle the case, the next listed attorney shall be appointed.

Any attorney who is passed over shall be first in sequence for the next appointment.

5. Attorney Compensation

Commentary. A critical responsibility of the assigned counsel system is to ensure that participating attorneys are promptly compensated at a fair and reasonable rate. If rates are too low or compensation delayed, a qualified attorney will leave the plan, thus defeating one of the implicit purposes of an assigned counsel system—to insure broad bar support for indigent defense services.

The ABA standards and Model Act approach the question of compensation very generally by requiring “reasonable” and “adequate” compensation. The NLADA and Washington standards go further to peg compensation rates to prevailing rates among the private bar or among other governmental attorneys (e.g., prosecutors). The two state standards (Georgia and Indiana) set specific rate minimum rates, while the Kansas and North Dakota standards set a specific statewide compensation rate. The North Dakota standards also provide detailed requirements for judicial service of attorney requests for payment. Recent case law has defined reasonable rates as covering the lawyer’s overhead with an additional amount over that. See, e.g., *State ex ref. Stephan v. Smith*, 747 P.2d 816 (Kan. 1987).

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-2.4. Compensation and Expenses

Assigned counsel should receive prompt compensation at a reasonable hourly rate and should be reimbursed for their reasonable out-of-pocket expenses. Assigned counsel should be compensated for all hours necessary to provide quality legal representation. Compensation for assigned counsel should be approved by administrators of assigned-counsel programs.

NLADA Guidelines for Legal Defense Systems in the United States

3.1 Assigned Counsel Fees and Supporting Services

Assigned counsel should be adequately compensated for services rendered. Fees should be related to the prevailing rates among the private bar for similar services. These rates should be reviewed periodically and adjusted accordingly.

...

In developing a fee schedule, the effect of the fee schedule upon the quality of representation should be considered. Fee structures should be designed to compensate attorneys for effort, skill and time actually, properly and necessarily expended in assigned cases.

Fee schedules, whether provided by statute or policy, should be designed to allow hourly in-court and out-of-court rates up to a stated maximum for various classes of cases, with provision for compensation in excess of the scheduled maxima in extraordinary cases.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 4.7.1 Assigned Counsel Fees

Reasonable compensation shall be provided to assigned counsel, at a rate commensurate with that paid for other contracted government legal work (e.g., work contracted for by attorneys general, county legislatures or commissions, etc.) or with prevailing rates for similar services performed by retained counsel in the jurisdiction.

Standard 4.7.2 Method of Compensation

- a. Attorneys shall be compensated at an hourly rate, with no distinction between rates for services performed in and outside of court.
- b. The amount of compensation sought shall be reviewed by the Administrator and approved unless there is cause to believe the amount is unwarranted.
- c. Maximum fee limits shall not be established. Where they exist, they shall be subject to exception, upon approval by the Administrator acting within guidelines established by the Board.
- d. Periodic billing and payment during the course of counsel's representation shall be provided for, at least in lengthy cases.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 13. Court Assigned Attorneys

If a court assigns an attorney under section 3 (d) or 6, it shall prescribe a reasonable rate of compensation for his services based on the complexity of the issues, the time involved, and other relevant considerations, and shall determine the direct expenses, necessary to representation, for which he should be reimbursed. Payment or reimbursement shall be made out of the [appropriate fund] of the state.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 2.6 Fees Paid to Lawyers Under a Panel Program

The local committee shall determine the method of compensation to be paid under a panel program within the following guidelines:

No program shall have a fee schedule which compensates attorneys at a rate of less than \$45.00 per hour for out-of-court work and less than \$60.00 per hour for in-court work.

In approving fees, the local committee shall take into consideration the complexity of the case and the corresponding fee that is presently being obtained by competent members of the bar for similar representation where privately retained. While the fee paid under the

panel program need not equate to that of a corresponding fee obtained by a private practitioner, there should be a reasonable relationship.

The Council discourages the setting of maximum fees which appointed attorneys may receive; however, if a committee chooses to set maximum fees the maximums set for trials or similar situations must be at least as follows:

- \$1000.00 for misdemeanors.
- \$2500.00 for non-capital felonies.
- \$5000.00 for capital felonies where the death penalty is not sought.

No maximum fee shall be set for capital felonies in which the death penalty is sought. An appointed attorney shall be permitted to petition the court for a fee in excess of the maximum set for a particular category of case. It shall be within the sole discretion of the court after consideration of the petition whether or not to award a fee in excess of the maximum fee established by the local governing committee.

The Council recommends that fee requests of appointed attorneys be submitted to the Administrator of the Indigent Defense program or the local governing committee for approval. An appointed attorney may petition the court if the fee requested has been denied or reduced. It shall be within the sole discretion of the court after consideration of the petition whether or not to award the fee requested.

Capital felonies in which the death penalty is sought should be compensated based on hourly rates and the time spent as documented in records submitted by the attorneys.

Compensation for a capital felony case in which the death penalty is sought shall be at least the same hourly rate as other cases, but each case should be examined by the court and the fee total should be based on a complete examination of the individual case. Special attention shall be given to continuing counsel obligations in death penalty cases when conviction and imposition of the death penalty occur.

The monetary standards contained in this paragraph may be waived by the Council, on a year-to-year basis, upon a showing that compliance with them would work a demonstrable financial hardship upon a local governing authority, and would result in a diminution of ability to provide indigent defense services.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

H. Compensation of Assigned Counsel

The comprehensive plan shall provide that counsel appointed on a case-by-case basis for trial or appeal shall submit a claim for services and reimbursement for expenses.

1. Hourly Rate. Counsel shall be compensated for time actually expended at the hourly rate of not less than sixty dollars (\$60.00).
2. Incidental Expenses. Counsel shall be reimbursed for reasonable, incidental expenses, e.g., photocopying, long-distance telephone calls, postage, and travel.

3. Periodic Payments. Periodic payment during the course of counsel's representation shall be made monthly upon request of appointed counsel.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-5-2. Rates of compensation

- (a) Each assigned counsel shall be compensated at the rate of \$50 per hour.

...

- (c) Contract counsel shall be compensated at the rate or rates established and set forth in the contract between the board and the assigned counsel.

105-5-4. Multiple attorneys

No more than one attorney shall be compensated for services rendered at the same stage of proceedings, unless the judge determines that co-counsel is required due to the extreme seriousness of the case.

105-5-5. Overpayments

If it is determined by the director that an attorney has been paid an amount in excess of what is allowable according to the current regulations regarding compensation, the director shall notify the attorney to immediately reimburse the board for a like amount. If not paid on demand, the director may recoup that amount from a subsequently approved claim from that attorney.

105-5-6. Reasonable compensation; non-tried cases

- (a) Each appointed and assigned attorney shall be compensated for time expended in representing indigent defendants and other indigent persons at the hourly rate prescribed in K.A.R. 105-5-2. Except as provided in K.A.R. 105-5-89, reasonable compensation shall not exceed \$1,000 in the following cases:
 - (1) Those felony cases in the trial court that are classified as non-drug offenses of severity level 1 through 5 that are not submitted to a judge or jury, including services at a preliminary hearing sentencing, if applicable; and
 - (2) Those felony cases in the trial court that are classified as drug offenses, that have not been submitted to a judge or jury, and in which there have been six hours or more spent in court in defense of the indigent defendant, including services at a preliminary hearing and sentencing, if applicable.
- (b) Except as provided in K.S.R. 105-5-8 and K.A.R. 105-6(a), reasonable compensation shall not exceed \$750 in the following cases:
 - (1) Those felony cases in the trial court that are not submitted to a judge or jury, including services at a preliminary hearing and sentencing, if applicable, and that are classified as severity level 6 through 10 non-drug offenses; and

- (2) Those felony cases in the trial court that are not submitted to a judge or jury, that are classified as drug offenses, and in which there have been fewer than six hours spent in court in defense of the indigent defendant, including services at a preliminary hearing and sentencing, if applicable.
- (c) Except as provided in K.A.R. 105-5-8, K.A.R. 105-5-6(a), and K.A.R. 105-5-6(b), reasonable compensation shall not exceed \$410 in the following types of cases:
 - (1) Habeas corpus cases as authorized by K.S.A. 1997 Supp. 22-4503 and K.S.A. 1997 Supp. 22-4506;
 - (2) Cases filed pursuant to K.S.A. 60-1507 and K.S.A. 1997 Supp.22-4506 ;
 - (3) Habeas corpus cases as authorized by K.S.A. 22 -2710;
 - (4) Habeas corpus cases as authorized by K.S.A. 1997 Supp. 22-3428 and L/S/A/ 22-3428a; and
 - (5) Habeas corpus cases as authorized by K.S.A. 1997 Supp. 59-2965.
- (d) Except as provided in K.A.R. 105-5-8, reasonable compensation shall not exceed \$200 in the following types of cases:
 - (1) Representation of grand jury witnesses determined to be indigent and called to testify pursuant to K.S.A. 22-3009 ;
 - (2) Representation of indigent persons committed to custody as material witnesses pursuant to K.S.A. 1997 Supp. 22-2805 ;
 - (3) Probation revocation hearings; and
 - (4) Motions to modify sentence.

