



Expert Report

**An Assessment of Indigent Defense Services
In Montana**

SUBMITTED IN THE CASE

*White v. Martz
CDV-2002-133*

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BY

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TABLE OF CONTENTS

	<u>Page(s)</u>
Table of Contents	i, ii
Executive Summary	1
I. Background.....	3
A. The Right to Counsel in Criminal Cases.....	3
B. State Efforts to Fulfill <i>Gideon’s</i> Promise.....	3
C. The National Legal Aid & Defender Association’s Expert Qualifications.....	6
D. Methodology of the NLADA’s Assessment of Montana’s Indigent Defense System	8
E. Montana Indigent Defense Systems in Transition	11
II. Assessment of Indigent Defense Services in Montana	12
A. State Funding, Establishment of Institutional Defender Offices, the Involvement of the Private Bar & Parity with the Prosecutorial Function (<i>ABA Ten Principles</i> , Numbers 2 & 8)	14
1. Montana’s Failure to Adequately Fund Indigent Defense Services	14
2. Parity with the Prosecutorial Function.....	17
3. Establishment of Institutional Public Defender Offices and Involvement of the Private Bar	21
B. Independence from Undue Political Interference (<i>ABA Ten Principles</i> , Number 1).....	22
1. Lack of Professional Independence for Assigned Counsel.....	25
a. Attorney Selection	25
b. Attorney Compensation	27
c. Use of Investigators and Experts	28
d. Other Types of Judicial Interference.....	30
2. Lack of Administrative Independence of the Missoula Public Defender Office	32
C. Attorney Qualification & Training (<i>ABA Ten Principles</i> Numbers 6 & 9)	34
1. Attorney Qualification	34
2. Attorney Training	36
D. Client Eligibility & Timeliness of Appointment (<i>ABA Ten Principles</i> , Number 3).....	39
1. Eligibility Determinations.....	40

2. Timeliness of Assignment of Counsel	41
E. Time to Meet with Clients & Confidentiality (ABA <i>Ten Principles</i> , Number 4)....	44
1. Confidentiality	44
2. Time to Meet With Clients	45
F. Workload (ABA <i>Ten Principles</i> , Number 5).....	47
G. Attorney Performance (ABA <i>Ten Principles</i> , Number 10)	53
H. The Impact of Montana’s Failure to Adhere to the Ten Principles on Indigent Persons	57
1. Conflicts.....	58
2. Waiving the Probable Cause Hearing.....	59
3. Lack of Attorney/Client Contact.....	59
4. Failure to Investigate	61
5. Infrequent Motion Practice	62
6. Infrequent Trials	63
7. Prioritizing Speedy Dispositions	64
8. Waiving the Right to a Speedy Trial	65
9. Infrequent Appeals.....	66
III. Conclusion	67
Appendix A.....	68
Appendix B.....	72
Appendix C.....	74
Appendix D	75

Executive Summary

After conducting intensive site visits and interviews and reviewing the deposition and document discovery from the litigation in *White v. Martz*, the National Legal Aid & Defender Association (NLADA) has concluded that the provision of indigent defense services in Montana is unconstitutional in at least the following respects:

- Montana has failed to adequately fund the provision of indigent defense services. It has not assumed responsibility for the funding of indigent defense services in the misdemeanor courts and is not meeting its responsibility to fund such services in the district courts. The State's own budget projections indicate a total shortfall of between \$4.2 and \$4.6 million for the 2004-2005 fiscal period. This shortfall is from a budgeted number that does not come close to covering the costs of a constitutionally adequate indigent defense system. *See infra*, Section II.A.1; ABA *Ten Principles*, Number 2.
- Montana's failure to adequately fund indigent defense services has resulted in woefully inadequate resources for indigent defense, particularly as compared to those available to the prosecution. Public defenders in many counties must pay for their own office overhead, computers, software, telephones, photocopying, secretarial and paralegal assistance — items they cannot afford they go without. The State's public defender offices are also under-resourced. Nine attorneys in the Missoula County Public Defender Office, for example, must all share one investigator, one paralegal and three secretaries. The County Attorney's Office, in contrast, has the resources of the police and sheriff's department, three paralegals and seven secretaries. *See infra*, Section II.A.2; ABA *Ten Principles*, Number 8.
- Indigent defense services in Montana are not sufficiently independent and free from undue political interference. The judiciary largely controls indigent defense in many counties by appointing counsel, approving attorney compensation and reviewing the use of experts and investigators. Judges are free to (and often do) appoint counsel as they see fit rather than pursuant to objective guidelines, deny public defenders additional compensation for complex cases, and subject the use of experts and investigators to limits not applicable to prosecutors. Although it is relatively free from such judicial control, the Missoula Public Defender Office is also insufficiently independent — the County Attorney in that County, for example, often reviews the Office's budget. *See infra*, Section II.B; ABA *Ten Principles*, Number 1.
- Montana has failed to ensure that only qualified counsel represent indigent defendants and that public defenders receive the training necessary to perform competently. Many attorneys are assigned to cases pursuant to strict rotational systems with no regard for their level of experience. Attorneys are often forced to learn on the job, or not at all, as the State does not provide any orientation program for newly hired public defenders, any systematic and comprehensive training, or any technical assistance. County attorneys, in contrast, have access to

an office created by the State specifically to provide them with training and technical assistance. *See infra*, Section II.C; ABA *Ten Principles*, Numbers 6 and 9.

- There is no uniform system for determining eligibility for indigent defense and appointing public defenders in a timely manner in Montana. Screening for indigency varies from county to county but is done on an ad hoc basis in all counties, resulting in abuses of the system. Delays in appointment and initiation of client contact are also rampant. Defenders in Missoula County often do not see their clients for the first time until several weeks after appointment. *See infra*, Section II.D; ABA *Ten Principles*, Number 3.
- Public defenders in Montana do not have adequate time to meet with their clients and often fail to ensure that the meetings that do occur are confidential. There are no uniform policies or procedures for establishing and maintaining a working client relationship and many public defenders do not have regular and periodic substantive meetings with their clients. Letters from clients indicating that weeks, if not months, had passed since they had last heard from their attorneys are not uncommon, particularly in Missoula County. *See infra*, Section II.E; ABA *Ten Principles*, Number 4.
- There are no policies or procedures in Montana limiting the number or type of indigent defense cases to which public defenders may be assigned or any policies or procedures for collecting caseload data. Although the NLADA was unable to secure reliable caseload data, deposition testimony by public defenders indicates that are uniformly overworked. *See infra*, Section II.F; ABA *Ten Principles*, Number 5.
- Public defenders in Montana are not supervised in any meaningful way or monitored for compliance with any performance standards. There are no standards governing a defender's obligations to his or her client, conflicts of interest, the use of investigators and experts, the right to a speedy trial, plea bargaining, or the requesting of continuances. Although judges are involved in the appointment of indigent defense counsel and review attorney compensation, they do not provide any direct supervision because doing so would violate the Canons of Judicial Ethics. *See infra*, Section II.G; ABA *Ten Principles*, Number 10.

These failings have resulted in significant harm to indigent defense clients in Montana, who pay the price in the form of attorneys who take cases despite clear conflicts of interest, inappropriate waivers of probable cause hearings, lack of meaningful contact with their attorneys, failures to investigate or to use experts, infrequent motion practice and trials, pressure to take guilty pleas and to sign speedy trial waivers, and infrequent appeals. *See infra*, Section II.H.

Constitutional rights extend to all Americans, not merely those of sufficient means. Although state and local governments must balance other important demands on their resources, the Constitution does not allow for justice to be rationed to the poor due to insufficient funds. Montana has failed to deliver the constitutional right to effective assistance of counsel promised over forty years ago by the United States Supreme Court.

I. Background

A. The Right to Counsel in Criminal Cases

In the landmark case *Gideon v. Wainwright*,¹ the United States Supreme Court ruled that states have a constitutional obligation under the Sixth and Fourteenth Amendments to provide counsel to indigent defendants in felony cases. In so doing, it unanimously concluded that “reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” To the Court, the fact that “[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime” makes it an “obvious truth” that “lawyers in criminal courts are necessities, not luxuries.” Accordingly, the right to counsel has consistently been extended to any case that may result in a potential loss of liberty.²

B. State Efforts to Fulfill Gideon’s Promise

In the ensuing forty years since *Gideon*, the Court’s “obvious truth” has been obscured or lost at the hands of many state governments.³ Empirical research

¹ 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963).

² *Gideon* established the right to counsel for felony trials. Subsequent cases extend that right to direct appeals, *Douglas v. California*, 372 U.S. 353 (1963); custodial interrogation, *Miranda v. Arizona*, 384 U.S. 436 (1966); juvenile proceedings resulting in confinement, *In Re Gault*, 387 U.S. 1 (1967); critical stages of preliminary hearings, *Coleman v. Alabama*, 399 U.S. 1 (1970); misdemeanors involving possible imprisonment, *Argersinger v. Hamlin*, 407 U.S. 25 (1972); and misdemeanors involving a suspended sentence, *Alabama v. Shelton*, 535 U.S. 654 (2002).

³ Political expediency and/or under-education on right to counsel issues presents the most apparent explanation for this failure. The constituency most directly impacted by the failure of government to ensure equal access to justice is the one most limited in its ability to affect public discourse. By definition, people of insufficient means have limited resources to gain access to forums that promote public awareness of their concerns. On top of this, people in need of public defender services oftentimes are undereducated, inarticulate, mentally ill, developmentally delayed, under-aged, and/or suffering from substance abuse. It can be easy for state policy-makers to paint the funding of indigent defense services as “giving money to criminals” without the people most affected by their actions being able to effectively respond. Indeed, many indigent clients processed through the criminal justice system are, upon conviction, stripped of their ability to participate in the electoral process altogether by state laws that deny the franchise to convicted felons.

There is a critical need to increase public attention to the current state of the American justice system and how poorly our government delivers on its constitutional obligation, particularly since most people believe

demonstrates that states vary greatly in their abilities to deliver on the promise of effective assistance of counsel. Collectively, these studies identify two primary factors that determine the quality of indigent defense services provided: (1) the degree and sufficiency of state funding; and (2) compliance with nationally recognized standards for the delivery of indigent defense services.

Twenty-three states currently fund indigent defense services entirely at the state level.⁴ In those that do not, localities must assume the burden. Because local funding is primarily derived from property taxes, the amount available for defender services tends to constrict in inverse proportion to the demand for such services (i.e., a weakened local economy causes increases in unemployment, worker flight, demands for other county services, and crime). As a result, the quality of public defender representation in a state that relies upon local funding generally fluctuates widely from locality to locality. A system that metes out justice in proportion to the availability of limited local resources cannot assure victims, the accused and the general public that resulting verdicts are fair, correct, swift and final.⁵

State funding alone, however, does not guarantee an adequate system. Meaningful access to counsel requires the promulgation and enforcement of standards for attorney competency. Independent assessments from around the country demonstrate that those states that adopt and enforce standards for indigent defense system-wide AND provide adequate statewide funding receive the highest marks in terms of ensuring access to meaningful representation.⁶

in the importance of providing adequate legal representation to those who cannot afford it. Belden, Russenello & Stewart, *Americans Consider Indigent Defense: Analysis of a National Study of Public Opinion* (Jan. 2002) (“Providing competent legal representation is one of our most fundamental rights in the U.S. 88% convincing; 65% very convincing;” “A lawyer with a small enough caseload to provide the time necessary to prepare a defense for each person (94% of those polled believe this to be either an important or guaranteed right);” “Resources to hire investigators to check evidence and find witnesses (91% found such resources to be either important or guaranteed).”).

⁴ They are Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida (as of July 1, 2004), Hawaii, Maine, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin.

⁵ Notably, a recent report concludes that not only does a statewide, state-funded indigent defense system improve the quality of defense services provided, but it also results in significant economic savings for the state. NAACP Legal Defense and Education Fund, Inc. (LDF), *Economic Losses and the Public System of Indigent Defense: Empirical Evidence on Pre-Sentencing Behavior from Mississippi*, June 2003.

⁶ Reports from states, including states that assume financial responsibility for their indigent defense systems, indicate that the failure to promulgate and enforce nationally recognized practice standards results in the failure to provide meaningful access to justice. These reports discuss the shortcomings of indigent defense in (i) **Alabama**, Bright, Stephen B., *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at stake* (1997); *Survey of the American Law* 783 (New York University School of Law, 1999); (ii) **Arizona**, *Report on Status of Indigent Defense in Arizona* (The Spangenberg Group, Jan. 1993); (iii) **California**, *Contracting for Indigent Defense Services: A Special Report* (U.S. Department of Justice, Bureau of Justice Assistance, Apr. 2000); *Evaluation Report & Recommendations, Riverside County Public Defender* (NLADA, Dec. 2000); *Evaluation Report & Recommendations, San Bernardino County Public Defender* (NLADA, Nov. 2001); *A Pilot Assessment of*

The absence of sufficient state funding and the failure to promulgate and enforce nationally recognized standards result in lawyers providing sub-par representation, as measured by a range of criteria including, but not limited to:

- Failure to adequately investigate the charges against their clients;
- Failure to maintain regular contact with clients to permit informed decision-making;
- Failure to make appropriate procedural and substantive motions;
- Failure to hire necessary experts;
- Failure to stay abreast of changes in the relevant law; and,
- Failure to preserve viable issues for appeal.

As a result of such failures, clients spend more time in jail than necessary (both pre-trial and post-sentencing), plead guilty without a proper understanding of collateral consequences, fail to get needed social services and suffer other adverse consequences.

Although some states have gradually begun to accept their constitutional obligation by providing more funding and promulgating standards that result in greater

the Offices of the Public Defender, Santa Clara County California (NLADA, Dec. 2003) (hereinafter “NLADA, Pilot Assessment in Santa Clara County”); (iv) **Georgia**, *Report of the Chief Justice’s Commission on Indigent Defense* (2003); *Status of Indigent Defense in Georgia: A Study for the Chief Justice’s Commission on Indigent Defense – Part II: Analysis of implementing Alabama v. Shelton in Georgia* (2003); (The Spangenberg Group, 2003); *Report to the Chief Justice’s Commission on Indigent Defense* (The Spangenberg Group, 2002); (v) **Louisiana**, *In Defense of Public Access to Justice: An Assessment of Trial-Level Indigent Defense Services in Louisiana 40 Years after Gideon* (NLADA, Mar. 2004), available at www.nlada.org/Defender?Defender_Evaluation (hereinafter NLADA, Assessment of Trial-level Indigent Defense Services in Louisiana 40 Years after Gideon); (vi) **Maine**, *An Assessment of Access to Counsel and Quality Representation in Delinquency Proceedings* (New England Juvenile Defender Center & American Bar Association, Oct. 22, 2003); (vii) **Michigan**, *Model Plan for Public Defense Services in Michigan* (Oct. 2002); (viii) **Mississippi**, *Assembly Line Justice Mississippi’s Indigent Defense Crisis* (NAACP Legal Defense and Education Fund, Inc. (LDF)), (Mar. 2003); *Economic Losses and the Public System of Indigent Defense: Empirical Evidence on Pre-Sentencing Behavior from Mississippi* (NAACP Legal Defense and Education Fund, Inc. (LDF)), (Mar. 2004); (ix) **Nevada**, *Miranda v. Clark County*, 279 F.3d 1102, 1112 (9th Cir. 2002); *Indigent Defense Services in the State of Nevada: Findings and Recommendation* (The Spangenberg Group, Dec. 2003); *Evaluation of the Public Defender Office: Clark County, Nevada* (NLADA, Mar. 2003), available at www.nlada.org/Defender/Defender_Evaluation (hereinafter “NLADA Evaluation in Clark County, Nevada”); (x) **North Dakota**, American Bar Association, *Review of Indigent Defense Services in North Dakota* (Jan. 2004); (xi) **Pennsylvania**, *Indigent Defense Services in Venango County* (Franklin Pennsylvania (NLADA , Mar. 2002) (hereinafter NLADA, Indigent Defense in Venango County); (xii) **South Carolina**, South Carolina Office of Indigent Defense, *Newsletter*, v. 1, n. 1 (1998); (xiii) **Tennessee**, *Tennessee Public Defender Case-Weighting Study* (The Spangenberg Group, Apr. 1999); (xiv) **Texas**, *The Fair Defense Report* (Texas Applesseed Fair Defense Project, Dec. 2000); (xv) **Vermont**, *Report of Indigent Defense Task Force* (Task Force on Indigent Defense in Vermont, Jan. 2001); (xvi) **Virginia**, *A Comprehensive Review of Indigent Defense in Virginia* (The Spangenberg Group, Jan. 2004); (xvii) **Washington**, *Seattle Times*, available at www.seattletimes.nwsourc.com/news/local/unequaldefense/stories/one/5.html; www.seattletimes.nwsourc.com/news/local/unequaldefense/stories/two/; and, www.seattletimes.nwsourc.com/news/local/unequaldefense/stories/three/.

accountability (generally through statewide indigent defense commissions), the forty years it has taken to accomplish these improvements has caused some national organizations and private law firms to begin systemic litigation in those states that still fail to fulfill the promise of the *Gideon* decision.

In February 2002, the American Civil Liberties Union (ACLU) filed a class-action lawsuit against the State of Montana alleging constitutional deficiencies in the delivery of the right to counsel (*White v. Martz*). The ACLU retained the National Legal Aid & Defender Association as an expert to conduct an objective assessment of the effectiveness of criminal defense services rendered to the indigent in Montana.

C. The National Legal Aid & Defender Association’s Expert Qualifications

Created in 1911, the National Legal Aid & Defender Association (NLADA) has been a leader in supporting equal access to justice for over ninety years. NLADA currently supports a number of initiatives, including the American Council of Chief Defenders (ACCD), a leadership forum that brings together the top defender executives nationwide, and the National Defender Leadership Institute (NDLI), an innovative training project to support current managers and develop future leaders.

Recognizing that effective public policy depends upon the effective implementation and enforcement of such policies, NLADA has also played a leadership role in both the development of national standards for public defense systems⁷ and processes for evaluating compliance with those standards.

NLADA’s Justice Standards, Evaluation & Research Initiative is a national leader in conducting standards-based assessments. With proper evaluation procedures, standards help to assure professionals’ compliance with national norms of quality in areas where government policy-makers themselves may lack expertise. The concept of using standards to address quality concerns is not unique to the field of indigent defense. In fact, the strong pressures of favoritism, partisanship, and/or budget constraints on public officials underscore the need for standards to assure fundamental quality in all facets of government. For instance, realizing that standards are necessary both to compare bids equitably and to assure quality products, policy-makers long ago ceased taking the lowest

⁷ Guidelines for Legal Defense Systems in the United States (National Study Commission on Defense Services [staffed by the NLADA; commissioned by the U.S. Department of Justice], 1976) (hereinafter NLADA Guidelines for Legal Defense Systems”); ABA *Ten Principles, infra* n.11 ; Standards for the Appointment and Performance of Counsel in Death Penalty Cases (NLADA, 1988; ABA, 1989); Defender Training and Development Standards (NLADA, 1997); Performance Guidelines for Criminal Defense Representation (NLADA, 1995) (hereinafter “NLADA Performance Guidelines”); Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services (NLADA, 1984; ABA, 1985) (hereinafter “NLADA Guidelines for Negotiating and Awarding Governmental Contracts”); Standards for the Administration of Assigned Counsel Systems (NLADA, 1989) (hereinafter “NLADA Standards for the Administration of Assigned Counsel Systems”); Standards and Evaluation Design for Appellate Defender Offices (NLADA, 1980); Evaluation Design for Public Defender Offices (NLADA, 1977); and Indigent Defense Caseloads and Common Sense: An Update (NLADA, 1994).

bids for constructing public works like schools and bridges and required winning contractors to meet minimum quality standards of safety.

