

Adopted by ABA House of Delegates
February 5, 2002

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
CRIMINAL JUSTICE SECTION
GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION
STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN
COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION
STANDING COMMITTEE ON PRO BONO AND PUBLIC SERVICE

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

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

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

THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

FEBRUARY 2002

THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM
February 2002

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

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

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

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

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

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

⁵ ABA, *supra* note 2, Standard 5-4.1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Defense counsel's ability, training, and experience match the complexity of the case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORT

Introduction

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

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

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

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

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

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

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

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

Overview of National Standards on Providing Criminal Defense Services

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

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

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

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

The Ten Principles of a Public Defense Delivery System

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

Conclusion

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

Respectfully submitted,

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