105-5-7. Reasonable compensation; tried cases

Each appointed and assigned attorney shall be compensated for time expended in representing indigent defendants at the hourly rate prescribed in K.A.R. 105-5-2. Except as provided in K.A.R. 105-5-8, reasonable compensation for felony cases tried on pleas of not guilty and submitted to a judge or jury for adjudication, including compensation for services at the preliminary hearing, sentencing and motions to modify the sentence, shall not exceed the following:

- (a) \$1,500 for felonies classified as non-drug offenses of severity levels 5 through 10 ;
- (b) \$2,000 for felonies classified as non-drug offenses of severity level 4 and felonies classified as drug offenses of severity levels 2 through 4; and
- (c) \$5,000 for felonies classified as non-drug offenses of severity levels 1 through 3, off-grid felonies, and felonies classified as drug offenses of severity level 1.

105-5-8. Compensation; exceptional cases

- (a) Any compensation for attorneys' services in excess of the amounts set out in K.A.R. 105-5-6 and K.A.R. 105-5-7 may be approved only in exceptional cases. A finding by the court that a case is exceptional shall be subject to final approval by the board. An exceptional case means any of the following:

- (1) Any case involving a felony charge in the trial court which does not appear on the sentencing range grid;
 - (2) any felony case tried on a not guilty plea in which there have been 25 or more hours spent in court in defense of the indigent defendant;
 - (3) any felony case not submitted to a judge or jury in which there have been 10 hours or more of in-court time spent in defense of the indigent defendant; or
 - (4) any case that has been declared an exceptional case by the court due to its complexity or other significant characteristics.
- (b) Each claim for compensation in an exceptional case shall be accompanied by a specific finding in a court order setting forth the basis for the declaration that the case is exceptional.
- (c) Reasonable compensation for attorneys' services in exceptional cases shall not exceed \$5,000 per case. However, additional compensation may be approved by the board if warranted by the extreme complexity of the case.

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

2. Guidelines for Payment of Appointed Counsel Fees and Expenses for Indigent Defense Services

1. Appointed Counsel Fees:
 - a. Appointed counsel shall be compensated at a rate of \$75 per hour. Appointed counsel shall receive the same hourly rate of compensation for out-of-court services, including travel time, as for in-court services.
 - b. If a lawyer anticipates a cumulative attorney fee in a particular case of more than \$1,000, early prior written approval of the judge presiding in the case is required.
 - c. If a lawyer anticipates a cumulative attorney fee in a particular case of more than \$2,000, the early prior written approval of the judge presiding in the case is required. The judge shall notify the presiding judge of the judicial district and the State Court Administrator of each approval of an anticipated cumulative attorney fee in a particular case of more than \$2,000.
 - d. If multiple attorneys are required in a particular case, the early prior written approval of the judge presiding in the case is required.
 - e. In exceptional cases in which total defense expenses may exceed \$5,000, the judge presiding in the case will, at the earliest possible time, after consultation with the appointed attorneys, set a total fixed fee payment for total defense expenses, including counsel fees, witnesses, and investigatory expenses for that case. Notice of this order should be provided to the attorneys and the State Court Administrator.

Judges should avoid setting maximum reimbursable time limits in a case, beyond which the counsel is not compensated.

6. Procedures for Review of Trial Judge Decisions Regarding Counsel Fees for Indigent Defense Services

Section 1: Statement of Authority

Pursuant to the North Dakota Rule on Local Court Procedural Rules and Administrative Rules (NDLocalCtR) and after consultation with the Advisory Committee of the Judicial District (Section 8, NDLocalCtR) the following procedure for the resolution of counsel for indigent defendant fee disputes in this judicial district is adopted.

Section 2: Statement of Policy

This procedure is consistent with Rule 3(a)(9), North Dakota Legal Counsel for Indigents Rule (NDLCIR), that any person requesting review of a fee decision of a trial judge on counsel payment for state funded or county funded services shall exhaust administrative remedies established by the presiding judge of the judicial district. It is the policy in this judicial district to provide effective procedures for the prompt and fair resolution of fee disputes. Misunderstanding can be avoided by complete and detailed documentation of counsel fees submitted to the trial judge.

...

Section 4: Standing

An “interested party” may seek review of a fee decision by a trial judge.

Section 5: Commencement of Review Procedures

Whenever a trial judge changes a counsel fee from that submitted, the trial judge shall explain the reason for the change in a letter to the attorney and offer the attorney the opportunity to meet with the judge to discuss the decision.

An interested party may file a written petition requesting review of a counsel fee decision with the presiding judge of the judicial district. Use of the petition form supplied by the office of the presiding judge is encouraged but not required. Verbal requests for review will be received but shall be reduced to writing and signed by the petitioner before any action is taken by the presiding judge.

The petition for review must include the names and addresses of all interested parties, a description of the kind of case involved, and the procedural history of the case. The petition must include a copy of the following:

1. An itemized bill of the fees charged by the attorney; and
2. The order of the trial judge relating to counsel payment.

Section 6: Time

Requests for review of counsel fee decisions must be filed within 30 days after notification of a fee decision either by a formal letter or receipt of partial payment,

whichever is earlier. The review procedure will be completed, whenever possible, within 60 days after a request is received.

Section 7: Acceptance of Partial Payment Not a Bar

Acceptance of partial payment is not a bar to the filing of a petition.

Section 8: Notice

Other interested parties will be notified by the presiding judge.

Section 9: Supplementary Materials

Each interested party will be provided an opportunity to submit written materials and explanations.

Alternate No. 1:

Section 10: Judge Review Panel

The petition will be reviewed by a panel of three judges appointed by the presiding judge. The judge whose fee decision is under review will not be appointed as a member of the panel.

Section 11: Oral Hearing

Any interested party may request an oral hearing before the panel. No oral hearing will be scheduled unless requested by an interested party within 10 days after receipt of notice of the filing of the petition. The panel may set an oral hearing on its own motion.

Section 12: Findings and Recommendations

Written panel findings and recommendations will be made to the trial judge.

The written findings and recommendations of the panel will be sent to all interested parties.

Section 13: Effective Date

The effective date of this procedure is _____, 19____.

Alternate No. 2

Section 10: Peer Review Panel

The petition will be reviewed by a panel of two attorneys appointed by the presiding judge and one attorney appointed by the attorney whose fee is under review.

Section 11: Oral Hearing

Any interested party may request an oral hearing before the panel. No oral hearing will be scheduled unless requested by an interested party within 10 days after receipt of notice of the filing of the petition. The panel may set an oral hearing on its own motion.

Section 12: Findings and Recommendations

Written panel findings and recommendations of the panel will be made to the trial judge.

The written findings and recommendations of the panel will be sent to all interested parties.

Section 13: Effective Date

The effective date of this procedure is _____, 19__.

Alternate No. 3

Section 10: Judge and Peer Review Panel

The petition will be reviewed by a panel of two judges and two attorneys appointed by the presiding judge, and one attorney appointed by the attorney whose fee is under review. The judge whose fee decision is under review will not be appointed as a member of the panel.

Section 11: Oral Hearing

Any interested party may request an oral hearing before the panel. No oral hearing will be scheduled unless requested by an interested party within 10 days after receipt of notice of the filing of the petition. The panel may set an oral hearing on its own motion.

Section 12: Findings and Recommendations

Written panel findings and recommendations will be made to the trial judge.

The written findings and recommendations of the panel will be sent to all interested parties.

Section 13: Effective Date

The effective date of this procedure is _____, 19__.