In the field of indigent defense, standards-based assessments have become the recognized norm for guaranteeing the adequacy of criminal defense services provided to the poor.⁸ NLADA standards-based assessments utilize a modified version of the Pieczenik Evaluation Design for Public Defender Offices, which has been used since 1976 by NLADA and other organizations, such as the Criminal Courts Technical Assistance Project of the American University Justice Programs Office.

The NLADA protocol combines a review of a jurisdiction's budgetary, caseload and organizational information with site visits to observe courtroom practices and/or to interview defense providers and other key criminal justice policy-makers (e.g., judges, prosecutors, county officials). This methodology ensures that a variety of perspectives are solicited and enables NLADA to form as complete and accurate a picture of an indigent defense system as possible.

NLADA's standards serve as a model for enacting jurisdiction-specific standards for indigent defense delivery, many of which are binding and enforceable by virtue of statutory codification, promulgation through state supreme court rules, adoption/citation in state supreme court opinions, as a condition to receive state financial support, or adoption by a state indigent defense oversight commission or public defense agency.⁹

NLADA's leadership in promoting consistent, quality representation through indigent defense standards was most recently recognized by the United States Supreme Court in *Wiggins v. Smith*, 539 U.S. 510 (2003). In that case, the Court recognized that national standards, including the American Bar Association's (ABA) *Standard for the Appointment and Performance of Counsel in Death Penalty Cases* (written by NLADA), should serve as guideposts for assessing ineffective assistance of counsel claims.

The American Bar Association's *Ten Principles of a Public Defense System* presents the most widely accepted and used version of national standards for indigent defense. They distill the existing voluminous national standards for indigent defense systems (as opposed to individual attorney performance¹⁰) to their most basic elements,

⁸ For instance, *see*: NLADA, Assessment of Trial-level Indigent Defense Services in Louisiana 40 Years after Gideon, *supra* n.13; NLADA, Pilot Assessment in Santa Clara County, *supra* n. 13; NLADA Evaluation in Clark County, Nevada, *supra* n. 13; NLADA, Indigent Defense in Venango County, *supra* n.13.

⁹ Such standards were gathered into the first-ever national Compendium of Standards for Indigent Defense Systems by the U.S. Department of Justice, with NLADA assistance, in 2000. *Supra* n. 7. www.ojp.usdoj.gov/indigentdefense/compendium/.

¹⁰ Requirements for individual attorney performance are comprehensively addressed in other NLADA and ABA standards. See NLADA Performance Guidelines, *supra* n. 14; Standards for Criminal Justice: Prosecution Function and Defense Function (ABA, 3d ed. 1993), available at www.abanet.org/crimjust/standards/dfunc_blk.html.

which officials and policymakers can readily review and apply. Initially authored by the NLADA, the *Ten Principles* were adopted by the American Bar Association (ABA) in February 2002.¹¹ In the words of the ABA Standing Committee on Legal Aid and Indigent Defendants, they “constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney.”¹²

D. Methodology of the NLADA’s Assessment of Montana’s Indigent Defense Services

NLADA conducted the current assessment of the indigent defense delivery system in Montana employing the ABA *Ten Principles* as well as other NLADA standards as objective measures. We examined Montana’s compliance with these standards in the following areas:¹³

- Independence of the system from undue outside influences (ABA *Ten Principles*, Number 1)
- Adequacy of funding (ABA *Ten Principles*, Number 2)
- Standardized eligibility determinations and timeliness of appointment (ABA *Ten Principles*, Number 3)
- Attorney time to meet with clients and protection of confidentiality (ABA *Ten Principles*, Number 4)
- Regulation of attorney workloads (ABA *Ten Principles*, Number 5)
- Attorney qualifications (ABA *Ten Principles*, Number 6)
- Continuity in representation (ABA *Ten Principles*, Number 7)
- Parity with the prosecutorial function (ABA *Ten Principles*, Number 8)
- Attorney training (ABA *Ten Principles*, Number 9)
- Supervision of attorney performance (ABA *Ten Principles*, Number 10)

¹¹ The *Ten Principles of a Public Defense System* (Appendix D) is based on a paper by James Neuhard, State Appellate Defender of Michigan and former NLADA President and H. Scott Wallace, former NLADA Director of Defender Legal Services, which was published in December 2000 in the *Compendium of Standards for Indigent Defense Systems* *Supra* n. 7. (www.ojp.usdoj.gov/indigentdefense/compendium/).

¹² ABA *Ten Principles*, *supra* n.7, from the Introduction.

¹³ Montana is in substantial compliance with ABA *Ten Principles*, Number 7, which recommends "vertical representation," such that the same attorney represents a client from arraignment through trial.

NLADA reviewed budgets, attorney time records, invoices from expert witnesses and investigators, court-generated case registry reports, depositions and exhibits from *White v. Martz*, and other relevant materials from the following Montana counties: Butte-Silver Bow, Flathead, Glacier, Lake, Missoula, Ravalli and Teton. Additionally, NLADA attempted to secure electronic caseload data from State officials in an effort to conduct a thorough, objective analysis of indigent defense caseloads and to determine average length of time from arrest to disposition for indigent defendants in each of the counties. Unfortunately, as of July 2004, the State had yet to produce all of the requested data.

NLADA put together a team of professional researchers and leading public defense practitioners from the American Council of Chief Defenders to assist in this effort, some of whom conducted on-site interviews and court observations. The Montana team consists of: Jo-Ann Wallace,¹⁴ David Carroll,¹⁵ Fern Laethem,¹⁶ David Meyer,¹⁷

¹⁴ Jo-Ann Wallace is Senior Vice President for Programs at NLADA. From June 1994 - February 2000 she was the Director of the Public Defender Service for the District of Columbia. Before becoming the Director, she was the Deputy Chief of the Appellate Division. She previously served the agency as the Coordinator of the Juvenile Services Program. Ms. Wallace has extensive experience as a lecturer on criminal justice topics. She has served as a visiting faculty member for Harvard Law School's Trial Advocacy Workshop and has been a regular faculty member of the District of Columbia Criminal Practice Institute, the District of Columbia Delinquency and Neglect Practice Institute, NLADA's Appellate Defender Training and Leadership and Management Training. Ms. Wallace has worked on national indigent defense issues for almost a decade, including serving as Chairperson for the Blue Ribbon Commission on Indigent Defense, a joint NLADA/United States Department of Justice project, serving as a lead consultant for the Department of Justice Symposium on Indigent Defense and conducting research and evaluations on indigent defense systems.

¹⁵ David Carroll joined NLADA as Director of the Justice Standards, Evaluations and Research Center in January 2002. Since joining NLADA, Mr. Carroll co-authored a report on indigent defense services in Louisiana, co-authored a similar report on indigent defense services in Venango County, Pennsylvania, led an on-site assessment of the public defender office in Clark County (Las Vegas), Nevada, provided consultation services for the Maryland State Public Defender, and co-authored a report for the U.S. Department of Justice on the Implementation and Impact of Indigent Defense Standards. For five and a half years, Mr. Carroll worked as a Senior Research Associate & Business Manager for The Spangenberg Group (TSG). TSG is a national and international research and consulting firm specializing in criminal justice reform. Since 1985, TSG has been the research arm of the American Bar Association on indigent defense issues.

Mr. Carroll directed numerous projects on behalf of TSG, including: a jail-planning study for Pierce County (Tacoma) Washington; a study of indigent defense cost recovery efforts in Jefferson and Fayette Counties, Kentucky (Louisville and Lexington); a statewide assessment of West Virginia's Public Defender Services; and principal analysis on a statewide public defender, court and prosecutor case-weighting study in Tennessee. He provided analysis and re-design of the New York Legal Aid Society's Criminal Defense Division and Criminal Appeals Bureau's case management information systems. Mr. Carroll was also chosen to provide on-site technical assistance to statewide Task Forces in Alabama, Illinois, Nevada, and Vermont under the auspices of the American Bar Association and the U.S. Department of Justice, Bureau of Justice Assistance.

¹⁶ Fern Laethem began her legal career as a Deputy District Attorney in Sacramento, California and was later appointed as an Assistant U.S. Attorney for the Eastern District of California. In 1981 she opened a solo criminal defense practice that she maintained until 1989, when California Governor George Deukmejian appointed her as the State Public Defender of California to oversee direct appeals in capital

Phyllis Subin,¹⁸ and Mary Broderick.¹⁹ The team members have a combined 100 years of experience in the field of indigent defense and each has spearheaded efforts to ensure widespread compliance with the requirements of the Sixth Amendment and the ABA *Ten Principles*. On site visits were conducted during three different periods: October 14-17, 2003; December 10-12th, 2003; and, March 8-11, 2004.

cases statewide. Governor Pete Wilson reappointed her for two more terms. Ms. Laethem retired as State Public Defender in 1999 and accepted a position with Sacramento County as the Executive Director of Sacramento County Conflict Criminal Defenders.

Ms. Laethem has served as a member of the California Committee of Bar Examiners, the California Judicial Council Appellate Standing Advisory Committee and the California Council on Criminal Justice. Ms. Laethem participated as a trainer in NLADA Defender Manager training for many years and is a consultant to contract public defender programs in other jurisdictions. She was recently appointed by the California senate to serve on the California Commission on Special Education.

¹⁷ David Meyer is a nationally recognized expert in organizational management, who has served on the Malcolm Baldrige National Quality Award Board of Examiners. Mr. Meyer is currently the Chief Deputy Director for the Los Angeles County Department of Mental Health, after a career spanning more than twenty years with the Los Angeles County Public Defender Office (LACPDO). From 1971 to 1993, Mr. Meyer served in several capacities, including acting head of the organization, Chief Deputy, Head of the Mental Health Division and Head of the Juvenile Unit. Mr. Meyer frequently lectures on organizational management and has participated in several NLADA site assessments (most recently in Riverside County and San Bernardino County, CA), in addition to providing private consulting services to defender organizations nationwide.

¹⁸ Phyllis Subin completed two gubernatorial appointment terms as the Chief Public Defender for the State of New Mexico in 2003. In that capacity, she was the leader of New Mexico's largest statewide law firm, the New Mexico Public Defender Department, which had a budget of over \$30 million and employed 320 staff members (160 attorneys) with over 100 contract attorneys. At the time of her first appointment, Ms. Subin was an Assistant Professor at the University of New Mexico School of Law and the director of the Criminal Defense Clinic. She has a long history in the teaching and training of law students and public defender attorneys and, following years as a trial and appellate public defender, Ms. Subin was the first Director of Training and Recruitment at the Defender Association of Philadelphia (PA), a large county public defender system, where she developed and taught a nationally recognized training program for lawyers and law interns.

Ms. Subin has also served as chair of NLADA's Defender Trainer's Section, was instrumental in writing and developing NLADA's national Training and Development standards and assisted in the creation of NLADA's Defender Advocacy Institute. Ms. Subin has consulted privately for a number of indigent defense programs, including the Kentucky Department of Advocacy.

¹⁹ Mary Broderick is a national indigent defense consultant who has served as a member of NLADA evaluation teams in Riverside County and San Bernardino County, California. From 1994-2002, Ms. Broderick served as Executive Director of California Attorneys for Criminal Justice (CACJ), the largest statewide criminal defense lawyers association. Prior to her work at CACJ, Ms. Broderick was the Director of the Defender Division at NLADA from 1985-1994. In that capacity, Ms. Broderick led an NLADA evaluation of the Cook County, Illinois (Chicago) public defender office, was editor of the NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases and NLADA Standards for Assigned Counsel Systems, and launched Life in the Balance (Death Penalty) and Defender Management Training. Before coming to NLADA, she was a public defense attorney with the Defender Association of Philadelphia, where she handled trials and appeals.

E. Montana Indigent Defense Services in Transition

Our site visits coincided with a transition in the funding, and in some cases, administration and provision of indigent defense services in Montana. Prior to legislation that took effect on July 1, 2003, Montana delegated primary responsibility for the funding and administration of its indigent defense systems to its counties. Any county, at the discretion of its county board, could create a public defender's office and provide for the appointment of a salaried chief public defender and any assistant public defenders.²⁰ Of the seven counties in our Report, Missoula was the only one to have a formal public defender office.

Counties that chose not to establish a public defender office could utilize a contract system, an assigned counsel system, or some combination of the two. Under the contract system, county officials contracted with local attorneys to handle some or all of the county's indigent defense work, usually for a flat annual rate. The terms of the contract and the rate of compensation were determined by the county. Under the assigned counsel system, local district court judges appointed counsel on a case-by-case basis and the county paid the attorneys at an hourly rate. The rate of compensation was determined by judges, often in consultation with county officials, and varied from county to county.

Butte-Silver Bow, Flathead, Lake and Ravalli Counties utilized the contract system. Glacier and Teton Counties relied upon the Ninth Judicial District Court Judge to assign counsel on a case-by-case basis.

Between 1985 and July 2003, the State reimbursed counties for the cost of providing defender services to adults (usually charged with felonies) in the district courts pursuant to the District Court Criminal Reimbursement Program (DCCRP). The counties remained responsible for the funding of indigent defense services in juvenile delinquency proceedings and misdemeanor proceedings in the justice and city courts.

State reimbursement of district court expenses, however, was only guaranteed to the extent that funding was available. Because the DCCRP was historically funded through a licensing tax on motor vehicles, the amount of available funding fluctuated by each year. As a result, the State reimbursed the counties for a percentage of their monthly expenditures on an on-going basis throughout the year. At the end of the year, if there was sufficient funding, the State would reimburse the counties for whatever approved expenses were outstanding.

On July 1, 2003, in response to aggressive lobbying from the counties, the State assumed direct responsibility

²⁰ Mont. Code Ann. § 46-8-202 (2003).

for the funding of indigent defense services in all district courts (including adult felony and delinquency matters).²¹

In those counties with assigned counsel and contract systems, the State now pays the attorneys directly. Invoices from assigned counsel that are approved by the local district court judge are paid at a rate of \$60 per hour. Contract attorneys are paid the amount set forth in their contracts. Counties with formal public defender offices continue to pay for district court indigent defense services up-front (public defenders remain county employees) but all costs are reimbursed by the State.

The State did not assume any responsibility for the cost of providing representation to indigents in the state's misdemeanor courts. Counties remain free to decide whether to provide district court defender services through assigned counsel, contracts or public defender offices. In July 2003, the four counties in this Report that previously used contract systems in the district courts purposefully failed to renew contracts to facilitate their dismissal from the *White v. Martz* lawsuit. In Ravalli, Lake and Butte-Silver Bow Counties, district court judges now assign indigent defense counsel on a case-by-case basis. In the fourth county, Flathead County, the attorneys have formed a loose confederation and designated one of their own as the Chief Public Defender. Missoula County continues to maintain a public defender office. Glacier and Teton Counties continue to assign counsel on a case-by-case basis.

II. Assessment of Indigent Defense Services in Montana

The current assessment of indigent defense services is not the first conducted by the NLADA in Montana. In 1974, NLADA received a grant from the federal Law Enforcement Assistance Administration (LEAA) to provide technical assistance to state indigent defense systems by establishing the National Center for Defense Management (NCDM). NCDM's stated mission was "to improve the efficiency of systems for the defense of the poor, to maximize their quality and to maintain their cost-effectiveness through sound planning, management assistance and management training."²²

²¹ 2003 Mont. Laws 583.

²² Montana Statewide Defender Systems Development Study (National Center for Defense Management), Dec. 1976 (hereinafter Statewide Development Study), Forward, at ii.

In 1975, LEAA approved the provision of NCDM technical assistance to Montana in response to a request by the Montana Board of Crime Control at the urging of the Montana Legal Services Corporation Board of Trustees. Specifically, NCDM was asked to interview representatives of various Montana organizations and agencies and solicit their views concerning indigent defense services in the state; analyze the current state of indigent defense services in three jurisdictions (Yellowstone County (Billings); Flathead County (Kalispell); and the 16th Judicial District (encompassing Fallon, Powder River, Carter, Custer, Rosebud, Prairie and Garfield counties); and recommend a more effective delivery system.²³

Using available national indigent defense standards as the basis of measurement, the report, *Montana Statewide Defender Systems Development Study* (1976), concluded that the general practice of criminal law in indigent defense cases in Montana fell below minimum standards for criminal justice.²⁴ NCDM found that the failure of practitioners to adhere to prevailing criminal justice standards was not simply an “occasional omission” or “isolated defect,” but the result of “a substandard system of indigent criminal justice.”²⁵

As did our assessment 28 years ago, our current assessment finds that indigent defense services in Montana do not meet the majority of nationally recognized standards for the delivery of indigent defense services, including the *ABA Ten Principles*. Indeed, the NLADA site team was struck by how many of the problems noted in 1976 had yet to be addressed.²⁶ NLADA found that NCDM’s characterization of Montana’s approach to indigent defense as a “substandard system” was somewhat generous. It implies that there is a “systemic” structure for the delivery of indigent defense services in place when in fact there is not.

The defining trait of indigent defense services in Montana is a “rugged individualism” in which attorneys “go it alone,” without the funding, resources, training, supervision and oversight that other indigent defense providers and criminal defense attorneys consider essential to the provision of constitutionally adequate legal representation. The substantial failure of the State to create a structure that complies with the majority of the *ABA Ten Principles* leads us to conclude that the indigent

²³ Statewide Development Study, supra n. 28, at 2-3.

²⁴ NCDM relied upon prevailing national standards, many of which have not been superceded in the intervening years, including the American Bar Association Minimum Standards for Criminal Justice (approved 1968), the National Legal Aid and Defender Association Standards for Defense Services (adopted 1976), and the National Advisory Commission on Criminal Justice Standards and Goals Defense Services (adopted 1974), and the National Study Commission on Defense Services (Defense of Eligible Persons, adopted 1976).

²⁵ Statewide Development Study, supra n. 28, at 15.

²⁶ Where relevant, NLADA cites the earlier report to buttress our current findings.

defense system in Montana delivers ineffective, inefficient, unethical, conflict-ridden representation to the poor.

In arriving at this conclusion, NLADA recognizes that Montana – like many sparsely populated and largely rural states – is differently situated from states with large urban centers. Nevertheless, the distribution of a state’s population does not and cannot exempt it from compliance with constitutional requirements to provide adequate legal services. In fact, the centralized provision of funding, oversight, training and supervision is more, rather than less, crucial to the delivery of adequate defender services in rural states. Defenders who essentially function as solo practitioners in isolated rural areas can benefit greatly from the contact with other defenders that a centralized statewide system affords.