Alternate No. 4

Section 10: Reconsideration by the Trial Judge

The petition will be reviewed by the trial judge at the request of the presiding judge.

Section 11: Findings

The written findings of the trial judge will be sent to all interested parties.

Section 12: Effective Date

The effective date of this procedure is _____, 19__.

7. North Dakota Legal Counsel for Indigents Commission Procedures for Review of Counsel Fee Disputes

Section 1: Statement of Authority

Pursuant to Rule 3(a)(10), NDLCIR, the North Dakota Legal Counsel for Indigents Commission, adopts procedures relating to Commission review of counsel fee disputes.

Section 2: Statement of Policy

Consistent with Rule 3(a)(5)(e) and Rule 3(a)(9), NDLCIR, it is the policy of the Commission to review disputed fee decisions by trial judges and to provide assistance to the parties in resolving counsel fee disputes. To this end, the Commission adopts procedures to aid in the resolution of counsel fee disputes.

Section 3: Definitions

The “trial judge” is the judge presiding in the case out of which the fee dispute arises.

An “interested party” is any aggrieved party including the affected attorney, trial judge, chair of any board of county commissioners, defendant, respondent and the state court administrator.

“Administrative Remedies” are remedies established by the presiding judge of each judicial district pursuant to Rule 3(a)(9), NDLCIR.

Section 4: Standing

An “interested party” may seek Commission review of a fee decision by a trial judge.

Section 5: Commencement of Commission Review

An interested party may file a written petition requesting Commission review of a counsel fee decision with the chair of the North Dakota Legal Counsel for Indigents Commission at the North Dakota Supreme Court. Use of the petition form supplied by the Commission is encouraged but not required. Verbal requests for review will be received but must be reduced to writing and signed by the petitioner before any action is taken by the Commission.

The petition for review shall include the names and address of all interested parties, a description of the kind of case involved, and the procedural history of the case. The petition should include a copy of the following:

1. An itemized bill of the fees charged by the attorney;
2. The order of the trial judge relating to counsel payment;
3. Payment approval by the presiding judge of the judicial district in state expense cases;
4. Payment approval by the Board of County Commissioners in county expense cases; and
5. Certification of exhaustion of administrative remedies within the judicial district pursuant to Rule 3(a)(9), NDLCIR, and a copy of the written recommendations produced as a result of the administrative remedies.

Section 6: Time

Requests for Commission review of counsel fee decisions must be filed within 60 days after the exhaustion of counsel fee dispute administrative remedies established by the presiding judge of the judicial district.

Section 7: Acceptance of Partial Payment Not a Bar

Acceptance of partial payment is not a bar to the filing of a petition.

Section 8: Notice

Other interested parties will be notified by the Commission of the filing of the petition.

Section 9: Supplementary Materials

Each interested party will be provided an opportunity to submit written materials and explanations which may be of assistance to the Commission.

Section 10: Oral Hearing

Any interested party may request an oral hearing before the Commission. No oral hearing will be scheduled unless requested by an interested party within 10 days after receipt of the filing of the petition. The commission may set an oral hearing on its own motion.

Section 11: Findings and Recommendations of the Commission

Commission recommendations to the trial judge may be made by the full Commission or by a panel of three Commission members designated by the Chair of the Commission. Commission recommendations will be made within 60 days after the filing of the petition for review.

The written findings and recommendations of the Commission will be sent to all interested parties.

Section 12: Open Records, Meetings and Voting

All records and meetings of the Commission relating to counsel fees are open to the public. All Commission votes must be recorded.

Section 13: Liaison with the Judicial Conduct Commission and the Disciplinary Board

If circumstances warrant, the Commission may refer matters coming to its attention to the Judicial Conduct Commission or the Disciplinary Board for further action.

Section 14: Effective Date

The effective date of these procedures is October 1, 1981.

Section 15: Citation

These procedures may be cited as Review of Counsel Fee Procedures (RCFP).

Washington Defender Association, Standards for Public Defense Services

Standard One. Compensation

Public defense attorneys and staff should be compensated at a rate commensurate with their training and experience. To attract and retain qualified personnel, compensation and benefit levels should be comparable to those of attorneys and staff in prosecutorial offices in the area.

For assigned counsel, reasonable compensation should be provided. Compensation should reflect the time and labor required to be spent by the attorney and the degree of

professional experience demanded by the case. Assigned counsel should be compensated for out-of-pocket expenses.

Contracts should provide for extraordinary compensation over and above the normal contract terms for cases which require an extraordinary amount of time and preparation, including, but not limited to, death penalty cases. Services which require extraordinary fees should be defined in the contract.

6. Attorney Expenses

Commentary. Most assigned counsel plans do not include provision for paying expenses incurred by attorneys in the course of representing their clients, even though such expenses are routinely incurred. Implicit in the standards below is the proposition that expenses should not be taken out of the lawyer's basic fee; otherwise there is a potential for conflict of interest. Among those that do, the specificity of the standards ranges from the ABA's generalized principle for payment of expenses to the detailed statements of what is included by the Kansas regulations and the North Dakota guidelines.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-2.4. Compensation and Expenses

Assigned counsel should...be reimbursed for their reasonable out-of-pocket expenses.

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 4.7.3 Payment of Expenses

- a. The Board shall establish policies as to expenses which will be reimbursed (including reasonable and necessary travel and long-distance and client collect telephone calls) and those which will not.
- b. Routine office expenses and out-of-pocket expenses shall be paid for by assigned counsel without reimbursement from the Program. The Administrator, with the guidance of the Board, shall approve reimbursement of extraordinary amounts which were reasonable, actual and necessary.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

H. Compensation of Assigned Counsel

The comprehensive plan shall provide that counsel appointed on a case-by-case basis for trial or appeal shall submit a claim for services and reimbursement for expenses.

...

2. Incidental Expenses. Counsel shall be reimbursed for reasonable, incidental expenses, e.g., photocopying, long-distance telephone calls, postage, and travel.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-6-2. Expenses allowed

Expense reimbursements shall include reimbursement for the following expenses:

- (a) the cost of photocopying prepared briefs;
- (b) the cost of binding appellate briefs for each case;
- (c) in-state travel and subsistence by appointed attorneys, not to exceed the rate set by the secretary of the department of administration for state employees in accordance with K.S.A. 75-3201, *et seq.* and K.S.A. 75-4601 *et seq.*;
- (d) expenses incurred by appointed attorneys in obtaining computerized legal research if the case presents a unique question of law to be researched. Such expenses shall not exceed \$200;
- (e) expenses incurred by appointed attorneys in taking depositions, if found to be authorized by statute and necessary in order to provide an adequate defense and when prior approval has been obtained from the court;
- (f) costs of mailing briefs; and
- (g) expenses incurred by appointed attorneys which would otherwise have been approved and paid by the board directly to a third party in accordance with statute or rule and regulation.

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

2. Guidelines for Payment of Appointed Counsel

...

2. Attorney Travel Expenses:
 - a. Mileage and travel expenses of the attorney will be reimbursed at rates not to exceed those provided in Sections 44-08-04 and 54-06-09, NDCC.
 - b. If a lawyer anticipates cumulative travel expenses exceeding \$500, the early prior written approval of the judge presiding in the case is required.
3. Other Investigatory and Defense Service Expenses:
 - a. Witnesses will be compensated pursuant to Sections 31-01-16, 31-01-17, 31-01-18, and 31-01-19, NDCC, upon submission of itemized documentation including the dates attending court, travel and other expenses.
 - b. The following expenses, up to \$500, will be reimbursed without prior written approval of the judge presiding in the case:

1. Investigators;
 2. Expert witnesses;
 3. Out-of-state witnesses.
- c. Interpreters for foreign languages and for the visually or hearing impaired will be provided as required by law (See Sections 28-33-02, 31-01-11, NDCC). Interpreter expenses shall be reimbursed; however, the level of compensation is determined by the judge presiding in the case.
- d. The following expenses will be reimbursed without prior approval of the judge presiding in the case:
1. Collect telephone charges from defendant ;
 2. Long distance telephone charges ;
 3. The first \$40 in copying charges, including court records and medical records;
 4. The copying charges for briefs on appeal ;
 5. Fees for service of subpoenas by private service of process agencies. Any costs for service of subpoenas by law enforcement agencies should be referred directly to the State Court Administrator for disposition.
- e. If a lawyer anticipates individual investigatory or other defense expenses in a particular case of more than \$500, early prior written approval of the judge presiding in the case is required.
- f. Unless otherwise approved by the judge presiding in the case the following expenses will not be reimbursed:
1. Transcripts from other proceedings (Access, use or copies of transcripts in the pending proceeding will be provided by the trial court without charge to defense counsel. Any costs in the preparation of transcripts will be referred directly to the State Court Administrator for disposition.);
 2. Local telephone charges ;
 3. Office supplies;
 4. Incidental meals;
 5. Postage;
 6. Copying charges in excess of that allowed by 3(d)(3), including court records and medical records.
4. No advance funds payment authorization will be authorized for counsel. Counsel may submit expense vouchers for payment monthly.
5. When prior approval of Attorney Travel Expenses (Section 2) and Other Investigatory and Defense Services Expenses (Section 3) is required, the

standard for approval by the judge presiding in the case is whether the services are necessary to the preparation and presentation of an adequate defense.

6. Vouchers for all appointed attorney fees and expenses must be appropriately itemized.
7. Disputes regarding attorney fees or other defense service should be resolved pursuant to procedures established in each judicial district or by the Commission.

7. Related Provisions

Commentary. Two other assigned counsel-related provisions are these:

- Requirement for a complete and sufficient budget
- Provision for suitable office space

NLADA Standards for the Administration of Assigned Counsel Systems

Standard 3.4 Budget and Funding

- a. The Board, in consultation with the Administrator, shall submit a complete and sufficient budget to the funding authority.
- b. The funding authority has a constitutional and policy-based duty to fund the Program in a manner and in an amount consistent with provision of quality representation (Standard 2.1) and sound administration.
- c. The Administrator shall maintain records and accounts of expenditures in accordance with accepted accounting practices.

Standard 3.6 Office Space, Equipment, Supplies

The Program shall be provided with suitable space, equipment and supplies at appropriate locations, or with the funds necessary to obtain them.

I. Contract Defense

Another method for providing defense services is for the jurisdiction to contract with a local firm. As with any other form of government contracting, defense services contracts are typically subject to competitive bidding.

The advantages of contract defense services can include reduced costs, predictable costs, streamlining of the counsel appointment process, and counsel expertise.

The potential disadvantages of contract counsel come from possible underbidding by the winning firm, resulting in inadequate services. These are referred to as “low bid systems.” Inadequate service may, of course, result in a denial of the Sixth Amendment right to counsel (per *Gideon* and *Argersinger*), which can be the basis for appealing a conviction.

The standards in this section are intended to maximize the advantages in this system while protecting against the disadvantages.

The following topics are addressed in this section:

1. Authorization of contract services
2. Compensation
3. Contract termination and minimum term
4. Contracting procedures
5. Contract provisions
6. Prohibition on substitution of attorneys
7. Related provisions

1. Authorization of Contract Services

Commentary. Explicit provision for contract defense services is included in all but one of the national standards and in five state standards. (The New York City standards were written for contract providers.) The standards vary considerably in detail, ranging from the ABA's general approval of contract defense services to the North Dakota model contract.

One contradiction in the NLADA standards should be noted. The NLADA Guidelines for Legal Defense Systems would bar the letting of contracts through competitive bidding. However, the later-adopted NLADA Guidelines for Criminal Defense Contracts recognize that contract procurement is common and that standards are therefore necessary. These guidelines include a bar against awarding contracts on a low-cost basis only. The ABA, Kansas, and Washington standards also frown on awarding contracts exclusively to the lowest bidder. The Indiana standards imply competitive bid procedures, in contrast to the Georgia standards, which simply authorize such contracts. The Appellate Standards for Michigan specifically bar the use of contracts at the appellate level in favor of a statewide attorney roster. See also, Arkansas Public Defense Commission, Minimum Standards.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-3.1. Use of contracts for services

Contracts for services of defense counsel may be a component of the legal representation plan. Such contracts should ensure quality legal representation. The contracting authority should not award a contract primarily on the basis of cost.

NLADA Guidelines for Legal Defense Systems in the United States

2.6 Private Defender Organizations

Where a defender organization provides services pursuant to contract, in order to maintain continuity and attract qualified personnel to the position of Defender Director, provision should be made, either by law or by contract, for the continuation of the defender service beyond the contract period.

The scope of the services to be provided should be stated explicitly in the contract.

Contracts for defender services should not be let on the basis of competitive bidding.

The contract should specify the workload anticipated as it relates to the amount of funds being provided in order to provide a formula in the event that the anticipated workload is exceeded.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline IV-3 Awarding the Contract

The Policy Board and/or Contracting Authority should award contracts for representation for those unable to afford counsel only when Contractors have complied with these guidelines. Under no circumstances should a contract be awarded on the basis of cost alone. The Policy Board and/or Contracting Authority shall determine whether the proposed budget of a potential contractor will provide the capability of complying with these Guidelines.

National Conference of Commissioners on Uniform State Laws, Model Public Defender Act

Section 10. Office of Defender General

...

- (d) Whenever appropriate, the Defender General may contract with private or public legal aid or other non-profit organizations that are equipped to provide the services to needy persons covered by this Act or to carry out any other function of the Office of Defender General. Each contract must provide (1) that the services performed shall meet the professional standards that this Act prescribes for services performed by the Office of the Defender General, and (2) that the services are subject to the Defender General's supervision and control.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 2.7 Contract Attorney Program

The local committee may elect to provide indigent defense services through a contract with an individual lawyer, or group of lawyers.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

L. Contracts

The comprehensive plan shall contain provisions for contracts for defense services, in the event that such contracts are used. The plan shall provide that contracts not be awarded primarily on the basis of costs and shall otherwise ensure quality legal representation. Procedures for the award of contracts should be published by the contracting authority substantially in advance of the scheduled date of award. The contracting parties should

avoid provisions that create conflicts of interest between the contractor and clients. Contracts for services should include, but not be limited to, the following subjects:

1. the categories of cases in which the contractor is to provide services;
2. the term of the contract and the responsibility of the contractor for completion of cases undertaken within the contract term;
3. the basis and method for determining eligibility of persons served by the contract;
4. identification of attorneys who will perform legal representation under the contract and prohibition of substitution of counsel without prior approval;
5. a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses;
6. supervision, evaluation, training and professional development;
7. provision of or access to an appropriate library;
8. a system of case management and reporting; and
9. the grounds for termination of the contract by the parties.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-10-5. Assigned Counsel Contracts

A public defender, the state appellate defender, and the designated conflicts office may, upon written authorization by the director, contract for services with qualified attorneys to undertake representation of indigent defendants to which each office has been appointed.

105-31-1. General Provisions

- (a) The board may elect to contract with one or more private attorneys for the delivery of indigent defense services in any county, counties, or district when there is evidence that such contracting may be cost effective or that the assigned counsel panel lacks attorneys of sufficient expertise or number.
- (b) The duration of the contract shall be set forth in the contract and shall be subject to availability of funds.

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

4. Model Contract for Counsel Services for Indigent Defendants

This CONTRACT is made between the following law firms:

hereinafter referred to as FIRM; and the State of North Dakota through its authorized representative, the presiding judge of the _____ Judicial District, hereinafter referred to as STATE (and the County of _____ through its authorized representative _____, hereinafter referred to as COUNTY).

1. FIRMS AND ATTORNEYS:

The FIRM includes the firms listed above which include the following attorneys who will provide services under this contract:

as well as, subject to the prior approval of the presiding judge of the Judicial District, any other duly licensed attorney who may be hired by the FIRM while this agreement is in force.

5. Guidelines for Establishment of Ad Hoc Advisory Committees

Application of Guidelines

The North Dakota Legal Counsel for Indigents Commission recommends that each presiding district judge or municipal judge who is either developing or continuing a contract system of delivering indigent defense services appoint an ad hoc advisory committee pursuant to the following guidelines to assist the judge in the development or continuation of a contract indigent defense system within the judge's jurisdiction.

Purpose of Guidelines

The appointment of an advisory committee will insulate the judge from any criticism based on patronage in the awarding of the indigent defense contract and promote collective participation among the judiciary, bar, and funding entity in the establishment or continuation of a contract system of delivering indigent defense services.