The following assessment of indigent defense in Montana against the ABA *Ten Principles* is presented in the order that makes the most sense to the issues in Montana and does not necessarily follow the numeric ordering of the principles.

**A. State Funding, Establishment of Institutional Defender Offices,
the Involvement of the Private Bar & Parity with the Prosecutorial
Function
(ABA *Ten Principles*, Numbers 2 and 8)**

The second of the *Ten Principles* supports both the establishment of an institutional defender program and the active participation of the private bar in jurisdictions with high enough caseloads. The principle also addresses the need for state funding:

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

(internal citations omitted).

1. Montana’s Failure to Adequately Fund Indigent Defense Services

The second part of ABA *Ten Principles*, Number 2, explicitly calls for state funding of all indigent defense services. Implicit in this mandate is that the funding be adequate. Montana does not meet this component of Principle Number 2 because it has

failed to assume responsibility for the funding of indigent defense services in the misdemeanor courts and its funding of indigent defense services in the district courts is inadequate.

In FY 2004, the first full year in which the State assumed direct fiscal responsibility for the cost of district court indigent defense services, it grossly underestimated the cost of those services in large part because it failed to account properly for county expenditures the previous year.

At the beginning of the prior fiscal year, the State set aside approximately \$6.15 million to reimburse the counties for district court indigent defense costs.²⁷ Three months before the end of the fiscal year, however, the State had distributed this entire amount to the counties, rendering it unable to reimburse the counties for any further district court indigent defense expenses.²⁸ State documents estimate that during those last three months of FY 2003, the counties spent an additional \$400,000 on indigent defense costs, beyond the \$6.15 million for which they had already been reimbursed.²⁹ It is likely, however, that actual county expenditures exceeded the State's estimate because many counties simply stopped billing the State when they were informed there were no funds left for reimbursement.³⁰

Despite this shortfall, the State allocated even less money for district court indigent defense services in FY 2004. According to the Law and Justice Subcommittee Minutes of April 30, 2004, the State set aside \$5.4 million of District Court Program funds for such expenses.³¹ During his deposition in March 2004, the Supreme Court Administrator testified that the District Court Program had a funding shortfall of \$1.6 million as of the month of his deposition, three-quarters of the way through FY 2004, with a substantial projected shortfall over the next fiscal year.³²

²⁷ The State appropriated \$7.5 million for the District Court Program's variable expenses. The figure of \$6.15 million is based upon the State's estimates that expenditures for indigent defense services constitute 82% of variable expenses. Public Defender Study, Legislative Fiscal Division, March 2004, at p. 12, http://leg.state.mt.us/content/committees/interim/2003_2004/law_justice/staff_reports/Fisal_Report_PD_Study.pdf.

²⁸ Deposition of Supreme Court Administrator, R. James Oppedahl (March 25, 2004), at 47.

²⁹ "Final FY 2003 District Court Reimbursements to Counties per SABHRS", October 23, 2003.

³⁰ Deposition of R. James Oppedahl (March 25, 2004), at 31-32, 45-46.

³¹ Law and Justice Public Defender Subcommittee Minutes, April 30, 2004, Comments of Harry Freebourn, Legislative Fiscal Analyst, at 9. NLADA was not certain how to reconcile the numbers in this document with the statement by counsel for Defendants that the State allocated \$7.1 million for indigent defense in 2004. Conversation with Brian Morris, July 2004.

³² The Court Administrator estimates that for the 2004-2005 fiscal period, the total short fall for the District Court Program will be between \$4.2 and 4.6 million. Deposition of R. James Oppedahl (March 25, 2004), at 34-37.

Importantly, even these budget shortfall figures understate the inadequacy of indigent defense funding in Montana because they fail to account for “hidden” costs, such as those not paid for by the State³³ and those that were historically suppressed by the counties. For example, during 2003, one attorney in Butte-Silver Bow estimated that, given the hours of work required under her flat-fee indigent defense contract, the County was paying her approximately \$30/hour, half the rate that the State could have reimbursed Butte-Silver Bow.³⁴ In other words, even if the State had allocated enough to cover actual expenditures by the counties as reflected in past county reimbursement requests, that amount would still have been inadequate.

A significant contributor to Montana’s failure to comply with Principle Number 2 of the *Ten Principles* is the state’s failure to conduct a comprehensive assessment of the amount of money it would need to allocate to ensure that all of its defender systems are capable of providing constitutionally adequate legal representation.³⁵ Such an assessment would require a full accounting of the money spent in past years by the counties and the State and an understanding of how these funds were disbursed. This type of accounting is made more difficult by the fact that there is no uniform state-wide defender system or uniform state-wide records of the necessary information. The Supreme Court administrator testified, for example, that his office has not done anything to require counties to use a uniform accounting system for their district court expenses or for gathering caseload statistics.³⁶

Although NLADA has not conducted a comprehensive assessment to determine the amount of money Montana would need to allocate to its district court defender systems, even an allocation of the \$7.9 million suggested by the FY 2003 figures would have been insufficient.

Not only has Montana failed to adequately fund indigent defense in district courts responsible for felony cases, but it has also neglected to fund indigent defense in misdemeanor courts altogether. Although misdemeanor defender services are outside the scope of this Report, it should be noted that the failure of the post-July 1, 2003 state funding scheme to include misdemeanor defender services is particularly problematic. In 1972, the U.S. Supreme Court extended the right to counsel in *Gideon* to any misdemeanor case involving the possibility of incarceration.³⁷ Thirty years later, in *Alabama v. Shelton*, the Court mandated that governments must provide counsel not only to those indigent defendants who are sentenced to any term of incarceration, but also to

³³ Montana’s Public Defender System: Issues & Options #1: A Report to the Law and Justice Interim Committee, Sheri S. Heffelfinger, March 2004, at 21.

³⁴ Deposition of Deirdre Caughlin (Jan. 15, 2003), at 179-80.

³⁵ Deposition of R. James Oppedahl (March 25, 2004), at 96-97

³⁶ Deposition of R. James Oppedahl (March 25, 2004), at 48, 53-55.

³⁷ *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

defendants who received probationary or suspended sentences that may be subsequently converted into incarceration by virtue of a technical violation of those sentences.³⁸

In Missoula County, NLADA team members did not observe a single misdemeanor defendant appearing with legal counsel, even those entering guilty pleas. The Justice Court does not use “waiver of counsel” forms that would provide at least minimal indicia that a waiver was both voluntary and knowing. At misdemeanor plea hearings, judges offered no explanation of the collateral consequences of pleading guilty, including, for example, the impact a criminal record has on employment, housing, eligibility for health or income-support benefits, or immigration status. Absent such explanations to establish that a plea was entered voluntarily and knowingly, these proceedings may generate future court actions at considerable public expense.³⁹

Although misdemeanor convictions or sentences may not generally result in lengthy incarceration, the life consequences of convictions can be severe, including job loss, family breakup, substance abuse and deportation – all factors that tend to foster recidivism.

2. Parity with the Prosecutorial Function

Montana’s failure to adequately fund its indigent defense services also places the state in non-compliance with Principle 8, which addresses the necessity for parity between indigent defense resources and those of the prosecution:

There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.... No part of the justice

³⁸ *Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764 (2002). Nationally, this is a very significant number of cases. More than four million offenders receive probation or a suspended sentence annually, and of these, 13% (or some 600,000) are subsequently incarcerated for violating their conditions of probation. U.S. Dep’t of Justice Bureau of Statistics, *Probation and Parole in the United States*, available at <http://ojp.usdoj.gov/bjs/abstract/ppus01.htm>. In making its ruling, the Court noted that 34 states were already in compliance with its ruling by virtue of providing a statutory right to counsel in such cases. Montana was not among that majority of states. *Shelton*, 535 U.S. at 669 nn.7-9.

³⁹ The plight of one indigent defense client observed in Missoula Justice Court is a good example of this problem. The defendant in question was charged with stealing firewood. He stipulated to the court that he stole the wood to keep his family warm. Prior to sentencing, the district attorney questioned the defendant as to whether or not he had ever stolen firewood before. The client, clearly scared, stated that he had stolen wood before from the same place on an earlier occasion. The district attorney asked that the court impose fines and victim restitution for *both* incidents even though the defendant had not been charged with any wrongdoing in connection with the earlier episode. The defendant was not informed that he did not have to answer the district attorney’s question nor was he informed of possible collateral consequences to pleading guilty.

system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system. This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

There is a direct correlation between the number of prosecutions brought in a jurisdiction and the indigent defense workload in that jurisdiction. And, since prosecution resources (both funding and staffing) significantly affect the number of prosecutions brought, increased prosecution funding directly increases defender workload. Disparity of resources between public defenders and prosecutors exacerbates the inability of public defenders to keep up with workload increases and causes delay in dispensing justice to victims, witnesses and defendants.

As Chief Justice Warren Burger wrote in 1972, “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.’”⁴⁰ The Justice Department’s 1999 report, *Improving Criminal Justice*, concludes that:

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

Montana has done nothing to ensure parity between the prosecutorial and defense functions.⁴¹ For example, state law mandates that county prosecutors work under the direction and supervision of the state’s Attorney General, but does not designate a centralized defender supervisor.⁴² State law requires that county attorneys in large counties work full-time, have at least five years experience and receive a base salary of \$50,000 with periodic increases, but is silent as to defender qualifications or

⁴⁰ *Argersinger v. Hamlin*, 407 U.S. 25, 43 (1972) (Burger, J., concurring) (internal citations omitted).

⁴¹ The disparity in resources between prosecutors and indigent defense providers in Montana was the subject of testimony at the February 7, 2003 ABA hearings on the right to counsel. See testimony of Deirdre Caughlan at: www.abanet.org/legalservices/downloads/sclaid/indigentdefense/gidhear1excerptcaughlan.pdf.

⁴² Mont. Code Ann. § 2-15-501 (2003).

compensation.⁴³ State law provides for the establishment of a County Attorney Assistance Program to provide training and technical assistance to county prosecutors, but does not provide the same for public defenders.⁴⁴

While the State provides prosecutors in the six counties with assigned counsel systems with staff, operational resources, computers and Internet access, it does not provide defenders in those counties with the same. Attorneys who cannot afford to pay for office overhead, computers, software, phone, photocopying, secretarial and paralegal assistance through hourly billing fees must go without.

As of July 2003, neither of the two primary indigent defense providers in Lake County had a secretary or a paralegal, adversely affecting their ability to maintain contact with their clients. As one defender stated, “the problem you run into is a one-man operation, you are sitting there talking to someone and you get a call. You’ve got a choice. A lot of times I will not answer the call.”⁴⁵ The Lake County Attorney’s Office has both a secretary and a paralegal.⁴⁶

One of the Lake County public defenders testified that he has no access to Internet legal research tools. Instead, he must sometimes travel 70 miles to the University of Montana Law School to get adequate legal research materials.⁴⁷ Although the Missoula Public Defender Office has access to Westlaw, not all attorneys have the necessary passwords.⁴⁸ A Butte-Silver Bow defender stated, “I mean, everybody brags about Lexis/Nexis. I don’t know if that’s any good. But what would really be helpful is updated disks on digests and things like that where I can get some case names and then go look them up.”⁴⁹

Whereas prosecutors have access to the investigatory resources of police, sheriffs, and FBI, indigent defense investigators in all of the counties except Missoula must be obtained through petition to and approval by the judge. In some areas, there simply are no local investigators who do defender work. One Glacier County attorney testified that if there were an investigator in the county for public defender work, the attorneys would “probably work him to death.”⁵⁰ His sentiments were echoed by another attorney who

⁴³ Mont. Code Ann. § 7-4-2503 (2003).

⁴⁴ Deposition of John Connor (Aug. 21, 2002), at 48-49; *see also* MCA 44-4-103.

⁴⁵ Deposition of Benjamin Anciaux (July 14, 2003), at 188.

⁴⁶ Depositions of Benjamin Anciaux (July 14, 2003), at 46; Larry Nistler (July 11, 2003), at 87-88.

⁴⁷ Deposition of Benjamin Anciaux (July 14, 2003), at 49.

⁴⁸ Depositions of Susan Boyer (Aug. 20, 2003), at 82-83; Colleen Ambrose (June 9, 2004), at 61.

⁴⁹ Deposition of Patrick McGee (January 16, 2003), at 45-46.

⁵⁰ Deposition of William Hunt (July 25, 2003), at 72-73, 79-80.

testified, “if we had someone here that we could use as an investigator, I would use the heck out of them.”⁵¹

A Lake County attorney expressed a desire for an investigator “on standby,” in the same manner that the state has the sheriff’s office and the police department “on standby.” Not having regular access to an investigator means that he must act as “a private investigator and in addition to being the attorney, [making it] difficult to juggle the time necessary to do that.”⁵²

The Missoula County Public Defender Office is similarly under-resourced.⁵³ As of 2003, it had nine attorneys, one paralegal, one law clerk, one investigator and three secretaries. By comparison the County Attorney’s Office had twelve attorneys, four paid interns, three paralegals and seven secretaries, in addition to the resources of the police and sheriff’s department.⁵⁴

The lack of sufficient secretarial staff forces defenders to do much of their own clerical work, reducing the amount of time they can give to their clients.⁵⁵ According to one Missoula attorney, “I think the inefficiencies in our office just run amok. I do more filing of my own stuff than the secretaries do.”⁵⁶ Another noted: “I did my own filing, I did my own – I typed my own letters. You know, that takes away from the time that you can actually be acting as an attorney.”⁵⁷

The lack of sufficient investigative staff requires defenders either to do their own investigations (a task for which they receive no training) or to forgo investigations altogether. According to deposition testimony, the one staff investigator is often too busy to assist attorneys with their cases.⁵⁸ The Chief Public Defender testified that the attorneys themselves are responsible for conducting investigations.⁵⁹

⁵¹ Deposition of Robert Olson (July 29, 2003), at 57.

⁵² Deposition of Benjamin Anciaux (July 14, 2003), at 52-53.

⁵³ http://www.co.missoula.mt.us/accounting/Budget/029DC_PubDef.htm>;
<http://www.co.missoula.mt.us/accounting/Budget/003CA.htm>.

⁵⁴ Deposition of Margaret Borg (June 11, 2004), at 401.

⁵⁵ Depositions of Susan Boyer (Aug. 20, 2003), at 139; Nik Geranios (August 15, 2003), at 134, Bruce Gobeo (Aug. 12, 2003), at 50-51; Robert Henry (Aug. 4, 2003), at 78-79.

⁵⁶ Deposition of Susan Boyer (Aug. 20, 2003), at 99-102.

⁵⁷ Deposition of Colleen Ambrose (June 9, 2004), at 55-56.

⁵⁸ Depositions of Bruce Gobeo (August 12, 2003), at 171-72; Janna Gobeo (August 13, 2003), at 198-99; Robert Henry (August 4, 2003), at 110-11; Wade Zolynski (July 9, 2003), at 60.

⁵⁹ Deposition of Margaret Borg (Aug. 11, 2003), at 367.

A general lack of funding prevents defenders from hiring their own experts and forces them to rely on the State's experts. When asked about expert witnesses, one defender testified: "Can't use them, can't get them. We just don't have the money in the budget."⁶⁰

A general lack of funds also prevents Missoula County defenders from receiving the same compensation as their prosecutorial counterparts. The Missoula Chief Public Defender received \$76,024 in FY 2003 whereas the County Attorney received \$88,582.⁶¹ Similarly, public defenders in that County received between \$31,408 and \$50,794 while assistant county attorneys received between \$37,190 and \$59,446.

3. Establishment of Institutional Public Defender Offices and Involvement of the Private Bar

The first section of Principle 2 calls for an indigent defense system to involve both full-time professional staff public defenders and private attorneys.

Several studies have concluded that public defender offices provide efficient and cost effective representation in jurisdictions with sufficient caseloads to support such offices due to a number of factors, including: familiarity with criminal law, specialization for certain types of cases, and centralization of administrative costs.⁶² For these reasons, the *Ten Principles* call for the establishment of institutional defender offices where caseloads are sufficient to justify one. At the same time, ABA Principle 2 recognizes the benefit of maintaining private bar involvement where caseloads are not sufficiently onerous.

Although Montana has public defender offices in some counties — including Missoula, Cascade, Lewis and Clark, Yellowstone, Anaconda/Deer Lodge, and Gallatin — the State has never conducted any type of assessment to determine whether other counties with similar populations might also be better served by public defender offices. Flathead County, for example, has a population equal in size to that of Cascade County and larger than those of Lewis and Clark and Gallatin Counties, but has no public defender office.

⁶⁰ Deposition of Bruce Gobeo (Aug. 12, 2003), at 195. See also Depositions of Robert Henry (August 4, 2003), at 131; Wade Zolynski (July 9, 2003), at 99-100.

⁶¹ <http://www.co.missoula.mt.us/accounting/Budget/Personnel/PubDef.pdf>;
<http://www.co.missoula.mt.us/accounting/Budget/Personnel/CA.pdf>.

⁶² See West Virginia Office of Legislative Auditor, *Preliminary Performance Review of Public Defender Services* (1998), available at www.wvpds.org; West Virginia Public Defender Services, *Report of the Indigent Defense Task Force*, January 2000, also available at www.wvpds.org. Report includes: The Spangenberg Group, *Final Report to the West Virginia Indigent Defense Task Force*, January 2000; North Carolina Indigent Defense Services, *FY02 North Carolina Public Defender & Private Assigned Counsel Cost Benefit Analysis*, 2003, available at www.ncids.org. See, e.g., NLADA Standards for the Administration of Assigned Counsel Systems, *supra* n. 14.

In establishing how to involve the private bar in jurisdictions without sufficiently high caseloads, Principle 2 calls for coordinated assigned counsel plans with explicit policies and procedures. NLADA has promulgated guidelines that set forth the framework for establishing and administering a coordinated assigned counsel plan. The guidelines call for the appointment of a general governing body to oversee the program and an administrator⁶³ to manage it. They also recommend that the Board and administrator promulgate policies; ensure practice standards, equitable compensation, sufficient support services, and workload limits; and develop job descriptions, training programs, and a system of supervision and monitoring. Neither the State nor any of the assigned counsel counties discussed in this Report have a board or an administrator, and as discussed in further detail below, there are no uniform practice standards, job descriptions, training programs, workload limits, or systems of supervision and monitoring.

B. Independence from Undue Political Interference (ABA *Ten Principles*, Number 1)

The first of the ABA's *Ten Principles* addresses the importance of independence in indigent defense representation. ABA Principle 1 provides that:

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

⁶³ NLADA Guidelines for Legal Defense Systems, *supra* n. 14, Guideline 2.14 Qualifications, Conditions of Employment, and Role of the Administrator, provides: 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.

*merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.*⁶⁴

As stated in the Office of Justice Programs Report, *Improving Criminal Justice Through Expanded Strategies and Innovative Collaborations: A Report of the National Symposium on Indigent Defense* (“Improving Criminal Justice”): “The ethical imperative of providing quality representation to clients should not be compromised by outside interference or political attacks.”⁶⁵ Courts, prosecutors or government should have no greater oversight role over lawyers for indigent defendants than they do over lawyers for paying clients. With respect to judicial control of the defense function, the National Study Commission on Defense Services concluded in 1976 that: “The mediator between two adversaries cannot be permitted to make policy for one of the adversaries.”⁶⁶

Indigent defense delivery programs that fail to guarantee professional independence for public defenders, assigned counsel or contract attorneys are fatally flawed. These programs compromise the integrity of the attorney-client relationship and work to the detriment of indigent defendants by providing them with counsel whose professional judgment may be influenced by concerns that do not affect counsel for clients with financial means.

Independence of the defense function may be compromised in assigned counsel programs where the judge has unilateral power to select lawyers to be appointed to individual cases and to reduce, deny or otherwise control the lawyer’s compensation. It may be compromised in flat-fee contract programs that pay a single lump sum for a block of cases regardless of how much work the attorney does, creating a direct financial conflict of interest with the client, in the sense that work or services beyond the bare minimum effectively reduce the attorney’s take-home compensation.⁶⁷ And, it may be

⁶⁴ Annotations and footnotes omitted throughout.

⁶⁵ NCJ 181344, February 1999, at x.

⁶⁶ NLADA Guidelines for Legal Defense Systems *supra* n. 14, citing National Advisory Commission on Criminal Justice Standards and Goals (1973), commentary to 13.9.

⁶⁷ Flat fee contracting is oriented solely toward cost reduction, in derogation of ethical and constitutional mandates governing the scope and quality of representation. Fixed annual contract rates for an unlimited number of cases create a conflict of interest between attorney and client, in violation of well-settled ethical proscriptions compiled in NLADA the *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, written by NLADA and adopted by the ABA in 1985. *Supra* n. 14. Guideline III-13, entitled “Conflicts of Interest,” prohibits contracts under which payment of expenses for necessary services such as investigations, expert witnesses, and transcripts would “decrease the Contractor’s income or compensation to attorneys or other personnel,” because this situation creates a conflict of interest between attorney and client. The same guideline addresses contracts which simply provide low compensation to attorneys thereby giving attorneys an incentive to minimize the amount of work performed or “to waive a client’s rights for reasons not related to the client’s best interests.”

For these reasons, all national standards, as summarized in commentary to the eighth of the ABA’s *Ten Principles* direct that: “Contracts with private attorneys for public defense services should never be set primarily on the basis of cost; they should specify performance requirements and the anticipated workload,

compromised in public defender programs if the power to hire and fire the chief public defender is vested in a government official, such as the jurisdiction's chief executive, chief judge, or in officials who must run for popular election.⁶⁸

Many states resolve the issue of independence by placing the authority for oversight of the state's indigent defense system with a statewide indigent defense commission.⁶⁹ NLADA guidelines recommend that the duties of the independent

provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services.”

⁶⁸ The National Study Commission on Defense Services in 1976 expressed concern with the cost, distraction, and counter-productiveness of allowing the intrusion of electoral politics into a governmental function that should be focused exclusively on criminal law and administration. NLADA Guidelines for Legal Defense Systems, *id.* at 217, *supra* n. 14.

⁶⁹ Of the 22 states that funded 100% of indigent defense services as of 2003, 14 (or 64%) have indigent defense commissions. States with commissions: **Arkansas** (seven members appointed by the Governor); **Colorado** (Two separate commissions, one that oversees the public defender and one that oversees the conflict defender; all appointments are made by the Supreme Court. Judges, prosecutors, law enforcement, and public defenders ineligible); **Connecticut** (seven members; two appointments by Chief Justice; one each by Speaker of the House, President Pro Tem of Senate, minority leader of the House, and minority leader of the Senate); **Hawaii** (five members appointed by Governor); **Iowa** (five members; three appointed by Governor – one of whom is nominated by the State Bar and one who is nominated by the Supreme Court; two members appointed by General Assembly – one per chamber – from two different political parties); **Maryland** (three members appointed by the Governor); **Massachusetts** (fifteen members appointed by the Justices of the Supreme Court); **Minnesota** (seven members; Supreme Court has five appointments; governor has one; prosecutors ineligible); **Missouri** (seven members appointed by Governor with advice and consent of the Senate); **New Hampshire** (fourteen members; Governor appoints seven, one appointment from each court level - Supreme, Superior, Probate, President of the New Hampshire Municipal & District Court Judges Association, Attorney General; President of the State Bar; Representative of Superior Court Clerks); **North Carolina** (thirteen members, see text of report for details); **Oregon** (seven members; Chief Justice appoints and serves as ex officio member; judges, prosecutors and law enforcement representatives ineligible); **Virginia** (nine members appointed by the Speaker of the House in consultation with Senate and House Courts of Justice Committees); and **Wisconsin** (nine members appointed by the Governor with approval by the Senate).

Of the six that fund at least 75% of indigent defense services, three (or 50%) have commissions, although the two states without a commission (**Florida** and **Tennessee**) have elected public defenders answerable to their constituencies to ensure independence. Both of those states have also state public defender associations that serve some of the same roles as indigent defense commissions in other states: **Kansas** (nine members; Governor appoints; Senate confirms. Judiciary and law enforcement are ineligible); **Kentucky** (eleven members; four members by Governor, two of whom are nominated by the State Bar and KY Protection and Advocacy Advisory Board; one by Speaker of the House; one by President of the Senate; two by Supreme Court. The Dean of the state's two Law Schools is also appointed. Prosecutors and law enforcement are ineligible); **North Dakota** (seven members appointed by the Chief Justice upon recommendations of Association of Counties, Chief Presiding Judge, State Bar, three appointments, and Attorney General, two appointments).

In total, 68% or 19 of the 28 states that fund at least 75% of indigent defense services have statewide commissions (or elected public defenders) to guard against undue infringement on the independence of public defenders. Clearly the consensus trend is toward statewide indigent defense commissions. In fact, of the remaining 22 states, five states that have a statewide commission that reimburses counties for a portion of their indigent defense costs based (in most cases) on the counties meeting commission-set standards (**Indiana, Georgia, Louisiana, Ohio** and **Texas**). One of these (**Georgia**) recently enacted legislation that will have the state assume 100% of indigent defense costs starting in 2005.

commission include the selection of a chief administrator, monitoring of quality of services rendered, serving as a liaison between the legislature and the defender service, and ensuring the independence of the defender system.⁷⁰

Indeed, the 1976 NCDM report recommended the creation of a similar body in Montana because defenders were not independent from the judiciary (and in some cases the county commission):

“Where the judge is defense counsel’s paymaster, the defendant’s legal interest may be pitted against the attorney’s financial interest. Does the attorney dare challenge the judgment or discretion of the court when his own fee is at stake? Will the attorney risk the displeasure of his benefactor in order to pursue a point in behalf of his client? The conflict is obvious; the pressures are compelling.”⁷¹

Twenty-eight years later Montana still does not have any uniform hiring, appointment, or attorney compensation policies or procedures that ensure defender independence from the judiciary, the county commissioners or the county attorney.

1. Lack of Professional Independence for Assigned Counsel

In the Montana counties included in this Report, the judiciary largely controls the defense function in assigned counsel programs. Among other things, judges appoint counsel, approve attorney compensation and scrutinize the use of experts and investigators.

a. Attorney Selection

There are no uniform policies or procedures governing the judicial appointment of counsel. As previously stated, the State requires that all county attorneys must have practiced law for five years,⁷² but has not issued written job qualifications for indigent defense counsel in non-capital cases.⁷³ Pursuant to section 2-5-1020, MCA, the Appellate

⁷⁰ NLADA Guidelines for Legal Defense Services, Standard 2.10, *supra* n. 14.

⁷¹ *Statewide Assessment*, at 17-18. Recommendation 1: “The Montana legislature should establish a public corporation entitled the Montana Defender Corporation. Its mandate should be to create a statewide defender system of high quality and to select and prescribe the work duties for the office of Montana Public Defender.

The composition of the Board of Directors of the Corporation should reflect three basic concerns: First, fidelity to the high standards of the legal profession; second, loyalty to the best interests of the client; and third, accountability to the public for the proper expenditure of state funds.” *Statewide Assessment*, page 27.

⁷² Mont. Code Ann. § 7-4-2701 (2003).

⁷³ Montana does have written standards for the appointment of counsel in capital cases and ensures that only those attorneys who meet those standards are assigned such cases.

Defender Commissioner was to have compiled and kept current a statewide roster of attorneys eligible for appointment by an appropriate court as trial and appellate counsel for indigent defendants. As of May 2004, it had not done so. Section 3-1-1602(3), MCA, requires the District Court Council to develop and adopt policies and procedures to administer state funding of district court that address (among other concerns) hiring policies. Again, as of May 2004, it had not done so.

As a result, lawyers report that the criteria used by district court judges when making appointments varies from county to county, with some judges appearing to have no meaningful selection criteria other than admission to the bar.⁷⁴ In fact, eligibility for appointment in some counties appears to be based on the nature of the personal relationship between the attorney seeking employment and the district court judge, rather than on qualifications and experience. Attorneys who are thought to be too vigorous in their defense of clients have been denied appointments.

During his deposition, a Glacier County defender stated that he “thinks” that the local judge appoints counsel pursuant to a mental list, but he does not know how lawyers get on this list.⁷⁵ Another Glacier County attorney reported that a local lawyer had been denied future appointments after he “broad-sided the judge”⁷⁶ and because he had a “very poor working relationship with the county attorneys . . .”⁷⁷ The same attorney noted that, in his view, an ability to “resolve cases” with the county attorney will ensure future appointments more than “going to trial and fighting a case tooth and nail” will.⁷⁸ NLADA was unable to discern criteria used by judges in Glacier to appoint public defenders.

In Butte-Silver Bow County, the most inexperienced of the four attorneys who currently receive appointments previously worked as a law clerk for one of the local judges. Without disparaging that attorney’s ability or performance, we were unable to glean a meaningful process for his selection. He was asked to take on a public defender contract prior to October 1, 2003 by a judge who spoke to him for approximately five minutes before appointing him.⁷⁹

⁷⁴ See, e.g., Depositions of Brad Belke (Dec. 16, 2002), at 44-45; Frank Joseph (Dec. 12, 2002), at 27-28; Patrick McGee (Jan. 16, 2003), at 15, 17; Jack Morris (Dec. 18, 2002), at 36-40; Nathan Hoines (July 28, 2003), at 15-17; William Hunt (July 25, 2003), at 18, 24; Terry Matt (July 24, 2003), at 44-45; Laurie McKinnon (Aug. 1, 2003), at 32-36; Robert Olson (July 29, 2003), at 15-18; Benjamin Anciaux (July 14, 2003), at 10-12; Larry Nistler (July 11, 2003), at 22-3.

⁷⁵ Deposition of Robert Olson (July 29, 2003), at 12-13, 22.

⁷⁶ Deposition of William Hunt (July 25, 2003), at 21.

⁷⁷ Id. at 63.

⁷⁸ Id.

⁷⁹ Deposition of David Vicevich (Dec. 19, 2002), at 55-56.

A former Ravalli defender who married a local judge's former assistant reported that after he and his wife began dating, the judge made statements to the press and the county commissioners accusing the defender of spending too much time on his cases and filing too many motions. The following year, the County did not award the contract to that attorney but to a firm that made a low, flat-fee bid for the work.⁸⁰

Although the Flathead Chief Public Defender selects attorneys for inclusion on the assigned counsel panel, he consults with the Court Administrator and the County Attorney's Office before doing so.⁸¹ During his deposition, he stated that he generally evaluates applications based on his own personal knowledge.⁸² Experienced attorneys with significant backgrounds in criminal law who are known for zealous representation have been rejected in favor of lawyers recently out of law school.⁸³

Unfettered judicial control coupled with a lack of objective, publicized hiring criteria results in the hiring of attorneys based on considerations other than merit and, more disturbingly, the banishment of attorneys who test the prosecution's case against their client in an adversarial manner. In a legal community as small as Montana's, this type of judicial interference is likely to be widely known and acted upon among the lawyers themselves.

b. Attorney Compensation

In July 2003, the State issued policies pursuant to which all assigned counsel will be compensated at \$60 per hour for district court felony cases, an amount that is to cover expenses such as secretarial and paralegal services, office overhead and research materials.⁸⁴ A local district court judge, however, must approve all attorney bills before they are paid. It is also worth noting that the state conducted no studies or analyses in arriving at that rate and had no plans of doing so as of the date of this Report.⁸⁵

Prior to the state assumption of indigent defense costs, judges were also required to approve attorney bills prior to payment. According to the deposition testimony of many defenders, judges scrutinized bills for time they believed to be excessive and refused to pay additional compensation in difficult cases. Some public defenders ultimately decided not to waste their time applying for compensation they had little or no hope of receiving.

⁸⁰ Depositions of David Stenerson (Jan. 30, 2003), at 123-24, 148-152; Mark McLaverty (Aug. 26, 2003), at 63-65.

⁸¹ Deposition of Robert Allison (July 8, 2003), at 100.

⁸² *Id.* at 129-30, 157.

⁸³ *Id.* at 172-76.

⁸⁴ Deposition of R. James Oppedahl (March 25, 2004), at 115-116.

⁸⁵ *Id.* at 96-97, 116-17.

One attorney in Butte-Silver Bow, for example, testified that although she is entitled to additional compensation for complex cases, she no longer routinely applies for such funding after being denied it five times out of six. In her 20 years of practice as a public defender, she has only received additional compensation for a complex case once.⁸⁶ A county commissioner in Lake County testified that although public defenders in that county are entitled to additional compensation upon approval by a district court judge for good cause shown, such compensation has only been awarded “in one case possibly.”⁸⁷

Another public defender in Ravalli testified that he was initially denied additional compensation for representing a client at a sentencing review and received payment only after a prolonged dispute.⁸⁸ That same public defender was forced to engage in a series of fee disputes with the county when a judge (who was irate that the defender was dating his former assistant) improperly denied the defender’s bills.⁸⁹

c. Use of Investigators and Experts

To obtain funding for expert and investigative services, defense counsel in Butte-Silver Bow, Teton, Glacier, Flathead, Ravalli and Lake Counties must apply to the district court judges for permission. Defenders repeatedly testified that the courts limit their ability to employ such individuals.⁹⁰

A Teton County defender testified that he uses investigators rarely because “you know, I don’t think on a simple case the court is going to approve one . . .”⁹¹

A Butte-Silver Bow County defender stated that when she asks to hire expert witnesses for sentencing purposes, “I’ve basically had to explain why their presence is necessary as opposed to just reading a pre-sentence report or having the State’s psychologist or whatever be there for sentencing purposes.”⁹²

She also stated that she has had difficulty obtaining approval to hire investigators:

⁸⁶ Deposition of Deirdre Caughlin (Dec. 9, 2002), at 84-85.

⁸⁷ Deposition of Michael Hutchin (June 25, 2003), at 74.

⁸⁸ Deposition of David Stenerson (Jan. 30, 2003), at 88-90.

⁸⁹ *Id.* at 121-24.

⁹⁰ Depositions of Deirdre Caughlan (Dec. 9, 2002), at 139-40; Mark McLaverty (Aug. 26, 2003), at 279-81.

⁹¹ Deposition of Nathan Hoines (July 28, 2003), at 54-55.

⁹² Deposition of Deirdre Caughlan (Dec. 9, 2002), at 139.

“In terms of investigators, I know that both district judges generally, unless it’s a fairly low bill, will specifically tell me, either in the order or once they reviewed the investigator’s bill, that they believe that the investigator has either overcharged or that it’s a frivolous type of inquiry.”⁹³

“[My experience with a sitting district court judge]...has basically been that he’s really scrutinizing my requests for the investigator. I know he’s complained about [my investigator’s] bills on a couple of occasions and has confronted [my investigator] on those.”⁹⁴

A Ravalli County defender stated “I got the feeling that, you know, unless I could show in black-and-white that this person is critical or absolutely necessary in a case that I would be denied.”⁹⁵ He added that he considered judicial scrutiny of this sort “crippling,” and stated that even though he was capable of conducting his own investigations, the fact that he was defense counsel prevented him from testifying to anything he found.⁹⁶

In some counties, the court limits the dollar amount it will initially approve for investigatory or expert services. For example, in Flathead County, defenders testified that they are limited to \$500 for such services; in Ravalli, they are limited to between \$500 and \$1000; and in Lake County, there is a cap for investigative but not expert services.⁹⁷ Defenders must reapply to the judges for permission to retain services if the cost of those services exceeds the amount permitted by the court.⁹⁸

In one instance, a judge in Ravalli County refused to pay the full cost of the bill of an expert witness hired by a defender for trial. The judge authorized the payment of only \$100 out of a \$1200 bill.⁹⁹

Judicial control of investigatory and expert resources has a number of consequences that impede the defense function in a legal community as small as

⁹³ Deposition of Deirdre Caughlan (Jan. 15, 2003), at 201-202.

⁹⁴ Id. at 199.

⁹⁵ Deposition of David Stenerson (January 30, 2003), at 66-8.

⁹⁶ Id.

⁹⁷ Deposition of Benjamin Anciaux (July 14, 2003), at 58-59 (judges place caps on the defenders’ ability to hire an investigator); *but, c.f.*, Deposition of Larry Nistler (July 11, 2003), at 101 (defender will request court permission to use an investigator and voluntarily include a \$1000-\$2000 limit on the initial request).

⁹⁸ Depositions of David Stufft (Dec. 5, 2003), at 57-58; Sean Hinchey (July 16, 2003), at 41-42; Glen Neier (July 16, 2003), at 69-70; Mark McLaverty (Aug. 26, 2003) at 159-60 (district court judges limit investigators to \$500 or \$1000 up-front and require further application for reimbursement for additional expenditures); Deirdre Caughlan (Dec. 9, 2002), at 149-50.

⁹⁹ Deposition of Mark McLaverty (Aug. 26, 2003), at 120-21.

Montana's. When defense counsel asks permission from the judges, he or she must often expose elements of his or her defense strategies to support that request. In fact, many defenders testified at their depositions that their practice is to inform the prosecutor when they seek such services as well as the judge.¹⁰⁰

Moreover, judicial control discourages defenders from using these crucial services as their professional opinion dictates. By denying defender requests, scrutinizing or cutting bills, and placing limits on the use of these services, judges send the message that these services are luxuries rather than the basic tools of an adequate defense.

This message apparently has been heard loud and clear. Although some defenders contend that judges never deny their requests for investigators or experts, the same defenders state that they rarely ask for one.¹⁰¹

d. Other Types of Judicial Interference

In addition to judicial control over defense appointments, compensation and resources, NLADA discovered additional court practices that impede the defense function. Some defenders reported that judges pressure them to pursue plea bargains, to handle their cases in a manner that is convenient to the court, or to refrain from vigorously pursuing justified defense strategies. These pressures are of great concern whether or not the defenders accede to them. They send a message that the court, rather than the defender and client, is the arbiter of the defense strategy. Defenders who resist these pressures understand that they must do so tactfully or face future reprisals against them or their clients from the court.