Guidelines

1. Each presiding district judge or municipal judge should appoint an ad hoc advisory committee to assist the judge in the development or continuation of a contract indigent defense system.
 - a. Where the funding entity is a city, the committee should consist of four members, including:
 - 1) a member of the city governing body who should serve as chair of the committee;
 - 2) a judge who presides over a similar court to that presided over by the appointing judge in an adjacent jurisdiction; and
 - 3) two licensed attorneys who will not be bidding on or have an interest in the indigent defense contract.

If fewer than two attorneys from the city are available to serve on the committee, the appointing judge should seek the assistance of attorneys residing outside of the city or limit participation on the committee to one

licensed attorney.

- b. Where the funding entity is the state, the committee should consist of four members, including:
 - 1) a district court judge or the district court administrator who should serve as chair of the committee; and
 - 2) three licensed attorneys who will not be bidding on or have an interest in the contract.
2. The duties of the committee should be to:
 - a. advise on and recommend to the judge the minimum requirements and terms of the contract for indigent defense services;

Washington Defender Association, Standards for Public Defense Services

Standard Five. Administrative Expenses

Contracts for public defense services should include the administrative costs associated with providing legal representation. These costs may include travel, telephones, law library, financial accounting, case management systems, the reporting requirements imposed by these standards, and other costs necessarily incurred in the day to day management of the contract.

Standard Eighteen. Guidelines For Awarding Defense Contracts

The county or city should award contracts for public defense services only after determining that the attorney or firm chosen can meet accepted professional standards. Under no circumstances should a contract be awarded on the basis of cost alone. Attorneys or firms bidding for contracts must demonstrate their ability to meet these standards.

Contracts should only be awarded to:

- a) attorneys who have at least one year's criminal trial experience in the jurisdiction covered by the contract (i.e., City and District courts, Superior Court or Juvenile court), or
- b) to a firm where at least one attorney has one year's trial experience.

City attorneys, county prosecutors, and law enforcement officers should not select the attorneys who will provide indigent defense services.

2. Compensation

Commentary. Only two standards are directed at the compensation paid to the attorney working for the contractor. The NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services would pay contractor attorneys at a rate equal to attorneys who contract with other government agencies. The Indiana standards would compare salaries to those of the prosecuting attorney's office.

Washington state standards do not address attorney salaries, but instead direct attention to the problem of extraordinary cases.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-10 Compensation

The contract shall provide that the Contractor compensate:

...

(b) attorneys at a minimum rate which reflects the following factors:

- (1) the customary compensation in the community for similar services rendered by privately retained counsel to a paying client or government or other publicly-paid attorneys to a public client;
- (2) the time and labor required to be spent by the attorney;
- (3) the degree of professional ability, skill and experience called for and exercised in the performance of the services.

Guideline III-11 Special Case Compensation

The contract should provide for reasonable compensation over and above the normal contract price for cases which require an extraordinary amount of time and preparation, including, but not limited to, capital cases. Services which require special fees should be determined in the contract.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

G. Compensation of Salaried or Contractual Public Defenders

The comprehensive plan shall provide that the salaries and compensation of salaried and contractual public defenders shall be substantially comparable to similar positions in the office of the Prosecuting Attorney. Compensation shall include, but is not limited to, reimbursement for reasonable office expenses and other reasonable, incidental expenses, e.g., photocopying, long-distance telephone calls, postage and travel.

Washington Defender Association, Standards for Public Defense Services

Standard One. Compensation

...

Contracts should provide for extraordinary compensation over and above the normal contract terms for cases which require an extraordinary amount of time and preparation, including, but not limited to, death penalty cases. Services which require extraordinary fees should be defined in the contract.

3. Contract Termination and Minimum Term

Commentary. Contract providers can be particularly vulnerable to political pressures. Conflict between aggressively defending the client and protecting the economic self-interest of the contractor is an especial danger. However, provisions can be put into the contract to reduce these pressures. Hence, standards are needed to ensure that jurisdictions do not void the conflict unless good cause is demonstrated and that a minimum term for the contract is provided for. Of the one national and three state standards here, the NLADA, Georgia, and Washington standards agree on requiring good cause for termination. The North Dakota standards provide only for 90 days' notice before termination without cause. The NLADA and Georgia standards provide for a minimum term for the contract, and the North Dakota standards speak to the question of what happens to cases previously assigned if the contract is terminated. See also standards relating to the independence of the defense functions *supra*. Other related standards include Arkansas Public Defender Commission, Minimum Standards, recommending a minimum two-year contract period.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Guideline III-4 Term of Contract

Contracts for legal defense service should be awarded for at least two year terms. Removal of the Contractor short of the agreed term should be for good cause only.

Guideline III-5 Definition of “Good Cause”

The Contract shall define “good cause” such as is required for removal of the Contractor (Guideline III-4) as: failure by the contractor to comply with the terms of the contract to an extent that the delivery of services to clients by the Contractor is impaired or rendered impossible, or a willful disregard by the Contractor of the rights and best interests of clients under this contract such as leaves them impaired. The individual actions of the Contractor or any one attorney taken in connection with one case alone shall not necessarily constitute “good cause” for removal.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 2.7 Contract Attorney Program

The local committee may elect to provide indigent defense services through a contract with an individual lawyer, or group of lawyers. Contracts for legal defense services should be awarded for at least a one year term. Removal of the Contractor short of the agreed term should be for good cause only.

The contract shall define “good cause” such as is required for removal of the Contractor as: failure by the Contractor to comply with the terms of the contract to an extent that the

delivery of services to clients by the Contractor is impaired or rendered impossible, or a willful disregard by the Contractor of the rights and best interest of clients under this contract such as leaves them impaired. The individual actions of the Contractor or any one attorney taken in connection with one case alone shall not necessarily constitute “good cause” for removal.

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

Guideline 4. Model Contract

...

10. Contract Term:

The duration of this contract is from July 1, _____ through June 30, _____ (preferably two years) and is renewable for an additional period of _____ at the option of both parties in writing on the following terms:

All necessary counsel services listed in Section 4 above for cases or proceedings for which appointments are made to the FIRM on or before June 30, _____ must be completed as part of this contract.

...

22. Termination of Contract:

Any party may terminate this CONTRACT immediately for cause at any time. Any party may terminate the CONTRACT without cause by 90 days written notice. All cases assigned and not completed within 90 days after expiration or notice of termination of the CONTRACT may be completed following consultation between the parties:

- A. By the FIRM assigned to the case before expiration of the CONTRACT;
- B. On an assigned counsel basis;
- C. By inclusion of the uncompleted cases in any subsequent contract; or
- D. Through any combination of A, B, or C.

Washington Defender Association, Standards for Public Defense Services

Standard Sixteen. Cause for Termination or Removal of Attorney

Contracts for defense services shall include the grounds for termination of the contract by the parties. Termination of an attorney’s contract should only be for cause. Good cause shall include the failure of the attorney to render adequate representation to clients; the willful disregard of the rights and best interests of the client; and the willful disregard of the standards herein addressed.

The representation in an individual case establishes an inviolable attorney-client relationship. Removal of counsel from representation therefore normally should not occur over the objection of the attorney and the client.

4. Contracting Procedures

Commentary. In order to minimize political involvement, some standards outline the procedures to be used for awarding contracts or require jurisdictions to determine and publish procedures for awarding contracts. In addition to the standards here, the North Dakota guidelines elsewhere in this volume detail contracting procedures. Indiana Standard L also calls for publishing the procedures for awarding of contracts, and Washington State Standard 18 prohibits certain classes of government officials from being involved in selecting the contractors.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-3.2. Contracting parties and procedures

- (a) The contracting authority and each contractor should be identified in the contract. Procedures for the award of contracts should be published by the contracting authority substantially in advance of the scheduled date of award.
- (b) The contracting authority should ensure the professional independence of the contractor by means of a board of trustees, as provided in standard 5-1.3.
- (c) The contracting parties should avoid provisions that create conflicts of interest between the contractor and clients.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

L. Contracts

The comprehensive plan shall contain provisions for contracts for defense services under I.C. 33-9-10, in the event that such contracts are used. The plan shall provide that contracts not be awarded primarily on the basis of costs and shall otherwise ensure quality legal representation. Procedures for the award of contracts should be published by the contracting authority substantially in advance of the scheduled date of award.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105-31-1. Awarding the Contract

- (a) The board shall not pursue a contract through the competitive bidding process but only through negotiation.
- (b) Contracts to individual attorneys or firms shall be awarded on the basis of:
 - (1) the experience and qualifications of the attorney or firm;

- (2) the willingness and ability of the attorney or firm to comply with the performance criteria and statistical reporting provisions of the contract; and
- (3) the negotiated rate of compensation.