For example, one defender stated in his deposition that, on at least two occasions, a Butte-Silver Bow District Court judge cautioned him, out of court, about his representation in individual cases. In both instances, according to the defender, the judge implied that he had already decided the client's guilt and/or sentence based on evidence that he had seen *ex parte*, prior to any type of hearing or trial.¹⁰²

Another Butte-Silver Bow defender testified that judges have criticized her decisions to take cases to trial:

“I have gotten the impression that on some of the cases I have taken to trial, they felt, and that being Judge Whelan and Judge Purcell, that the trial was

¹⁰⁰ See, e.g., Depositions of Deirdre Caughlan (Jan. 15, 2003), at 199; Terry Matt (July 24, 2003), at 191-193; Ben Anciaux (July 14, 2003), at 53-54; Glen Neier (July 16, 2003), at 72.

¹⁰¹ Depositions of Janna Gobeo (Aug. 13, 2002), at 148-49; Ben Anciaux (July 14, 2003), at 51; Terry Matt (July 24, 2003), at 88; Colleen Ambrose (July 9, 2003), at 63-64.

¹⁰² Deposition of David Vicevich (Dec. 19, 2002), at 167-85.

frivolous and it should have not been held, that my clients have accepted, or should have accepted plea offers. And that's been kind of the undertone.”¹⁰³

A third Butte-Silver Bow attorney stated that he made it his practice to ask the judges for advice on how to handle his cases.¹⁰⁴

A Missoula County attorney who formerly contracted with the Public Defender's Office to take conflict cases stated that a judge inappropriately reprimanded him for vigorously cross-examining a public defender alleged to have provided constitutionally ineffective legal assistance to a client:

“[The judge] said I was being a son of a bitch and I was being outrageous, what I was doing with [the attorney on the stand] . . . He said he never hoped to see that kind of thing in his court again and various other comments like that. He said it was unforgivable.”¹⁰⁵

In Butte-Silver Bow and Ravalli Counties, some judges direct clients to maintain weekly contact with their defenders between court dates as a condition of their pre-trial release.¹⁰⁶ The judges then require their attorneys to report to the court and the prosecutor when their clients do not maintain such contact. Attorneys who fail to make such reports subject their clients to a revocation of their pre-trial release.

An ethics opinion by the National Association of Criminal Defense Lawyers (NACDL)¹⁰⁷ recently concluded that the practice of requiring a client to maintain contact with his or her attorney violates the client's right to confidentiality, a defender's duty of loyalty to his or her clients, and the attorney-client privilege.¹⁰⁸ It also found that this practice created an impermissible conflict of interest by compelling the defender to become a witness against clients prosecuted for failing to appear or maintain contact.¹⁰⁹

According to defense lawyers in the jurisdiction, at least one Ravalli judge orders the prosecutor, the defense lawyer, and the client in every criminal case to meet in

¹⁰³ Deposition of Deirdre Caughlan (Dec. 9, 2002), at 150.

¹⁰⁴ Deposition of Frank Joseph (December 12, 2002), at 30-31.

¹⁰⁵ Deposition of William Boggs (March 16, 2004), at 61-62.

¹⁰⁶ *See, e.g.*, Deposition of Larry Mansch (Aug. 6, 2003), at 481 (“virtually every client is ordered by the Court to check in with my office once a week”).

¹⁰⁷ NACDL Ethics Advisory Committee, *Formal Opinion 03-03*(July 2003) (hereinafter “NACDL Opinion”). This opinion may be found on the Internet at: [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicsopinions/\\$FILE/op03-03.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicsopinions/$FILE/op03-03.pdf).

¹⁰⁸ *Id.* at 10.

¹⁰⁹ *Id.*

person, on a date determined by the judge, to negotiate a plea bargain and report back to the court.¹¹⁰ This practice compromises the independence of the defense function by imperiling the client's right to remain silent, preventing defenders from timing their negotiations with the prosecutors strategically (i.e., after they have had an opportunity to pursue potentially exculpatory or mitigating facts), forcing the defense to preview its case, and permitting the prosecutor to "size up" the client and her demeanor and explore the client's version of facts and events prior to trial.

"[A]t the face-to-face meeting itself you have the bizarre happening event where your client, who has the right to remain silent, is in the office of a County Attorney who is prosecuting him or her. And in essence, they are sizing him up or listening to him speak or telling them how strong they think their case is and here's how we should resolve it, when they should be doing that through the attorney. And it can be intimidating. And what about my client's right to remain silent? And they get around that in Ravalli County by saying, well, your client doesn't have to say anything. True enough. And I say, well, if my client doesn't have to say anything, why does he have to be there. Don't have a good answer for that. The judge has ordered us to negotiate."¹¹¹

2. Lack of Administrative Independence of the Missoula Public Defender Office

The role of the county public defender office should be one that is necessarily independent from county government and adverse to that of the county prosecutor. Because Montana has no policies to ensure the independence of the defense function, the Missoula County Public Defender Office is often compromised by politics and county policy. While the Chief Public Defender has asserted that county government does not control the practice of her defenders, she often aligns herself with the county's interests to the detriment of her staff and her clients.

For example, when the County Commissioners threatened to cut the staff of the Public Defender's Office by one felony attorney and the district court judges issued an order prohibiting the County Commissioners from doing so, the Chief Public Defender sided with the County Commissioners:

"I felt the fix was in and I didn't want to get caught in the crossfire between the judges and the commissioners over who could and could not make financial decisions for the County. I don't want to be there. I was okay where I was. And I went to the judges and asked them to rescind the order and they did."¹¹²

In defending her decision, she stated:

¹¹⁰ Deposition of Larry Mansch (Aug. 6, 2003), at 424.

¹¹¹ *Id.*, at 426.

¹¹² Deposition of Margaret Borg (Aug. 8, 2003), at 44.

“I’m a department head for Missoula County. When the commissioners say to me, ‘We will fund you to the best of our ability, but we are in dire financial straits and we are requiring everybody in Missoula County to take a hit based on the percentage of your budget, here’s your dollar amount, take a hit,’ I have to do that. That’s part of the nature of doing my business. I have no choice. I’m either a player or I’m an obstructionist, and I think I’ve had success over the years being a player and understanding that climate.”¹¹³

“My office exists as a branch of Missoula County government to defend indigent criminal defendants. That means if there’s one, we do it; that means if we get 1500 new cases a year, we do it.”¹¹⁴

In addition, she appears to place the interests of the prosecutors or the jail guards above those of her clients. For example, pursuant to an “open file discovery” agreement between the Missoula Public Defender’s Office and the County Attorney’s Office, defenders make informal requests for discovery materials¹¹⁵ and do not make formal motions.¹¹⁶ In fact, according to some public defenders, the Chief Public Defender actively discourages formal discovery motions.¹¹⁷ Without formal motions, however, there is little or no judicial recourse if discovery materials are intentionally withheld or inadvertently omitted and no written record for appeal.¹¹⁸ As one defender testified:

“[The open file policy] caused a problem once where [another public defender] had been asking for a certain piece of discovery for months and the trial date was coming close. And he tried to go to the judge and get a motion *in limine* to have evidence excluded and she said, sorry, you never did a formal motion to compel. And he tried to explain the policy, basically, that we don’t do those. And she said, well, sorry.”¹¹⁹

¹¹³ *Id.*, at 44-45.

¹¹⁴ *Id.*, at 310.

¹¹⁵ *Id.*, at 351-54.

¹¹⁶ *Id.*, at 353-354; Deposition of Susan Boyer (Aug. 20, 2003), at 122; Colleen Ambrose (June 9, 2004), at 124.

¹¹⁷ Depositions of Colleen Ambrose (June 9, 2004), at 124; Susan Boyer (Aug. 20, 2003), at 123-124; Robert Henry (Aug. 4, 2003), at 107.

¹¹⁸ Deposition of Robert Henry (Aug. 4, 2003), at 106-08.

¹¹⁹ Deposition of Susan Boyer (Aug. 20, 2003), at 122.

One defender thinks that the open file policy was devised to reduce the number of motions that come before the judge.¹²⁰ Another believes that it was created at the behest of the prosecutor:

“I think, you know, it’s my sense [the Chief Public Defender] kind of hashed out this policy with the county attorney’s office and she’s kind of agreed that that’s the way it will be done, you know. And that filing written discovery motions, the County Attorney’s office doesn’t like it and, you know, therefore, she discourages it.”¹²¹

Regardless of the motivation, discouragement of formal motion practice can have serious consequences for clients. For example, one public defender failed to make any motions to compel for outstanding state discovery even after 4 months had passed since she made her original discovery requests to the state.¹²²

Similarly, to make things “easier for the jail personnel,” defenders in the Missoula Public Defender Office do not request that their incarcerated clients attend court hearings unless absolutely necessary.¹²³

One defender reported that the Missoula County Attorney reviews the budget of the Public Defender Office.¹²⁴ On one particular occasion, the defender stated the County Attorney questioned the Chief Public Defender about where she had obtained funding to send a number of defenders to trial training.¹²⁵ “We are the stepchildren of the county attorney’s office. The county attorney goes over our budget. I mean, it’s amazing.”¹²⁶

C. Attorney Qualification & Training (ABA *Ten Principles*, Numbers 6 & 9)

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

¹²⁰ Id. at 122-23.

¹²¹ Deposition of Robert Henry (Aug. 4, 2003), at 107.

¹²² Deposition of Alice Kennedy (June 10, 2004), at 171.

¹²³ Deposition of Bruce Gobeo (Aug. 12, 2003), at 188.

¹²⁴ Deposition of Bruce Gobeo (Aug. 12, 2003), at 244-46.

¹²⁵ Id. at 245-47.

¹²⁶ Id., at 44.

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.

1. Attorney Qualification

All attorneys have an ethical obligation to accept only those cases for which they know they have the knowledge and experience to offer zealous and quality representation.¹²⁷ Principle Number 6 integrates this duty together with various systemic interests – such as efficiency and the avoidance of attorney errors, reversals and retrials, findings of ineffective assistance of counsel, wrongful convictions and/or executions, and attendant malpractice liability – and restates it as an obligation of the indigent defense system within which the attorney is engaged to provide legal representation services.

Typically, this requirement is implemented by classifying attorneys according to their years and types of experience and training, which correspond to the complexity of cases, the severity of charges and potential punishments, and the degree of legal skills generally required. Attorneys can rise from one classification to the next by accumulating experience and training. Assigned counsel programs commonly maintain various “lists” from which attorneys are selected according to the classification of the offense.¹²⁸ Public

¹²⁷ See, e.g., ABA Model Rules of Professional Conduct, Rule 1.1; NLADA Performance Guidelines, 1.3(a) *supra* n.14.

¹²⁸ The indigent defense system in **Massachusetts** stands as an excellent example of how this works. At the local level, where private bar counsel provides most indigent defense services, attorneys accepting cases must first be certified by CPCS to take cases. To accept District Court cases (misdemeanors and concurrent felonies), attorneys must apply and be accepted into one of the bar county advocate programs and attend a five-day state-administered CLE seminar offered several times throughout the year.

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

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

All newly certified attorneys must participate in a mandatory program of mentoring and supervision overseen by the Bar Advocacy Programs. Attorneys seeking appointments to children and family law matters, for example, must meet with their mentors prior to any new assignments and bring writing samples to help develop a skills profile. The mentors and mentees are required to meet at least four times per year, and mentors are instructed to follow CPCS’ performance guidelines (below) in assessing their mentees’

defender programs place attorneys in different divisions of the office. Since death penalty litigation is uniquely complex and demanding, attorney qualifications are a common element of standards for capital defense, whether through statute, state supreme court rule, or indigent defense system directive.¹²⁹

In several of the counties included in this Report, attorneys are often assigned to cases pursuant to strict rotational systems with little regard for their level of experience.

A Missoula defender attorney testified that he was assigned a rape case in which the client was facing a life sentence although he had never handled such a case before.¹³⁰ A Butte Silver-Bow defender reported that he too was assigned a rape case despite never having handled one and had to train himself to handle the matter.¹³¹

Another Missoula defender testified that despite being hired as a “trainee” with almost no criminal experience, she immediately inherited a departing public defender’s full caseload of 130-150 cases, which included assault and felony DUIs.¹³² Yet another testified that his training consisted of following another attorney around for roughly a week, after which “they threw me into the fire.”¹³³

In Flathead County, new attorneys are routinely assigned to complex robbery, burglary and drugs cases, despite their lack of experience with such cases.¹³⁴ Another Flathead attorney said new attorneys are subjected to “the baptism of fire.”¹³⁵

A Glacier attorney testified that when he began accepting appointed cases, he had no litigation experience whatsoever as a fully licensed lawyer.¹³⁶

2. Attorney Training

abilities. Participation in the program is mandatory for an attorney’s first eighteen months, and may continue longer at the discretion of the mentor.

¹²⁹ *OJP Compendium*, Vol. 3
(www.ojp.usdoj.gov/indigentdefense/compendium/standardsv3/v3b.htm#Top).

¹³⁰ Deposition of Colleen Ambrose (June 9, 2004), at 42-44. See also Deposition of Bruce Gobeo (Aug. 12, 2003), at 213.

¹³¹ Deposition of Frank Joseph (December 12, 2002), at 90-91.

¹³² Deposition of Susan Boyer (Aug. 20, 2003), at 18-19, 22-23.

¹³³ Deposition of Robert Henry (Aug. 4, 2003), at 64.

¹³⁴ Deposition of Sean Hinchey (July 16, 2003), at 54.

¹³⁵ Deposition of Mark Sullivan (July 18, 2003), at 69.

¹³⁶ Deposition of William Hunt (July 25, 2003), at 10.

Indigent defense system best-practice models uniformly recognize the importance of a training, education, and development plan for the staff of the criminal defense delivery system. *ABA Ten Principles*, Number 9 states:

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.

There is no orientation program for newly hired indigent defense attorneys, no systematic and comprehensive training, and no technical assistance for any of the attorneys in any of the counties NLADA has visited to date.¹³⁷ Assigned counsel in Glacier, Butte-Silver Bow, Lake, Flathead, Ravalli, and Teton receive no county or state supported training, and they receive almost no criminal defense advocacy training on their own. Without training, attorneys are left to determine on their own what constitutes competent representation and will often fall short of that mark. This is especially true when there are no practice guidelines in place and performance is not monitored on an on-going basis.¹³⁸

¹³⁷ Depositions of Robert Allison (July 8, 2003), at 38-41; Benjamin R. Anciaux (July 14, 2003), at 59-60; Susan Boyer (Aug. 20, 2003), at 18-19, 22, 23, 53, 57 and 105-107; William Carey (Sept. 30, 2003), at 79; Bruce Gobeo (Aug. 12, 2003), at 94, 97, 101-102 and 246; Janna Gobeo (Aug. 13, 2003), at 14-18, 141-44, 164-65, and 239; Robert Henry (Aug. 4, 2003), at 64-65, 71-74, 83-84, 121-23; Sean Hinchey (July 16, 2003), at 32-33, 54; William Hunt (July 25, 2003), at 25, 27, 69, 89, 90; Larry Mansch (Aug. 6-7, 2003), at 57, 70-71, 196; Terryl Matt (July 24, 2003), at 45, 47, 116, 152; Laurie McKinnon (Aug. 1, 2003), 72-74; Mark McLaverty (Aug. 26, 2003), at 22-24, 33-34, 132; Glen Neier (July 16, 2003), at 16-18, 49, 50, 73, 92; Larry Nistler (July 11, 2003), at 101-03; Robert Olson (July 29, 2003), at 19-20, 62-64; Kelli Sather (Jan. 31, 2003), at 87, 89; Wade Zolynski (July 9, 2003), at 34-35, 39-42, 46-47, 126.

¹³⁸ Earlier, through the ABA Standards for Criminal Justice, Providing Defense Services, Standard 5-1.5, “Training and professional development” (3rd Ed. 1992), (hereinafter “ABA Standard for Criminal Justice: Providing Defense Services”), the ABA adopted this statement:

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’s *Performance Guidelines for Criminal Defense Representation* (1995),¹³⁸ Guideline 1.2, *supra* n.14, endorses the following training requirements:

- (a) To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Where appropriate, counsel should also be informed of the practices of the specific judge before whom a case is pending.
- (b) Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation.

Although attorneys in Missoula are encouraged to go to Continuing Legal Education Programs, which are paid for by the county, and required to become members of the NACDL, these guidelines have not been formalized in writing.¹³⁹ Similarly, Missoula's allocation of money toward attorney training has resulted in little to no actual training in fact. Current and former staff attorneys report that newly hired attorneys are trained "on the fly" and more experienced attorneys receive little, if any, criminal law training. A former public defender convened two or three training sessions at the Missoula Public Defender Office, using his experiences at the federal defenders' office in Spokane, Washington, as a guide. The sessions stopped, however, when he left the office for other employment.¹⁴⁰

Unlike comparable organizations in other states, the Montana Appellate Public Defender does not provide any form of training or legal updates from the Montana Supreme Court. The problem is compounded because, although the Montana Association of Criminal Defense Lawyers offers an annual seminar in criminal defense, the program is not adequate. Moreover, many defenders do not or cannot attend and instead satisfy their requirements by attending other types of continuing legal education programs (CLEs).¹⁴¹

In fact, as noted earlier in this Report, when Missoula did send several attorneys to a trial training session, the head County Attorney reviewed the public defenders' office budget and expressed concerns about the cost of the training, despite the fact that the county pays for comparable training for county attorneys.¹⁴²

As a result, newly hired attorneys have no opportunity to acquire and maintain the skills and legal knowledge necessary to test the prosecution's case. Experienced indigent defense counsel have no formal opportunity to hone their skills and remain knowledgeable of significant changes in the law unless they personally fund the substantial travel and registration expenses required to participate in continuing education and training programs outside the State.

The lack of training and state support can have serious consequences for clients. One Missoula attorney testified that the office's failure to provide adequate updates on major developments in the law has resulted in her being inadequately prepared.¹⁴³

¹³⁹ Deposition of Mark McLaverty (August 26, 2003), at 43-45.

¹⁴⁰ Depositions of Susan Boyer (Aug. 20, 2003), at 53-54; Robert Henry (Aug. 4, 2003), at 71-74; Wade Zolynski (July 9, 2003), at 35-37.

¹⁴¹ Depositions of Robert Allison (July 8, 2003), at 41; Brad Belke (Dec. 16, 2003), at 173; Sean Hinchey (July 16, 2003), at 33; William Hunt (July 25, 2003), at 89-91.

¹⁴² Deposition of Bruce Gobeo (Aug. 12, 2003), at 246-47.

¹⁴³ Deposition of Janna Gobeo (August 13, 2003), at 143-44.

That CLEs are required for all attorneys does not ensure that public defenders receive training meaningful for their indigent defense practices. Although Montana attorneys are required to attend 15 hours of CLEs annually, there is no requirement that public defenders attend CLEs relevant to their criminal defense practice. For example, one attorney in Butte-Silver Bow testified that his only ongoing professional training is via CLEs that relate not to criminal defense, but rather areas he deals with in his private practice, like family law.¹⁴⁴ Another public defender in Butte-Silver Bow testified that he has not attended any CLE courses in criminal law since summer 2001, when he was a clerk.¹⁴⁵

One Lake County public defender noted that the Montana Criminal Defense Association holds a CLE in Chico Hot Springs every year, but he testified that he usually “can’t take three days off” to attend.¹⁴⁶ Even if he could take the necessary time away from his practice – always difficult for a solo practitioner – the county would not reimburse him for any CLE-related expenses.¹⁴⁷

Finally, with respect to death penalty cases, as of July 1, 2003, only 2 or 3 of the approximately 40 attorneys regularly employed as indigent defense counsel in Butte-Silver Bow, Missoula, Glacier, Teton, Flathead, Lake, and Ravalli Counties had the experience necessary to be certified as a capital defender. Pursuant to standards recently set by the Montana Supreme Court, capital defenders must have had significant experience, within the last five years, trying criminal cases to conclusion. At least one of those cases must have been a capital case or a case involving charges of or equivalent to deliberate homicide.