5. Contract Provisions

Commentary. The heart of defense services contracting is, of course, the contract elements. Several standards direct detailed attention to this topic. The most detailed is Part III of the NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services. See also, Vermont Defender General, “Contract for Personal Services.”

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-3.3. Elements of the Contract for Services

- (a) Contracts should include provisions which ensure quality legal representation and fully describe the rights and duties of the parties, including the compensation of the contractor.
- (b) Contracts for services should include, but not be limited to, the following subjects:
 - (i) the categories of cases in which the contractor is to provide services;
 - (ii) the term of the contract and the responsibility of the contractor for completion of cases undertaken within the contract term;
 - (iii) the basis and method for determining eligibility of persons served by the contract, consistent with standard 5-7.1;
 - (iv) identification of attorneys who will perform legal representation under the contract and prohibition of substitution of counsel without prior approval;
 - (v) allowable workloads for individual attorneys, and measures to address excessive workloads, consistent with standard 5-5.3;
 - (vi) minimum levels of experience and specific qualification standards for contracting attorneys, including special provisions for complex matters such as capital cases;
 - (vii) a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses;
 - (viii) limitations on the practice of law outside of the contract by the contractor;
 - (ix) reasonable compensation levels and a designated method of payment;
 - (x) sufficient support services and reasonable expenses for investigative services, expert witnesses and other litigation expenses;
 - (xi) supervision, evaluation, training and professional development;
 - (xii) provision of or access to an appropriate library;
 - (xiii) protection of client confidences, attorney-client information and work product related to contract cases;
 - (xiv) a system of case management and reporting;
 - (xv) the grounds for termination of the contract by the parties.

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services

Part III: Elements of a Contract for Public Defense Services

Each of the following Guidelines should be included in a contract for public defense services. If contracts are to be awarded through some kind of bidding, RFP, or other competition, these should serve as the basis for the RFP or bidding document. Contracts should be awarded on the basis of the completeness and adequacy of a Contractor's consideration of these Guidelines.

Guideline III-1 Parties

The contract should identify the Contracting Authority, the Contractor, and any other public or private person, agencies or organizations which are party to the contract.

Guideline III-2 Scope of Contract

The contract should specify the categories of cases in which the Contractor is to provide services.

Guideline III-3 Determination of Eligibility

The Contract should specify the procedure by which client financial eligibility is to be determined and the person, officer or agency responsible for making the determination initially and at subsequent review proceedings. The contract should either incorporate eligibility standards by reference to those in accepted use or it should specify the eligibility standard applicable in all cases handled by the Contractor. The contract should provide that any information or statements of the defendant obtained in the process of determining eligibility shall be considered confidential and privileged.

Guideline III-4 Term of Contract

Contracts for legal defense service should be awarded for at least two year terms. Removal of the Contractor short of the agreed term should be for good cause only.

Guideline III-5 Definition of "Good Cause"

The Contract shall define "good cause" such as is required for removal of the Contractor (Guideline III-4) as: failure by the Contractor to comply with the terms of the contract to an extent that the delivery of services to clients by the Contractor is impaired or rendered impossible, or a willful disregard by the Contractor of the rights and best interests of clients under this contract such as leaves them impaired. The individual actions of the Contractor or any one attorney taken in connection with one case alone, shall not necessarily constitute "good cause" for removal.

Guideline III-6 Allowable Caseloads

The contract should specify a maximum allowable caseload for each full-time attorney, or equivalent, who handles cases through the contract. Caseloads should allow each lawyer to give every client the time and effort necessary to provide effective representation. Attorneys employed less than full-time on handling a mix of cases should handle a proportional caseload.

Guideline III-7 Minimum Professional Qualifications

The Contract should specify minimum qualifications for staff lawyers. These qualifications should be developed by the Advisory Board which screens contract applications. If defense services are to be provided in more than one category of cases, the contract should specify different minimum-qualifications for each category of cases for which the Contractor will provide services.

Guideline III-8 Support Staff and Forensic Experts

The contract should provide for employment of secretaries, social work staff, mental health professionals, forensic experts and support staff to perform tasks not requiring legal credentials or experience and tasks for which support staff and forensic experts possess special skills. Such skills are particularly important in ensuring effective performance of defense counsel at the bail, pretrial release, investigation and sentencing stages, and in the preparation of dispositional plans.

- (a) Secretaries. The contract should provide an adequate number of secretaries to ensure competent representation to clients and adequate assistance to attorneys.
- (b) Social Service Personnel. The contract should provide an adequate number of social service personnel to assist...clients.
- (c) Mental Health Professionals. The contract should specifically include funds for confidential hiring of mental health professionals to perform evaluations and to assist at trial, unless mental health professionals are provided to the contractor to perform mental evaluations by court order or otherwise upon request.
- (d) Forensic and Other Experts. The contract should specifically include funds for confidential hiring of forensic and other experts and for the use of forensic experts at trial.

Guideline III-9 Investigators

The contract should specify that adequate investigation services necessary to provide competent representation shall be available to the Contractor. No contract clause should interfere with the contracting attorneys' selection, supervision, or direction of investigators.

Guideline III-10 Compensation

The contract shall provide that the Contractor compensate:

- (a) its staff, employees, subcontractors and retained forensic experts at rates commensurate with their training, experience and responsibilities and with compensation paid to persons doing similar work in public agencies in the jurisdiction;
- (b) attorneys at a minimum rate which reflects the following factors:
 - (1) the customary compensation in the community for similar services rendered by privately retained counsel to a paying client or government or other publicly-paid attorneys to a public client;
 - (2) the time and labor required to be spent by the attorney;

- (3) the degree of professional ability, skill and experience called for and exercised in the performance of the services.

Guideline III-11 Special Case Compensation

The contract should provide for reasonable compensation over and above the normal contract price for cases which require an extraordinary amount of time and preparation, including, but not limited to, capital cases. Services which require special fees should be determined in the contract.

Guideline III-12 Case and Work-Overload

The contract should provide that the Contractor may decline to represent clients at no penalty in the event that during the contract:

- (a) the caseload assigned to the Contractor exceeds the allowable caseloads specified through the process recommended in Guideline III-5; or
- (b) the Contractor is assigned more cases requiring an extraordinary amount of time and preparation than the Contractor can competently handle even with payment of extraordinary compensation as specified in Guideline III-11; or
- (c) the cases assigned to the Contractor exceed any number that the contract specified or that the Contractor and Contracting Authority reasonably anticipated at the time the contract was concluded.

Guideline III-12 Duration of Representation

The contract shall specify that the Contractor has the responsibility to complete any and all cases once representation is commenced under terms of the contract. Representation commenced by the Contractor in trial court shall be continued through all trial court proceedings if provided by the contract; representation commenced by or taken to an appeal court by the Contractor shall be continued until the appeals process is terminated by an act of the appeals court which is accepted as final on the merits by defense counsel and his or her client.

Nothing in this Guideline shall prohibit a Contractor or attorney from withdrawing from a case in which a court has recognized a conflict of interest for the attorney or in which defendant is found to be ineligible for services as defined in Guideline III-3.

Guideline III-13 Conflicts of Interest

The contract should avoid creating conflicts of interest between Contractor or individual defense attorney and clients. Specifically:

- (a) expenses for investigations, expert witnesses, transcripts and other necessary services for the defense should not decrease the Contractor's income or compensation to attorneys or other personnel; and
- (b) contracts should not, by their provisions or because of low fees or compensation to attorneys, induce an attorney to waive a client's rights for reasons not related to the client's best interest; and
- (c) contracts should not financially penalize the Contractor or individual attorneys for withdrawing from a case which poses a conflict of interest to the attorney.

Guideline III-14 Payment

The contract should provide that payments to the Contractor be made monthly or at times agreed to by the parties without regard to the number of cases closed in the period.

Guideline III-15 Financial Records

The contract shall provide that the Contractor shall retain financial records, submit financial reports, and produce an Annual financial evaluation or audit.