In contrast to the complete state failure to offer adequate training to its public defenders, Montana has created an office, headed by a county attorney training coordinator, specifically to provide training and technical assistance to county attorneys on a regular basis.¹⁴⁸ This office conducts two training sessions a year for county attorneys and provides trial assistance when asked.¹⁴⁹ The training session on criminal law typically runs for 14 CLE hours and fees are paid by the counties.¹⁵⁰ County attorneys and their staff also receive periodic newsletters on recent developments in the law.¹⁵¹

¹⁴⁴ Deposition of Brad Belke (Jan. 15, 2003), at 170-71, 173; Robert Allison (July 8, 2003), at 40-41.

¹⁴⁵ Deposition of David Vicevich (Dec 19, 2002), at 34.

¹⁴⁶ Deposition of Larry Nistler (July 11, 2003), at 102.

¹⁴⁷ Id. at 102-03.

¹⁴⁸ Mont. Code Ann. § 44-4-103 (2003), MCA; Deposition of John Connor August 21, 2002, at 7.

¹⁴⁹ Depositions of John Connor (August 21, 2002) at 7; Deirdre Caughlin (Dec. 9, 2002) at 153.

¹⁵⁰ Id. at 14, 16

¹⁵¹ Id. at 33-35.

D. Client Eligibility & Timeliness of Appointment (ABA *Ten Principles*, Number 3)

The third of the ABA's *Ten Principles* requires indigent defense systems to:

Screen clients for eligibility, then assign and notify counsel of their appointment within 24 hours. Counsel should be furnished upon arrest, detention, or request.

1. Eligibility Determinations

All states restrict publicly funded defense services to those financially unable to retain counsel on their own behalf. *Gideon* requires no more. However, in order to ensure that indigent defendants have access to the representation to which they are constitutionally entitled, systems for screening financial eligibility must include three procedural safeguards.

First, pre-determined financial criteria related to client resources and local economic factors must be in place. Second, national standards direct that client eligibility determinations be performed by public defense agencies or a neutral screening agency of the court.¹⁵² A financial “disqualification” should be subject to review and reversal by a judge. Third, these determinations must occur in a timely manner.

The manner in which defendants are screened for indigency and the timing of the assignment of counsel can have a significant impact on the quality of defense provided. Screening mechanisms that are too restrictive prevent defendants who lack the financial means from having any attorney at all. Systems lacking pre-determined criteria and neutral decision-making authority expose indigent defendants to arbitrary denials and are potentially vulnerable to manipulation and abuse. Timely eligibility determinations are necessary so that a public defender may begin work early in the life of a case, which is critical for effective representation.

In Montana, there are no uniform policies or procedures governing eligibility for defender services, and the screening of defendants for indigency varies by county. In some places, the judges alone determine indigency. In Flathead County, this function is delegated to the defenders themselves. In Missoula County, the Public Defender's Office re-screens clients referred to them by the justice courts.¹⁵³ In all cases, the financial standards are unclear and, to a large extent, the decisions appear to be made on an ad hoc basis.

¹⁵² NSC, Guideline 1.6. Cf. ABA *Defense Services*, Standard 5-7.3. For a fuller discussion of eligibility standards employed in the United States, please see Appendix A.

¹⁵³ Deposition of Wade Zolynski (July 9, 2003), at 140-42.

The lack of standards not only can result in erroneously denied counsel, but also exposes the system to potential abuse. Testimony reflects a number of incidents in which public defenders appeared to use the lack of defined standards to silence, manipulate, or eliminate clients. In Ravalli County, a client reported that his public defender threatened to disclose to the court facts that might have disqualified the client from receiving defender services unless the client paid the attorney a \$2000 retainer.¹⁵⁴ In Missoula County, a client who wrote several letters to his public defender expressing frustration over, among other things, her failure to meet with him, reported that he was subsequently told that the Office intended to reconsider whether he was in fact qualified for indigent defense services.¹⁵⁵

Although the NLADA did not find evidence that these practices were widespread, systems in which the criteria for determining financial eligibility are as ill-defined as those we saw across Montana are vulnerable to this kind of abuse.

2. Timeliness of Assignment of Counsel

The requirement that representation be provided promptly to criminal defendants is based on the constitutional principle that the right to counsel attaches at “critical stages” that occur before trial, such as custodial interrogations,¹⁵⁶ post-indictment lineups,¹⁵⁷ and preliminary hearings.¹⁵⁸ Most national standards exceed the constitutional minimum and require that representation be provided upon detention or request, even though formal charges may not have been filed. Timely assignment of counsel facilitates early interviews, investigation, and resolution of cases, and avoids discrimination between the outcomes of cases involving indigent and non-indigent defendants.¹⁵⁹ Under the ABA *Ten Principles*, counsel should be furnished upon arrest, detention, or request, and assigned and notified of their appointment within twenty-four hours.

The promptness of the assignment of and initial consultation with counsel delimits the speed with which the attorney may commence representation of the client, which in turn influences important pretrial rights as well as, for example, the duration of pretrial detention. National standards caution that a delay in the initial interview and in the commencement of any investigation hinders overall case preparation. Memories may fade, witnesses may become unavailable for interviews, the alleged crime scene may change, and evidence may be contaminated or destroyed.

¹⁵⁴ Deposition of David Stenerson (Jan. 30, 2003), at 217.

¹⁵⁵ Deposition of David Chase (Feb. 5, 2004), at 37, 41-48.

¹⁵⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁵⁷ *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967).

¹⁵⁸ *Coleman v. Alabama*, 399 U.S. 1 (1970).

¹⁵⁹ *ABA Providing Defense Services*, commentary to Standard 5-6.1, at 78-79.

Unnecessary delays in the initiation of the attorney-client relationship also produce a variety of detrimental effects on the rest of the criminal defense system. For example, delays may result in clients entering uncounseled guilty pleas to charges for which they have defenses. This results not only in inappropriate punishment, but also excessive appellate reversals and the expense of new trial-level proceedings. These cases delay the processing and conclusion of criminal matters to the detriment of the aggrieved parties, the defense, the prosecution, and the courts as a whole. Early representation by counsel presents a cost-effective means to promote justice.

Montana public defenders acknowledge the importance of initiating the attorney-client relationship as soon as possible in order to explore alternatives to incarceration, explain legal procedures, obtain facts relevant to the criminal charges, initiate investigation, or negotiate plea settlements.¹⁶⁰ Yet, there are no uniform policies or procedures governing the timeliness of appointment of counsel, or the time period within which counsel must make initial contact. As a result, practices vary by county.

Because the Ninth Judicial District Judge travels the circuit in Glacier, Teton, and two other counties, attorneys may not be assigned to a case until two or three weeks after the date of arrest.¹⁶¹ In Butte-Silver Bow County, attorneys may not receive appointments until one to two weeks after arrest. According to one attorney, “[s]ometimes people slip through the cracks.”¹⁶² In Ravalli County, a client (also charged with offenses in Glacier and Cascade Counties) waited approximately three months for the appointment of counsel.¹⁶³

Even in those instances in which counsel is appointed in a timely manner, attorneys often do not make timely contact with the client. Both public defenders and public defender clients report that incarcerated clients in Glacier, Butte-Silver Bow and Ravalli Counties may often wait several days after counsel is appointed before their initial meetings with their attorneys.¹⁶⁴

In Missoula, it could be a matter of weeks. According to at least one attorney, it takes roughly one week from the time the Public Defender Office is appointed counsel

¹⁶⁰ See e.g., depositions of Vanessa Ceravolo (July 17, 2003), at 24-26; Bruce Gobeo (Aug. 12, 2003), at 77-83.

¹⁶¹ Deposition of Robert Olson (July 29, 2003), at 90-91.

¹⁶² Deposition of David Vicevich (Dec. 19, 2002), at 209-210.

¹⁶³ Deposition of Laurie McKinnon (Aug. 1, 2003), at 157-59.

¹⁶⁴ Depositions of William Hunt (July 25, 2003), at 43-44; Kenneth Ingraham (Feb. 26, 2004), at 29-30; David Vicevich (Dec. 19, 2002), at 157, 209-10; Larry White (Feb. 2, 2004), at 13; Deirdre Caughlan (Dec. 9, 2002), at 41, 193; Patrick McGee (Jan. 16, 2003), at 53-54; Jack Morris (Dec. 18, 2002), at 247-48; Frank Joseph (Dec. 12, 2002), at 135.

before the Office assigns a case to an individual attorney.¹⁶⁵ When an attorney resigns (which happens frequently), it can take the Office weeks to reassign that attorney's cases.¹⁶⁶ Once assigned, Missoula attorneys often do not see the client for another two to three weeks.¹⁶⁷

The effects of the high turnover in the Missoula Public Defender Office on continuity of representation and the length of time clients must spend in pre-trial detention is of particular concern. One Missoula attorney testified that in the spring of 2004 alone, the office lost three or four attorneys within a relatively tight time frame.¹⁶⁸ In fact, the Missoula Chief Public Defender testified that as of June 11, 2004, her office had only seven attorneys, with four vacancies that had yet to be filled.¹⁶⁹

One of the public defenders in the office testified that the transitioning of caseloads among attorneys often necessarily resulted in lengthening the amount of time clients spent in detention and the amount of time cases took to be resolved.¹⁷⁰ Another testified that she appealed to the Chief Public Defender for caseload relief when there were only three vacancies in the office but nothing was done.¹⁷¹ Yet another testified that after she inherited between 90 and 100 cases from a departing public defender and had to transition her own caseload to another attorney, she did not review the case files for her new cases "except as they came up" and did not send any notices to her new clients informing them that she was their new attorney.¹⁷² It was also this attorney's understanding that after the departure of a public defender and prior to the assignment of that defender's cases to another attorney, correspondence from clients would largely be left in an unopened pile.¹⁷³

When the initial visit does take place, it may be very abbreviated. Substantive conversations must wait until subsequent meetings. A Butte-Silver Bow attorney stated that he purposefully asks his clients not to tell him the facts of their case at the initial meeting. He waits to have such conversations until he receives discovery from the

¹⁶⁵ Deposition of Janna Gobeo (Aug. 13, 2003), at 174-75.

¹⁶⁶ Deposition of Candace Bergman (Feb. 9, 2004), at 104.

¹⁶⁷ Deposition of Janna Gobeo (Aug. 13, 2003), at 176-77. *See also* deposition of Bruce Gobeo (Aug. 12, 2003), at 179.

¹⁶⁸ Deposition of Alice Kennedy (June 10, 2004), 29-30.

¹⁶⁹ Deposition of Margaret Borg (June 11, 2004), 401.

¹⁷⁰ Deposition of Alice Kennedy (June 10, 2004), at 25, 111.

¹⁷¹ Deposition of Colleen Ambrose (June 9, 2004), at 44-45.

¹⁷² *Id.* at 101-102, 112.

¹⁷³ *Id.* at 114-115.

County Attorney, something that often takes between one and three weeks.¹⁷⁴ According to one Teton County attorney, “[n]ormally, an initial meeting, you don’t really have time, you know, if it’s in the courthouse, to discuss anything about the case.”¹⁷⁵

These departures from the national standards compromise the attorney’s ability to explore release possibilities with indigent defendants, develop the facts of the case or a defense strategy, explain upcoming legal proceedings, or negotiate settlement, to the harm of all parties involved.

E. Time to Meet with Clients & Confidentiality **(ABA *Ten Principles*, Number 4)**

It almost goes without saying that adequate representation requires the development of a meaningful attorney-client relationship. Development of this relationship requires, at the very least, that attorneys set aside sufficient time to meet with clients and discuss their cases in a private setting. Principle 4 recognizes the critical nature of these meetings by requiring that indigent defense systems:

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. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.

1. Confidentiality

It is common, even when counsel is retained, for individuals charged with crimes to distrust their lawyers. When lawyers are assigned to indigent defendants, this distrust is further fueled by suspicions concerning the attorney’s loyalties and dedication. Private, unpressured consultation between the attorney and client is essential to build and maintain trust. This is especially critical during the early stages of representation. The attorney-client privilege may only be maintained when conversations about the case are conducted in private.

In all seven counties, public defenders appeared to have sufficient access to private meeting spaces to consult with clients. The Missoula Public Defender Office and most assigned private counsel offices visited by NLADA had adequate private office space for client interviews. While NLADA did not visit jail facilities in each location, there is substantial evidence that reasonably private jail interview space exists.

¹⁷⁴ Deposition of Frank Joseph (Dec. 12, 2002), at 133-34, 143.

¹⁷⁵ Deposition of Nathan Hoines (July 28, 2003), at 129.

NLADA, however, observed and heard accounts of attorneys interviewing clients about critical aspects of their cases in courtrooms (often in the jury box), minutes before or during hearings,¹⁷⁶ in close proximity to court personnel, bailiffs and other counsel.

The failure to ensure confidentiality is harmful whenever it occurs and is usually attributable to inattentiveness or, more often, time constraints, rather than a shortage of space. Attorneys must be mindful that non-paying clients are as legally and ethically entitled to private conversations as paying ones.

2. Time to Meet With Clients

As reflected in the *ABA Ten Principles*, sufficient time to have regular, substantive consultations with clients is imperative to a viable indigent defense system. National standards require on-going substantive client meetings for several reasons.¹⁷⁷ First, as mentioned above, such meetings are necessary to develop trust between attorneys and their clients.¹⁷⁸ Second, public defenders must consult with clients in order to satisfy counsel's obligation to secure pretrial release if possible.¹⁷⁹ Third, they must meet with their clients to elicit relevant information to construct a meaningful defense.¹⁸⁰ Fourth, they must inform clients of their rights and the progress of the case.¹⁸¹ Finally, consultations enable clients to make informed decisions about the direction of their cases, including possibilities for negotiating a favorable plea agreement.¹⁸² For all of these reasons, sufficient attorney-client meetings are a condition precedent to adequate criminal representation.

¹⁷⁶ See, e.g., Depositions of William Hunt (July 25, 2003), at 116-17; Larry White (Feb. 2, 2004), at 17; Gary Ackermann (Feb. 3, 2004), at 21-22; Nathan Hoines (July 28, 2003), at 129.

¹⁷⁷ See e.g., ABA Standards for Criminal Justice: Prosecution Function and Defense Function, Standards 4-3.1(a), 4-3.2, 4-3.8, 4-5.1, 4-5.2(b); NLADA Performance Guidelines for Criminal Defense Representation, Guidelines 1.3(c), 2.2, 7.5; Mont. Rules of Prof'l Conduct, Rule 1.4 (2003).

¹⁷⁸ ABA Standards for Criminal Justice: Defense Function, Standard 4-3.1(a).

¹⁷⁹ NLADA Performance Guidelines for Criminal Defense Representation, Guideline 2.1 ("The attorney has an obligation to attempt to secure pretrial release of the client under conditions most favorable and acceptable to the client.").

¹⁸⁰ *Id.*, Guideline 7.5.

¹⁸¹ ABA Standards for Criminal Justice: Defense Function, Standard 4-3.6, 4-3.8; NLADA, *Performance Guidelines for Criminal Defense Representation* Guideline 1.3(c).

¹⁸² ABA Standards for Criminal Justice: Defense Function, Standard 4-5.1, 4-5.2, 4-6.1, 4-6.2.

Despite these universally accepted norms, there are no statewide policies or procedures in Montana for establishing and maintaining a working client relationship.¹⁸³ As a result, many Montana public defenders do not have regular and periodic substantive meetings with clients.¹⁸⁴

As of May 2004, Butte-Silver Bow County housed its detainees in Warm Springs Facility, 22 miles from Butte, causing attorneys to limit their visits with incarcerated clients to once or twice per month.¹⁸⁵ When asked how often he went to the jail, one attorney stated that “[i]t’s not easy” to find a place in his calendar to get there.¹⁸⁶ Another stated, “I didn’t like to go to Warm Springs.”¹⁸⁷

Many of these same attorneys will not accept collect phone calls from incarcerated clients, citing cost concerns.¹⁸⁸ One attorney estimated that the cost of a two to three minute collect call from the jail was roughly \$6 to \$7.¹⁸⁹

In Glacier and Teton Counties, public defenders spend several days each week traveling throughout the Ninth Judicial District for work-related reasons and thus are unable to return telephone calls made from the jails promptly.¹⁹⁰ One Glacier attorney stated that it might take him as long as a week to return a phone call, and that sometimes his clients “just have to track me down.”¹⁹¹ He further acknowledged that when he does meet with clients, his conversations are “pretty short,” inhibiting his ability to gather enough information from them.¹⁹² According to this attorney, “I just don’t have time to

¹⁸³ Depositions of Benjamin Anciaux (July 14, 2003), at 61; Laurie McKinnon (Aug. 1, 2003), at 75; Nathan Hoines (July 28, 2003), at 16-17; Deirdre Caughlan (Dec. 9, 2002), at 19, 97-100; Deirdre Caughlan (Jan. 15, 2003), at 164; Jack Morris (Dec. 18, 2002), at 206-207; Frank Joseph (Dec. 12, 2002), at 38; Brad Belke (Jan. 15, 2003), at 174-175; Patrick McGee (Jan. 16, 2003), at 37; Mark McLaverty (Aug. 26, 2003), at 53-54, 167.

¹⁸⁴ Depositions of Mark McLaverty (Aug. 26, 2003), at 79-80; Robert Olson (July 29, 2003), at 55; Daniel Finley (Feb. 2, 2004), at 52; Gary Ackermann (Feb. 3, 2004), at 60-61; Brad Belke (Dec. 16, 2002), at 64; David Vicevich (Dec. 19, 2002), at 157-159; Deirdre Caughlan (Dec. 9, 2002), at 72-73; Frank Joseph (Dec. 12, 2002), at 138-39.

¹⁸⁵ Depositions of Deirdre Caughlan (Dec. 9, 2002), at 41; David Vicevich (Dec. 19, 2002), at 159.

¹⁸⁶ Deposition of David Vicevich (Dec. 19, 2002), at 157.

¹⁸⁷ Deposition of Frank Joseph (Dec. 12, 2002), at 117.

¹⁸⁸ *See, e.g.*, Depositions of Deirdre Caughlan (Dec. 9, 2002), at 40-41; Frank Joseph (Dec. 12, 2002), at 57-8.

¹⁸⁹ Deposition of Frank Joseph (Dec. 12, 2002), at 57.

¹⁹⁰ Depositions of Robert Olson (July 29, 2003), at 55; William Hunt (July 25, 2003), at 44.

¹⁹¹ Deposition of William Hunt (July 25, 2003), at 88, 117-118.

¹⁹² *Id.*, at 120.

visit with Joe.”¹⁹³ He estimates that about one-quarter of the time, he meets with clients immediately prior to a court proceeding and only has “five minutes with [the] client” to explain to him what to expect.¹⁹⁴

At some point in 2000 or 2001, one of Ravalli County’s three primary public defenders almost completely stopped communicating in person with his clients or prosecutors.¹⁹⁵ He did not return phone calls and, according to one of his colleagues, neglected to tell his clients “what was going on.”¹⁹⁶ One client was arrested and incarcerated for failing to appear at a court hearing because her attorney failed to inform her of the date of the hearing.¹⁹⁷ Another client sat in jail for 5 ½ months, during which time he saw his attorney two or three times, for ten minutes each time.¹⁹⁸

In Missoula County, client meetings are sporadic, infrequent and generally weeks, if not months, apart. As one attorney noted, “I would like to visit every person every week, but I just don’t have time to do it.”¹⁹⁹ Although much of the inability of attorneys to meet with their clients can be attributed to caseload pressures as discussed in connection with Principle 5, the policies of the Missoula Public Defender also limit opportunities for attorney-client contact. As a matter of policy, the Missoula Public Defender Office will not accept phone calls from the jail.²⁰⁰ Also, as previously stated, Missoula public defenders generally do not bring incarcerated clients to court proceedings unless necessary.²⁰¹

F. Workload **(ABA *Ten Principles*, Number 5)**

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

¹⁹³ *Id.*, at 120.

¹⁹⁴ *Id.*, at 117.

¹⁹⁵ Depositions of Mark McLaverty (Aug. 26, 2003), at 79-82; William Fulbright (Feb. 6, 2003), at 34-35.

¹⁹⁶ Deposition of William Fulbright (Feb. 6, 2003), at 34.

¹⁹⁷ Deposition of David Stenerson (Jan. 30, 2003), at 182.

¹⁹⁸ *Id.* at 174-75.

¹⁹⁹ Deposition of Robert Henry (Aug. 4, 2003), at 133.

²⁰⁰ Depositions of Wade Zolynski (July 9, 2003), at 143; Susan Boyer (Aug. 20, 2003), at 117; Robert Henry (Aug. 4, 2003), at 97-98.

²⁰¹ Deposition of Bruce Gobeo (Aug. 12, 2003), at 187-188.

Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards²⁰² should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.

Regulating an attorney's workload is one of the simplest, most common and most direct safeguards against deficient representation for low-income people facing criminal charges. The National Advisory Commission on Criminal Justice Standards and Goals first developed numerical caseload limits in 1973 under the auspices of the U.S. Department of Justice. NAC Standard 13.12 recommends that the annual workload of an individual attorney not exceed: 150 felonies, or 400 misdemeanors, or 200 juvenile matters, or 200 mental health proceedings, or 25 appeals.

These numerical limits are based on NAC's estimate of the maximum number of cases a full-time attorney with appropriate para-professional and clerical support can handle and provide an adequate defense in each case. They assume that the attorney does not carry a mixed caseload (i.e. some combination of felonies, misdemeanors, juvenile matters, etc.), but instead handles one type of case throughout the year. In those jurisdictions where attorneys carry mixed caseloads, the standards can be prorated.

With slight modifications, these standards have been widely adopted and proven quite durable in the three decades since 1973.²⁰³ In many jurisdictions they have been refined, but not supplanted, by a growing body of methodology and experience for assessing "workload." Pursuant to these methodologies, workload is measured by assigning "weights" to different types of cases, proceedings and dispositions, depending on how much time is required to provide adequate representation in each one.²⁰⁴

²⁰² See n.35, *infra*.

²⁰³ See *Indigent Defense Caseloads and Common Sense: An Update* (NLADA, 1992), surveying state and local replication and adaptation of the NAC caseload limits.

²⁰⁴ See *Case Weighting Systems: A Handbook for Budget Preparation* (NLADA, 1985); *Keeping Defender Workloads Manageable*, Bureau of Justice Assistance, U.S. Department of Justice, Indigent Defense Series #4 (Spangenberg Group, 2001) (www.ncjrs.org/pdffiles1/bja/185632.pdf).

NLADA uses **Oregon** to highlight this fact. The contract requires Public Defender Services of Lane County to "maintain an appropriate and reasonable number of attorneys and support staff to perform its contract obligations." The contract and an appendix set a precise total number of cases to be handled by the contractor during the contract term, with specific numbers of cases allocated among numerous categories of cases, each of which generally requires different amounts of work. The contract also specifies the number of staff projected during the contract term. Thus, instead of the common per-attorney-per-year formulation of numerical caseload limits, the Lane County system reflects overall numerical caseload limits for all staff in the office combined. And instead of pure caseload limits, case numbers are allocated among

In some jurisdictions without formal workload limits, limits have been imposed through court rulings in individual criminal proceedings and systemic challenges to under-funded indigent defense systems in which litigants have successfully argued that excessive caseloads preclude attorneys from furnishing adequate legal representation.²⁰⁵

Montana has no statewide policies or procedures limiting the number or type of indigent defense cases to which an attorney may be assigned,²⁰⁶ and no uniform policies or procedures for collecting, maintaining or analyzing caseload data. Although the public defenders in the six assigned counsel counties also have private legal practices, there are no limitations on the number of private clients those attorneys may represent while accepting court appointments.²⁰⁷ There are no formal guidelines defining excessive

different categories of cases according to the number of hours commonly required for each type of case. This essentially constitutes a case “weighting” system, i.e., a means of measuring “workload” rather than caseload, and allowing more sophisticated planning for the office’s actual work and staffing needs. The workload model is preferred by national standards such as the ABA’s *Ten Principles* (“Principle 5 provides National caseload standards should in no event be exceeded,” “but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney’s nonrepresentational duties) is a more accurate measurement”).

Every six months, state funding officials conduct a budget review process, in which additional funding may be negotiated for extra work performed, such as cases requiring more than the usual amount of time or type of services. In fiscal year 2000-2001, the agency’s workload was estimated at 12,668 cases. An appendix to the contract delineates the estimated caseload by case type – e.g., four murder cases in the year; 4,752 felonies; 1,992 non-DUI misdemeanors; 504 DUI misdemeanors; 2,760 violations of parole; 216 contempt, mental health or other civil matters; 720 appeals; 192 juvenile dependency proceedings; 1,032 dependency review hearings; 264 juvenile probation violations; and 16 cases representing parents in termination-of-parental-rights proceedings. Each type of case has a presumptive dollar value attached to it, based on the presumptive number of hours of work required – for example, \$15,000 for a non-capital first-degree murder case, or \$2,200 for representation of a parent in a termination of parental rights proceeding.

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

²⁰⁵ See, e.g., *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981), cert. den. 454 U.S. 1142 (1982); *State v. Robinson*, 123 N.H. 665, 465 A.2d 1214 (N.H. 1983); *Corenevsky v. Superior Court*, 36 Cal.3d 307, 682 P.2d 360 (Cal. 1984); *State v. Smith*, 140 Ariz. 355, 681 P.2d 1374 (Ariz. 1984); *State v. Hanger*, 146 Ariz. 473, 706 P.2d 1240 (Ariz. 1985); *People v. Knight*, 194 Cal. App. 337, 239 Cal. Rptr. 413 (1987); *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987); *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), cert. den. 495 U.S. 957 (1990); *Hatten v. State*, 561 So.2d 562 (Fla. 1990); *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit*, 561 So.2d 1130 (Fla. 1990); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990); *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (Ark. 1991); *City of Mount Vernon v. Weston*, 68 Wash. App. 411, 844 P.2d 438 (Wash. Ct. App. 1993); *State v. Peart*, 621 So.2d 780 (La. 1993); *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996).

²⁰⁶ Depositions of Benjamin Anciaux (July 14, 2003), at 65; Brad Belke (Jan. 15, 2003), at 174; The Honorable Marc Buyske (July 31, 2003), at 79; Sean Hinchey (July 16, 2003), at 59.

²⁰⁷ See e.g., Depositions of Brad Belke (Dec. 16, 2002), at 131; Deirdre Caughlan (Dec. 9, 2002), at 79-80; David Vicevich (Dec. 19, 2002), at 195-196; Sean Hinchey (July 16, 2003), at 59; David Stenerson (Jan. 30, 2003), at 33; Robert Olson (July 29, 2003), at 48; Larry Nistler (July 11, 2003), at 75-6; Jack Morris (Dec. 18, 2002), at 150.

workloads or procedures instructing attorneys with such workloads how to seek assistance or relief. In fact, many attorneys believe that they are not permitted to decline cases, regardless of how overwhelmed they are, unless they can demonstrate a conflict of interest.²⁰⁸

Pursuant to state statute, the District Court Council has the authority to create policy with respect to workload but has not done so.²⁰⁹ In 2002, the Missoula public defenders attempted to negotiate caseload standards with Missoula County officials because they believed their caseloads to be so high that they were prevented from “being . . . able to provide the service that [they] thought the clients should get.”²¹⁰ The County refused to negotiate citing lack of funds.²¹¹

At roughly the same time, the Missoula public defenders wrote a letter to the Chief Public Defender stating that they could not handle the caseload adequately and requesting permission to refuse cases.²¹² The Chief Public Defender responded that the Office could not refuse any cases. According to one defender, the “consensus was everybody thought we were pretty stupid for putting in writing that we’re not able to do the work, basically.”²¹³ When the time came for the public defenders to sign a second union contract, they were told again that the County was unwilling to address the caseload issue.²¹⁴

While each district court maintains its own statistics, they do not do so for the purpose of monitoring attorney workload.²¹⁵ In fact, many attorneys stated in their depositions that they did not know the size of their annual workload.²¹⁶ The Chief Public

²⁰⁸ Depositions of Glen Neier (July 16, 2003), at 57; Margaret Borg (Aug. 8, 2003), at 310; Larry Nistler (July 11, 2003), at 109-110; Colleen Ambrose (June 9, 2004), at 27, 42; *but c.f.*, Deposition of Robert Olson (July 29, 2003), at 24 (thinks he could “probably” refuse a case).

²⁰⁹ Mont. Code Ann. 3-1-1602.

²¹⁰ Deposition of Bruce Gobeo (Aug. 12, 2003), at 28.

²¹¹ Deposition of Nik Geranios (Aug. 15, 2003), at 14-16, 49-50.

²¹² Depositions of Bruce Gobeo (Aug. 12, 2003), at 211-212; Janna Gobeo (Aug. 13, 2003), at 60-61; Nik Geranios (Aug. 15, 2003), at 44-45.

²¹³ Depositions of Bruce Gobeo (Aug. 12, 2003), at 214, 216; Nik Geranios (Aug. 15, 2003), at 51-54; Janna Gobeo (Aug. 13, 2003), at 62.

²¹⁴ Deposition of Alice Kennedy (June 10, 2004), at 34-35.

²¹⁵ Depositions of Vanessa Ceravolo (July 17, 2003), at 60; Mark Sullivan (July 18, 2003), at 87; David Vicevich (Dec. 19, 2002), at 185.

²¹⁶ Deposition of Bruce Gobeo (Aug. 12, 2003), at 32; Frank Joseph (Dec. 12, 2002), at 168-69; Jack Morris (Dec. 18, 2002), at 235-36; Patrick McGee (Jan. 16, 2003), at 90; Sean Hinchey (July 16, 2003), at 59-60; Glen Neier (July 16, 2003), at 106; Mark Sullivan (July 18, 2003), at 86-87; David Stenerson (Jan. 30, 2003), at 125-26; Wade Zolynski (July 9, 2003), at 65-66; Robert Henry (Aug. 4, 2003), at 51-53; Nik Geranios (Aug. 15, 2003), at 165-66; Susan Boyer (Aug. 20, 2003), at 90-91.

Defender of the Missoula Public Defender Office, for example, had no idea how many cases her lawyers had been assigned in the last year, how many felony trials her office had conducted, or how many appeals or petitions for post-conviction relief had been filed by the Office. Although such data can, among other things, inform staffing needs, she saw little value in collecting it.²¹⁷ She did testify, however, that attorneys have complained to her in the past about inheriting another public defender's caseload, and acknowledged that short of there being a conflict, those attorneys would have no recourse.²¹⁸

This same lack of data was noted 28 years ago, in 1976, when the NCDM published its report:

“The NCDM consultant team found no uniform reporting system classifying indigent defense caseloads and cost data. In no jurisdiction was there a capability (without considerable one-time personnel costs) to derive the indigent felony and misdemeanor caseloads.... In some jurisdictions, it was impossible to derive juvenile and mental health caseload data; in one jurisdiction, civil cases were mixed into criminal caseload reporting schema.”²¹⁹

During the discovery process in this litigation, NLADA attempted to secure electronic data from the Montana Supreme Court on the number of “DC” (the prefix for district court) felony cases closed by the local district courts in the seven target counties during calendar year 2003. NLADA had hoped to use this data to determine the number of DC cases (including both private and assigned cases) closed by each defender during the same time period. The numbers would not, however, represent the size of the defender's actual workloads because almost all of the attorneys have mixed caseloads that include misdemeanor, juvenile delinquency and dependency cases and involuntary commitment proceedings.²²⁰

²¹⁷ Deposition of Margaret Borg (Aug. 8, 2003), at 261-64. In April 2003, the American Council of Chief Defenders (ACCD) issued an ethics opinion declaring that a chief public defender is ethically prohibited from accepting a number of cases that exceeds the capacity of the agency's attorneys to provide competent, quality representation in every case. The opinion notes that the consequences of noncompliance may include bar disciplinary action against the defender as well as financial liability against the government entity responsible for financing the defender program. The ACCD opinion is based on long-standing national indigent defense standards for workload. The ACCD opinion is available electronically at: www.nlada.org/DMS/Documents/1082573112.32

²¹⁸ Deposition of Margaret Borg (June 11, 2004), at 424.

²¹⁹ Statewide Development Study, *supra* n. 28, at 21.

²²⁰ One attorney in Missoula, for example, testified that in addition to her criminal felony cases, she also handles CFS, sanity, youth court and misdemeanor cases and that those non-felony cases occupy roughly one-third of her time. Deposition of Alice Kennedy (June 10, 2004), at 38, 41.

After numerous attempts to secure the data, it became clear to NLADA that no one working for the state kept the electronic data necessary for a full and accurate assessment of public defender workloads. The Supreme Court administrator testified that the caseload tracking database currently in use exists in ten to fifteen different versions among the 56 counties, that his office has not provided any uniform directions to the counties as to how they should input data and that at least one county has opted not to use that database at all.²²¹ Thus, an adoption of four children could be reflected as one case in one county and as four cases in another county.²²² This failure to track key statistics in Montana has undoubtedly contributed to the State's inability to properly account and budget for its indigent defense obligations.

NLADA did ultimately receive some electronic data from the State, but it was insufficient to assess defender workloads in a meaningful way and we are not certain the numbers are reliable.

However, despite the unavailability of reliable State caseload figures, the deposition testimony of many attorneys indicates that their caseloads are overwhelming and impede the attorneys' ability to provide basic services to their clients. One attorney in Butte-Silver Bow, for example, stated, "I never have a 40-hour week."²²³ "By God, I am overworked."²²⁴ Another in Missoula testified, "You know, I feel that when I've talked to private lawyers who do criminal defense in just kind of informal surveys . . . when they hear what my caseload is their jaw drops."²²⁵ When asked about his workload, one of the two primary defenders in Lake County responded that he feels overworked "[p]retty much every day. I mean, the nature of this job is that you can never get caught up. . . . [The first year I had the contract,] I had worked myself into walking pneumonia and lost about 20 pounds and I simply couldn't – I couldn't sleep right, couldn't eat right."²²⁶

The consequences of the high caseloads were made clear by a Missoula attorney: "[Missoula public defenders] have far, far, far, far, far more cases than an attorney can handle and do a decent job. . . . I just think that the situation is such there that it's very difficult to do that kind of good job with that caseload."²²⁷ A public defender in Glacier

²²¹ Deposition of R. James Oppedahl (March 25, 2004), at 56-59.

²²² *Id.* at 105-06.

²²³ Deposition of Brad Belke (Dec. 16, 2002), at 98.

²²⁴ *Id.* at 61.

²²⁵ Deposition of Susan Boyer (Aug. 20, 2003), at 28.

²²⁶ Deposition of Larry Nistler (July 11, 2003), at 132-33.

²²⁷ Deposition of William Boggs (March 16, 2004), at 128, 134.

County concurred: “I have a lot of cases and I probably have too many. But if I try to keep track of every client and do that weekly check-in stuff, that’s all I would do.”²²⁸

The Flathead caseloads deserve special note. Unlike defenders in other counties who believe that they must accept the cases assigned to them, Mr. Sullivan and Mr. Stufft have asked to be assigned twice as many cases as their colleagues. Mr. Falla has asked to take on three times as many cases. All three attorneys have private legal practices. Because there are no caseload limits or policies, none of these attorneys are precluded from voluntarily assuming excessive caseloads – presumably to increase their income. When a fellow attorney who also had a private legal practice claimed that she was having difficulty handling many fewer cases, one of these three attorneys teased her, telling her she was “dragging out” the time she spent with her clients and in court.²²⁹

G. Attorney Performance

(ABA *Ten Principles*, Number 10)

The tenth of the ABA’s *Ten Principles* addresses the indigent defense system’s obligation to ensure that attorneys are monitored for compliance with performance standards:

Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency [citing the ABA’s Defense Function Standards and NLADA’s Performance Guidelines for Criminal Defense Representation].

An effective performance plan is much more than an evaluation form or process for monitoring compliance with standards. Without question, assessment is an important part of performance planning, but a sound performance plan entails much more. There is no “one-size-fits-all” performance plan, not only because organizations’ needs differ, but also because successful performance plans allow for some opportunity for staff to shape the plan. Despite differences in performance plans, sometimes even between similarly situated defender offices, there are many features that consistently appear in plans that work well. These include:

- *Clear plan objectives.* These commonly include such elements as fostering and supporting professional development, providing clear guidance and supporting accountability. Moreover, effective performance plans are tied to and support the fulfillment of the agency’s mission and

²²⁸ Deposition of William Hunt (July 25, 2003), at 116.

²²⁹ Deposition of Vanessa Ceravolo (July 17, 2003), at 25-27.

vision. Critically, effective plans emphasize a goal of promoting employees' performance success.

- *Specific performance guidelines.* People need to know what is expected of them in order to work towards fulfilling those expectations. Performance expectations should include, for example, expectations about attitudes and administrative responsibilities, as well as about substantive knowledge and skills.
- *Specific tools and processes for (1) assessing how people are performing relative to those expectations and (2) assessing what training or other support they need to meet performance expectations.* People whose positions require them to conduct performance evaluations must be trained and evaluated as part of their performance plan so that evaluations are done fairly and consistently.
- *Specific processes for providing training, supervision and other resources necessary to support performance success.*

Montana has no statewide written standards defining counsel's obligation to his or her client or outlining the parameters of the defense function, except with respect to capital representation. There are no statewide written procedures regarding conflicts of interest, attorney/client contact, the use of investigators and experts, the right to a speedy trial, plea bargaining or the requesting of continuances.²³⁰ Pursuant to a state statute promulgated in 1991, the Appellate Defender Commission was to develop and propose to the Supreme Court performance standards for non-capital representation.²³¹ As of May 2004, the Appellate Defender Commission had not proposed and the Supreme Court has not issued any such standards.