Guideline III-16 Supervision and Evaluation

The contract should establish a procedure for internal systematic supervision and evaluation of the performance of the Contractor's staff based upon publicized criteria. Supervision and evaluation efforts should include monitoring of time and caseload records, review and inspection of transcripts, an evaluation of attorney case activity, in-court observations, and periodic conferences. A system of performance evaluations should be based upon personal monitoring by the Contractor's Director or Chief Attorney and should be augmented by regular, formalized comments by judges, prosecutors, other defense lawyers and clients. The criteria of performance employed should be those of a skilled and knowledgeable criminal lawyer.

Guideline III-17 Professional Development

The contract should provide funds and sufficient staff-time to permit systematic and comprehensive training to attorneys and professional staff. Resources for training should be no less than is provided to prosecutors and judges in the jurisdiction, and should include continuing legal education programs, attendance at local training programs, and the opportunity to review training and professional publications and tapes. Where appropriate and where the size of the contract program requires, all attorneys should be required to attend an intensive, entry-level training program.

Guideline III-18 Standards of Recommendation

The contract shall require that the Contractor provide defense services to all clients in a professional, skilled manner consistent with minimum standards set forth by the American Bar Association, any applicable state bar association standards, the canons of ethics for attorneys in the state of the contract, and case law and applicable court rules defining the duties of counsel and the rights of defendants in criminal cases. The contract shall provide that counsel under contract shall be available to eligible defendants at their request, or the request of someone acting on their behalf, beginning at questioning, arrest, formal charging, or indictment. The Contracting Authority or the Contractor, as appropriate, shall ensure that attorneys provided by the contract shall be accessible to defendants before formal court appointment.

Guideline III-19 Confidentiality

The contract should prohibit the Contractor from releasing confidential attorney-client information or work product related to any case, except under a legal court order to do so, or after receiving a voluntary, knowing, and intelligent waiver from the client in the case, or to a subsequent attorney on the case.

Guideline III-20 Insurance

The contract may require that the Contractor provide malpractice insurance for attorneys representing clients under terms of the contract. The contract shall not provide that the Contractor hold the government or Contracting Authority harmless for the attorneys' representation of defendants.

Guideline III-21 Retention of Files

The contract shall provide that the Contractor provide for retention of client files in a manner that affords protection of the client's confidentiality interests (see Guideline III-17) for a specified period of time after the conclusion of the case at least equal to the period provided in rules governing all other lawyers' files in the jurisdiction but in no event less than five years.

Guideline III-22 Management System

The contract shall provide that the Contractor shall maintain a case reporting and management information system, data from which shall be available to, or provided to, the Contracting Authority and Policy Board. Any such system shall be maintained independently from client files so as to disclose no confidential or privileged information. The case reporting and management information system shall be used to provide the Contractor, the Contracting Authority and the Policy Board with caseload information sufficient to assure compliance with Guidelines III-3, III-5, III-14, and III-16 particularly.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

L. Contracts

The comprehensive plan shall contain provisions for contracts for defense services under I.C. 33-9-10, in the event that such contracts are used.... The contracting parties should avoid provisions that create conflicts of interest between the contractor and clients. Contracts for services should include, but not be limited to, the following subjects:

1. the categories of cases in which the contractor is to provide services;
2. the term of the contract and the responsibility of the contractor for completion of cases undertaken within the contract term;
3. the basis and method for determining eligibility of persons served by the contract;
4. identification of attorneys who will perform legal representation under the contract and prohibition of substitution of counsel without prior approval;
5. a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses;
6. supervision, evaluation, training and professional development;
7. provision of or access to an appropriate library;
8. a system of case management and reporting; and

9. the grounds for termination of the contract by the parties.

***New York City Indigent Defense Organization Oversight Committee,
General Requirements for All Organized Providers of Defense Services to
Indigent Defendants***

Standard IX. Compliance with Standards of Professional Responsibility

...

B. Evaluation Criteria

1. Does the defense organization maintain adequate procedures and sufficient data-processing capacity for identifying and avoiding conflicts of interest?

...

3. If the defense organization permits its lawyers to engage in legal work outside the scope of its contract with the City, does it maintain adequate procedures to ensure that:

...

- (c) no conflicts of interest exist between each lawyer's legal work unrelated to the contact and the interests of any client assigned to the defense organization?

4. Does the defense organization prohibit its lawyers from undertaking fee-generating representation of the defense organizations' clients or accepting any fee-generating matters arising from cases initially assigned under its contract with the City?

5. Does the defense organization prohibit referrals of present or former assigned clients to private lawyers?

6. Does the defense organization have adequate procedures to ensure that its lawyers do not otherwise abuse the attorney-client relationship to create fee-generating opportunities?

...

North Dakota Legal Counsel for Indigents Commission, Indigent Defense Guidelines and Procedures

Guideline 4. Model Contract for Counsel Service for Indigent Defendants

...

2. Services Covered:

The FIRM shall provide legal services for indigent defendants in the following categories of case:

- a. All cases in which a misdemeanor is charged;
- b. All cases in which a felony is charged;
- ...
- g. Extradition proceedings, pursuant to Chapter 29-30.3, NDCC;
- h. Uniform Post Conviction Act proceedings, pursuant to Chapter 29-32.1, NDCC ;
- ...
- k. Civil and criminal contempt proceedings;
- l. Appeals to the North Dakota Supreme Court in all categories of cases listed above;
- m. Retrials of all categories of cases listed above remanded by the North Dakota Supreme Court;
- ...
- q. Three cases on appeal to the North Dakota Supreme Court which were not tried in the lower courts by the FIRM. [The availability of representation for an indigent appellant may be necessary for a variety of reasons, including the possibility that an indigent defendant may request different counsel to prosecute an appeal, originally assigned counsel may withdraw before the decision to prosecute an appeal is made, or a defendant may expend all personal funds securing representation in the lower court and as a result is indigent for purposes of prosecuting an appeal. In these situations, or others not anticipated, it is desirable to provide access to representation for an indigent appellant whose case was not tried in the lower court by the FIRM.]

3. Services Excluded:

The following services are excluded from this contract:

- a. Any cases on appeal from a municipal court in the county;
- b. Any cases on appeal to the North Dakota Supreme Court which were not tried in the lower courts by the FIRM with the exception of three (3) cases addressed in paragraph 2(q) of this contract;

- c. Appeals to the United States Supreme Court; and
- d. Habeas corpus proceedings in state courts and in United States District Courts and Courts of Appeal.

4. Representation:

Representation will be made at all stages of the proceeding until completed. The FIRM shall include necessary representation of each indigent defendant in matters of investigation, trial preparation, preparation and filing of motions, arguments of motions, personal counsel and referral to other agencies when appropriate, referral to appropriate agencies, trial, post-trial motions, and motions, briefing and argument in the North Dakota Supreme Court and any retrials following an appeal. This includes preparation of all briefs, documents, letters, research and any and all things regarded as adequate representation of the indigent party.

13. Costs and Expenses:

The FIRM will pay for all costs, fees and expenses incurred in providing the contract services, except for the following expenses which will be paid by the STATE (and COUNTY):

- a. Witness fees and expenses, including expert witnesses (court approval required for expenses over \$500);
- b. Investigative services (court approval required for expenses over \$500) ;
- c. Depositions;
- d. Transcripts;
- e. Service of process fees;
- f. Collect telephone charges from defendant ;
- g. Long distance telephone charges;
- h. The first \$40 in copying charges, including court records and medical records;
- i. Copying charges for briefs on appeal ;
- j. Costs of medical and psychiatric evaluations when ordered or approved by the court;
- k. Interpreters for foreign languages and for the visually or hearing impaired;
- l. Necessary travel, meals and lodging expenses incurred while investigating or trying cases or proceedings, including cases removed from the county covered in this contract and tried in any other county. (*Alternative.* Necessary travel, meals and lodging expenses incurred while investigating or trying cases or proceedings, and necessary travel, meals and lodging expenses for cases removed from the county covered by this contract and tried in any other court.)

Mileage, meals and lodging expenses will be paid at the same rate as allowed by Section 54-06-09, NDCC, for state employees.

Costs and expenses in cases and proceedings which are prosecuted in district court will be paid by the STATE. Costs and expenses in cases and proceedings which are the responsibility of the county will be paid by the COUNTY.

14. Special Case Compensation:

The FIRM may apply to the Presiding Judge of the judicial district for reasonable compensation over and above the normal contract price for cases which require an extraordinary amount of time and preparation. The Presiding Judge shall have complete discretion in determining the amount of additional compensation to be paid, if any. In no case will the Presiding Judge approve additional compensation where the number of hours expended on the case by the FIRM does not exceed _____ hours. Other factors that will be considered by the Presiding Judge in making its determination include the complexity of the legal issues and the intricacy of the factual situation involved in the case.

Applications must be in writing and submitted to the Presiding Judge at the completion of the representation of the case, unless the financial burden of the case is such that it may adversely affect the ability of the FIRM to provide adequate representation in the case. The application must include the individual case records maintained in the case under Section 17 of this contract and a statement by the FIRM of the justification for the application.

6. Prohibition on Substitution of Attorneys

Commentary. Both Indiana and Washington limit the use of counsel who are not named or otherwise included in the contract.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

L. Contracts

...Contracts for services should include, but not be limited to, the following subjects:

4. identification of attorneys who will perform legal representation under the contract and prohibition of substitution of counsel without prior approval;

Washington Defender Association, Standards for Public Defense Services

Standard Twelve. Substitution of Attorneys or Assignment of Contracts

The attorney engaged by local government to provide public defense services should not sub-contract with another firm or attorney to provide representation and should remain directly involved in the provision of representation. If the contract is with a firm or office, the contracting authority should request the names and experience levels of those attorneys who will actually be providing the services, to ensure they meet minimum qualifications. The employment agreement shall address the procedures for continuing representation of clients upon the conclusion of the agreement.

7. Related Provisions

Commentary. Related standards address limits on private practice, nondiscrimination guarantees by the contractor, and exclusion of capital cases from the contract. The Washington nondiscrimination requirement is probably redundant in states with a generally applicable policy of requiring government contractors to act in a nondiscriminatory manner.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 2.7 Contract Attorney Program

Inclusion of capital felonies where the death penalty is sought as a portion of the contract is prohibited.

Washington Defender Association, Standards for Public Defense Services

Standard Thirteen. Limitations of Private Practice of Contract Attorneys

Contracts for public defense representation with private attorneys or firms shall set limits on the amount of privately retained work which can be accepted by the contracting attorney. These limits shall be based on the percentage of a full-time caseload which the public defense cases represent.

Standard Seventeen. Non-discrimination

Neither the Contracting Authority, in its selection of an attorney, firm or agency to provide public defense representation, nor the attorneys selected, in their hiring practices or in their representation of clients, shall discriminate on the grounds of race, color, religion, national origin, age, marital status, sex, sexual orientation or handicap. Both the contracting authority and the contractor shall comply with all federal, state, and local non-discrimination requirements.

Appendix:

NLADA Defender Training and Development Standards

1. Defender Training Structure & Funding

Standard 1.1 Training Is Essential

The defender organization must provide training opportunities that insure the delivery of zealous and quality representation to clients.

Standard 1.2 Written Training Plan

Every defender organization must have a clear, written plan, which includes specific goals and objectives, for offering training opportunities to all employees.

Standard 1.3 Adequate Financial Resources

Defender organizations must have adequate governmental funding for the resources to provide high quality training opportunities consistent with these standards.

Standard 1.4 Training Director and Staff

The leadership of the organization must ensure that the training efforts are administered and overseen by a person or persons who have training as a specific job duty, and whose other work duties are adjusted to ensure that the training responsibilities can be competently directed. Such person(s) should be provided with resources and staff to accomplish these responsibilities.

Standard 1.5 Organizational Position of Training Director

The organization's leadership team should demonstrate a firm and consistent commitment to training as an integral part of the office's practice. The person who is responsible for training should be a member of the organization's leadership team or have a meaningful voice in its decisions with regard to the organization's practices.

Standard 1.6 Director and Staff Qualifications

All employees who have training responsibilities should have abilities, experience and attitudes commensurate with their training responsibilities and assignments.

2. Defender Training Needs Assessment

Standard 2.1 Regular Needs Assessments

Every defender organization should, on a regular basis, identify and analyze its organizational and employee training needs to ensure that training efforts are responsive to those needs.

Standard 2.2 Training Needs Assessment for Organization and for Employees

Training needs assessments for the defender organization should be the responsibility of the training director. The supervision and evaluation of employees should include an annual training needs assessment for each employee.

3. Learning Objectives and Curriculum

Standard 3.1 Organizational Curriculum

The defender organization should have an organizational curriculum on how to provide zealous and quality representation to clients, which includes appropriate learning objectives for all its employees from entry level staff through the most experienced staff. Based upon the needs assessment findings, the defender organization should create a comprehensive curriculum with clear learning objectives for each of its training and development efforts.

Standard 3.2 Ethics and Professional Responsibility

The defender organization should offer training and develop materials on ethics and professional responsibility, and should include discussion of ethics and professional responsibility issues as they relate to intended learning objectives in training all employees.

4. Learning Experience and Educational Methods

Standard 4.1 Selection of Methods

The intended learning objectives in training efforts should determine the selection of instructional methods and strategies, the choice of accompanying program materials, the use of any technological aids which may be appropriate, and the length and location of the training.

Standard 4.2 Training Staff and Qualifications

Defender organizations' trainers should be qualified by education, intellect, experience, teaching ability, and temperament to provide instruction which promotes the achievement of intended learning objectives. The defender organization should encourage employees to serve as trainers and should provide them with appropriate training.

Standard 4.3 Materials and Learning Technologies

Defender organizations' trainers should use current learning technologies and media devices to augment the learning experience and promote the achievement of intended learning objectives. The defender organization should distribute instructional and

comprehensive reference materials which promote the achievement of intended learning objectives.

Standard 4.4 Learning as an Ongoing Process

Defender organizations should encourage all employees to continue the learning process outside formal programs offered by the organization.

Standard 4.5 Ongoing Publications and Distribution of Training Materials

Defender organizations should develop and regularly publish independent training materials. These should include both permanent resources and continuing education on developments in the law. If resources are available, the defender organization should obtain and/or produce and distribute audio tapes, videotapes, and computer assisted instruction for its employees.

Standard 4.6 Maintenance of Training Resources

Defender organizations should maintain an accessible library of training materials developed by defenders within the organization as well as seek to collect training materials from outside resources which would be of benefit to its employees.

5. Learning Environment

Standard 5.1 Physical Setting

The physical environment and location for training should be conducive to learning and consistent with achieving intended learning objectives. Defender organizations should have adequate and well-trained staff at the training site to assist the training director with logistics and to facilitate the presentation of training activities.

Standard 5.2 Joint Training

Defender organizations should, when appropriate, pursue joint training opportunities with other members of the criminal justice system, the legal profession, and the community at large.

Standard 5.3 Limitations on Use of Defender Resources

Consistent with the duty owed to clients, the adversarial nature of the criminal justice system, and the promotion of full learning, some defender training programs and materials should not be available to non-defenders.

6. Evaluation of Learning; Accreditation

Standard 6.1 Systematic Evaluation of Programs and Materials

Defender organizations should conduct systematic and continuous evaluations of the effectiveness of its programs and materials to assess content, the achievement of intended learning objectives, program design, methods of instruction, quality of presenters, and impact on the participants' future performance. These regular internal evaluations to training activities should be conducted by the training director for purposes of planning and improving training activities. In addition, the defender organization should seek an

independent evaluation of the office's training efforts and the strategic training plan by a person experienced in training.

Standard 6.2 Defender CLE Accreditation

Defender organizations should strive to satisfy the continuing legal education requirements of its staff. Where appropriate, the defender organization should seek accreditation by the jurisdiction's continuing legal education authority as a continuing legal education provider.

7. Death Penalty Defense and Other Complex and Specialized Practice Areas

Standard 7.1 Death Penalty Defense

Defender organizations should provide employees responsible for the representation of death penalty clients with all training necessary for high quality service to the client at every stage of the process: pretrial, trial, penalty phase, appeal and post-conviction.

Standard 7.2 Complex and Specialized Practice Areas²

Defender organizations should provide special training to employees responsible for the representation of clients with complex or especially difficult cases, as well as for those employees handling specialized areas of practice.

8. Organizational Development

Standard 8.1 Management and Leadership Skills

The defender organization should provide all supervisors and leaders with training in management, supervisory and training skills, as well as in leadership principles.

9. Quality Assurance

Standard 9.1 Quality Assurance

Defender organizations should develop and implement methods to insure zealous and quality representation for clients.