Missoula is the only one of the seven counties included in this Report to provide attorneys with any guidelines. In November 1999, one newly hired attorney came into possession of a copy of the NLADA "Performance Guidelines for Criminal Defense Representation" in his office, and the Chief Public Defender then ordered copies to distribute.²³² There was no formal training with respect to the guidelines.²³³ At their depositions, two attorneys testified that they found it difficult to adhere to the guidelines

²³⁰ See, e.g., Depositions of Brad Belke (Jan. 15, 2003), at 174; The Honorable Marc Buyske (July 31, 2003), at 35-36; Deirdre Caughlan (Jan.15, 2003), at 163-64; Kelli Sather (Jan. 31, 2003), at 90; Robert Olson (July 29, 2003), at 47; Glen Neier (July 16, 2003), at 77; Jack Morris (Dec. 18, 2002), at 207; Bruce Gobeo (Aug. 12, 2003), at 84; Susan Boyer (Aug. 20, 2003), at 112-13, 118.

²³¹ Mont. Code Ann. § 2-15-1020(9) (2003).

²³² Deposition of Nik Geranios (Aug. 15, 2003), at 130-31.

²³³ Depositions of Susan Boyer (Aug. 20, 2003), at 25-28; Bruce Gobeo (Aug. 12, 2003), at 223.

because of their caseloads.²³⁴ Upon being asked whether he had read the guidelines in full, another stated he had not and had just, “cracked the binding.”²³⁵

Missoula is also the only county to have a written policy defining conflicts of interest.²³⁶ Pursuant to that policy, attorneys may not withdraw from a case without the permission of the Chief Public Defender.²³⁷ Attorneys reported, however, that because the Chief is so busy with her own cases (according to her, she carries the highest caseload in the office), she may take weeks to decide whether withdrawal is appropriate. She often insists on speaking with the clients themselves and, according to one attorney, if clients are not actually pointing fingers at each other, the Chief Public Defender generally prefers to “see how things work out” before declaring a conflict.²³⁸

A Butte-Silver Bow attorney testified that he thought the Butte District Court judges had certain rules or procedures regarding the time period within which attorneys were to meet with their incarcerated clients, but he did not know what they were.²³⁹ Prior to July 1, 2003, the Butte public defender contracts required defenders to “conduct [themselves] in an ethical proper manner” and “render a complete and competent defense in all cases.”²⁴⁰ As previously stated, however, those contracts are no longer in effect and nothing has taken their place. A letter from a district judge to the Ravalli County Commissioners recommended that Ravalli County hire a supervising attorney, but that recommendation was never implemented.²⁴¹

Many attorneys, and at least one judge, did not know what performance standards were. When asked if such standards existed, one Flathead attorney stated that the only standards he knew of were “[t]he requirement to have CLE credits and to be a member in good standing with the State Bar.”²⁴² The Ninth Judicial District Court Judge testified that he did not know about performance standards until he saw them referenced in the

²³⁴ Depositions of Susan Boyer (Aug. 20, 2003), at 28-31; Nik Geranios (Aug. 15, 2003), at 131-33.

²³⁵ Deposition of Bruce Gobeo (Aug. 12, 2003), at 222-23.

²³⁶ See Deposition Exhibit 407, “Collective Bargaining Agreement between Missoula County and Teamsters Local No. 2,” pp. 5-6.

²³⁷ *Id.*, at 6; Depositions of Nik Geranios (Aug. 15, 2003), at 156-57 [note: “[W]e wanted there to be something more clearly delineated than what was there [regarding conflicts].”]; Susan Boyer (Aug. 20, 2003), at 65-6 [note: 65 “ There is no system to identify conflicts, as far as I know.”]; Janna Gobeo (Aug. 13, 2003), at 88-89.

²³⁸ Deposition of Janna Gobeo (Aug. 13, 2003), at 80-83, 88-89, 102, 106, 127-131.

²³⁹ Deposition of David Vicevich (Dec. 19, 2003), at 202.

²⁴⁰ See Deposition Exhibit 57, at ¶2.3.

²⁴¹ Deposition of David Stenerson (Jan. 30, 2003), at 139.

²⁴² Deposition of Mark Sullivan (July 18, 2003), at 57-8.

White v. Martz complaint. Although he then downloaded them from the Internet, he did not distribute them to or discuss them with any of the attorneys practicing in his judicial district.²⁴³

There is no formal evaluation process or systematic supervision of attorneys' performance in the seven counties included in this Report.²⁴⁴ Many attorneys claim that the District Court judges help assure quality representation and do not re-appoint attorneys who have not performed capably in the past.²⁴⁵ As discussed earlier, judges do review attorney time records prior to their submission to the state for payment or reimbursement purposes, but NLADA could find no apparent mechanism by which judges formally assessed attorney performance.

In fact, the Chief Justice of the Montana Supreme Court testified at her deposition that district courts were ethically precluded from administering the public defender systems.²⁴⁶ The Ninth Judicial District Judge stated that he did not provide any direct supervision with respect to any particular case because to do so would be a violation of the Canons of Judicial Ethics. As such, he did not inquire of either appointed counsel or public defender clients as to the timeliness of the first attorney-client meeting, monitor the amount of time public defenders spent with their clients, review public defender case files, or monitor public defenders' use of experts.²⁴⁷

A Flathead attorney admitted that none of the Flathead District Court judges had ever talked to him about his performance, or evaluated and critiqued his strengths and weaknesses.²⁴⁸ Another stated that he had never heard a judge either admonish or compliment a public defender.²⁴⁹ While a Butte attorney testified that a District Court Judge spoke to him about his alleged failure to file property bail bonds, the Judge took no disciplinary or corrective action.²⁵⁰

²⁴³ Deposition of The Honorable Marc Buyske (July 31, 2003), at 53, 78.

²⁴⁴ Depositions of Jack Morris (Dec. 18, 2002), at 162-163; Frank Joseph (Dec. 12, 2002), at 94; Robert Allison (July 8, 2003), at 67-68; Mark Sullivan (July 18, 2003), at 60; Larry Nistler (July 11, 2003) at 28-29; Benjamin Anciaux (July 14, 2003), at 44-45; Kelli Sather (Jan. 31, 2003), at 72; David Stenerson (Jan. 30, 2003), at 24-25; Glen Neier (July 16, 2003), at 103-04; Frank Joseph (Dec. 12, 2002), at 94; Susan Boyer (Aug. 20, 2003), at 59, 104, 106; Margaret Borg (Aug. 8, 2003), at 291-92, 299; Bruce Gobeo (Aug. 12, 2003), at 196; Janna Gobeo (Aug. 13, 2003), at 34.

²⁴⁵ Deposition of William Hunt (July 25, 2003), at 21.

²⁴⁶ Deposition of The Honorable Karla Gray (July 16, 2003), at 42-44.

²⁴⁷ Deposition of The Honorable Marc Buyske (July 31, 2003), at 52-60.

²⁴⁸ Deposition of Mark Sullivan (July 18, 2003), at 59-60.

²⁴⁹ Deposition of David Stufft (Dec. 5, 2003), at 134-36.

²⁵⁰ Deposition of Jack Morris (Dec. 18, 2002), at 165-67.

Other attorneys claim that they rely upon their fellow attorneys or even the County Attorney to point out mistakes in representation.²⁵¹ Although Flathead has a Chief Public Defender, he does not engage in any meaningful supervision. When asked what type of monitoring he does, he stated, “I just try to address specific concerns as they come up . . . I don’t follow lawyers around and make sure that they’re dotting all their I’s and crossing their T’s. . . . The individual attorneys monitor their performance.”²⁵² However, when one Flathead attorney who claimed to supervise himself was asked to identify the standards against which he judged his performance, he was unable to do so.²⁵³

Although the Flathead attorneys have regular contact with each other and meet periodically to discuss issues of common concern, they have no vigorous formalized process to identify and correct weak performance.²⁵⁴ One attorney acknowledged that while reviewing attorney case files assisted in assessing the adequacy of defender services, none of the Flathead attorneys had reviewed his case files and he had not reviewed theirs.²⁵⁵

Missoula’s Chief Public Defender also does not provide any meaningful supervision. She testified that her caseload is larger than anyone else’s in her office and that it includes most, if not all, of the Office’s “big cases,” as well as “problem cases” and those from the regular rotation system.²⁵⁶ It is impossible for any public defender supervisor to fulfill the obligations of good management while carrying a full caseload. In large, urban public defender systems across the country, the burden of supervisory duties – including conducting in-court observations, reviewing case files, discussing theories of the case, providing training, and monitoring the overall work of the people they are charged with overseeing – customarily allows supervisors to carry no caseload of their own or, at most, a very limited one.

Prior to July 1, 2003, the primary contractors in Ravalli were a loose confederation of colleagues in one law firm. No one looked at anybody else’s files to see how they were doing, or to review the quality of services provided.²⁵⁷ When one Ravalli attorney became secretive and withdrawn, no one bothered to check his work until it was discovered that he had stolen money from private clients. When his colleagues did

²⁵¹ Deposition of William Hunt (July 25, 2003), at 20.

²⁵² Depositions of Robert Allison (July 8, 2003), at 67; Mark Sullivan (July 18, 2003), at 59-60.

²⁵³ Deposition of David Stufft (Dec. 5, 2003), at 120-123.

²⁵⁴ Deposition of Mark Sullivan (July 18, 2003), at 60.

²⁵⁵ Deposition of David Stufft (Dec. 5, 2003), at 115-116.

²⁵⁶ Deposition of Margeret Borg (June 11, 2004), at 427-28.

²⁵⁷ Deposition of Mark McLaverty (Aug. 26, 2003), at 136.

review his public defender case files, they discovered that he had stopped communicating with clients and had been spending very little time on their cases.²⁵⁸

H. The Impact of Montana’s Failure to Adhere to the Ten Principles on Indigent Persons

Without adequate funding and resources comparable to those of the prosecution, sufficient independence from political and judicial influences, written attorney qualifications and adequate training, standardized eligibility and appointment processes, time to meet with clients, workload controls, performance standards and supervision, there are no checks and balances within Montana’s indigent defense system to ensure that attorneys are providing the type of adversarial representation contemplated by the federal and state constitutions.

The resulting harm to clients was clear from the testimony and documentary evidence we reviewed: attorneys failed to conflict themselves out of even the clearest cases of conflicts of interest, waived probable cause and preliminary hearings with inordinate frequency, failed to meet regularly and meaningfully with their clients, failed to investigate their clients' cases, made motions and went to trial only rarely, prioritized speedy dispositions over the best interests of their clients, improperly waived their clients' speedy trial rights, and seldom made appeals on behalf of their clients.

As set forth below, the apparent inability of public defenders to perform even the most basic tasks associated with the defense function highlights the dangers created by Montana's failure to ensure that its indigent defense services adhere to the *Ten Principles* and the impact that failure can and does have on indigent defense clients.

1. Conflicts

Conflicts of interest are rampant throughout the seven counties included in this Report. Although the State Bar of Montana’s Ethics Committee recently published an opinion stating that “an attorney may not simultaneously occupy the positions of a city attorney with prosecutorial functions and county public defender when the jurisdictions overlap,”²⁵⁹ this opinion appears largely to be ignored. One attorney in the Ninth Judicial District, for example, prosecutes misdemeanants in City Court while representing public defender clients in the District Court. To avoid any improprieties, the Judge did not appoint him to cases involving a city law enforcement official.²⁶⁰

One Ravalli attorney had a contract with Ravalli County to represent indigent parents in abuse and neglect proceedings at the same time she had a contract with the

²⁵⁸ *Id.*, at 82, 143.

²⁵⁹ State Bar of Montana Ethics Opinion 010417.

²⁶⁰ Deposition of Robert Olson (July 29, 2003), at 9-10.

local child welfare authorities to prosecute parents accused of abuse or neglect. She claimed that the District Court judge had no “problem with it just so everyone’s informed.”²⁶¹

As previously stated, the Missoula Public Defender’s Office frequently represents co-defendants in criminal matters and multiple parties in juvenile dependency proceedings. One attorney served as a child’s guardian *ad litem* in a dependency proceeding and simultaneously represented that child’s alleged rapist in a criminal proceeding.²⁶² The same attorney served as a guardian *ad litem* to an elderly woman who allegedly had been abused by her daughters, while also representing the son of one of the daughters in a criminal matter.²⁶³ In some of these cases, the Office ultimately has withdrawn, but only after confidences have been disclosed and a significant amount of time has passed.

2. Waiving the Probable Cause Hearing

Preliminary or probable cause hearings are often waived. One public defender reported that it was his standard practice to waive a preliminary hearing “without much discussion,” particularly when the client was incarcerated.²⁶⁴ Another noted that she does not go to any preliminary hearings.²⁶⁵ Case Registry Reports generated by the District Court in Flathead County indicate that during calendar year 2002 preliminary hearings were waived in at least one-third of all cases, if not more.

The failure to advocate aggressively at these early hearings is part of a larger pattern of a failure to advocate aggressively throughout the course of representation. Although these hearings may not necessarily result in the immediate dismissal of charges or the release of clients, they are nonetheless important stages in the criminal justice process and thus venues in which defense counsel ought forcefully to test the prosecution's case.

3. Lack of Attorney/Client Contact

As discussed more fully in connection with ABA *Principles* 3 and 4, many attorneys report difficulty meeting with clients in a timely and consistent fashion. The inability to meet with clients has significant consequences:

²⁶¹ Deposition of Kelli Sather (Jan. 31, 2003), at 40.

²⁶² Deposition of Janna Gobeo (Aug. 13, 2003), at 145-7.

²⁶³ *Id.* at 85.

²⁶⁴ Deposition of William Hunt (July 25, 2003), at 125-26; *but cf.* William Hunt, at 179 (no longer waives preliminary hearings).

²⁶⁵ Deposition of Alice Kennedy (June 10, 2004), at 134.

- A Butte-Silver Bow attorney stated that her inability to meet with clients often prevented her from making arrangements for bond or filing bond reduction motions; she could not discuss these options with her clients or ascertain their ability to meet bond obligations.²⁶⁶
- One Glacier County public defender representing a client who suffered from schizophrenia was unaware of his client's mental illness.²⁶⁷
- A Missoula County public defender representing a client who exhibited signs of mental instability did nothing in the case for six months while the client remained incarcerated.²⁶⁸
- Another Missoula County public defender did not inform her client that she was taking over his case from another attorney until she appeared with him for a court date. When asked about the situation, she replied, "I don't think that learning anything in court is ideal for a client or an attorney."²⁶⁹
- Yet another Missoula attorney sent a client (whom she had inherited from a departing public defender) a letter apologizing for her delay in responding to his letters. She explained that his file and some of the letters he had sent to the office had been misdirected to another attorney and that she had therefore not been aware of his situation until the previous month. When asked why it still took her a month to respond to her client's letters after discovering the mistake, she responded "You can try my caseload, try to respond to all those letters, that's why, just because I didn't have time."²⁷⁰
- Missoula County attorneys often seek repeated continuances without client permission as a means of handling their workloads.²⁷¹
- Some Missoula clients sit in jail prior to the disposition of their cases for a period of time that exceeds their ultimate sentence because attorneys are unable to visit in a timely manner.²⁷²

²⁶⁶ Deposition of Deirdre Caughlan (Dec. 9, 2002), at 41.

²⁶⁷ Deposition of William Hunt (July 25, 2003), at 142.

²⁶⁸ Deposition of Susan Boyer (Aug. 20, 2003), at 144.

²⁶⁹ Deposition of Alice Kennedy (June 10, 2004), at 101.

²⁷⁰ Deposition of Colleen Ambrose (June 9, 2004), at 173-74.

²⁷¹ Deposition of Mark McLaverty (Aug. 26, 2003), at 169.

²⁷² Deposition of Wade Zolynski (July 9, 2003), at 113-14.

- A Butte-Silver Bow attorney was unaware that his client who had been incarcerated for failing to appear at a court hearing had a catheter that needed to be changed every 48 hours and that the county jail did not have the medical facilities to change it.²⁷³ For three weeks, the client was transported to the police station every two days, handcuffed and shackled, to have the catheter changed before the attorney secured his release.²⁷⁴
- In Ravalli County, a public defender first presented his client with a plea offer the evening before a court hearing, in the presence of the prosecuting attorney. He then proceeded to discuss the plea offer with the client in the prosecutor’s presence, and the client signed the agreement, again in the prosecutor’s presence.²⁷⁵
- Another Ravalli public defender who represented a juvenile in a delinquency proceeding made a plea proposal to the prosecution that included restitution (presumably by the parents), but failed to inform the parents.²⁷⁶
- In yet another Ravalli County case, a client who had been adamant about keeping her home was assured by her public defender that she would be permitted to do so. At her sentencing hearing, however, she learned that her public defender had promised, without her permission and as part of her plea agreement, that she would forfeit her home.²⁷⁷

4. Failure to Investigate

Many defenders are unable to investigate the charges against their clients. One former Missoula public defender described the investigation of charges against a client and the obtaining of discovery (both formal and informal) from the prosecution as “aspirational” activities.²⁷⁸ Another stated that “the investigation is a definite shortcoming,”²⁷⁹ and asked, “When I have client appointments all afternoon, when am I going to do all the fact investigation?”²⁸⁰

²⁷³ Deposition of Larry White (Feb. 2, 2004), at 29-31.

²⁷⁴ *Id.*, at 32.

²⁷⁵ Deposition of David Stenerson (Jan. 30, 2003), at 177-78.

²⁷⁶ Deposition of William Fulbright (Feb. 6, 2003), at 36.

²⁷⁷ Deposition of David Stenerson (Jan. 30, 2003), at 183-84.

²⁷⁸ Deposition of Nik Geranios (Aug. 15, 2003), at 133.

²⁷⁹ Deposition of Susan Boyer (Aug. 20, 2003), at 130.

²⁸⁰ *Id.*, at 131.

The invoices submitted by the defenders to the State for reimbursement purposes between FY 1998 to FY 2003 indicate that hardly any use private investigators. As demonstrated in the Tables below, public defenders in Butte-Silver Bow, Flathead, Glacier, Lake, Ravalli and Teton used an investigator in 2.5% (217) and an expert in 2.8% (239) of the 8,535 felony cases for which they sought compensation.

Table 2-1
Percentage of Cases in Which Attorneys
Used An Investigator By Year and By County²⁸¹

	<u>FY98</u>	<u>FY99</u>	<u>FY00</u>	<u>FY01</u>	<u>FY02</u>	<u>FY03</u>
Butte-Silver Bow	3%	5.3%	0.4%	2%	0%	1.3%
Flathead	1.4%	4.3%	5.2%	4.8%	4.6%	7.3%
Glacier	0%	0%	0%	0%	0.8%	0%
Lake	0.5%	0.5%	0.8%	1.4%	0.8%	3.2%
Ravalli	0.4%	0%	0%	0%	0%	0.7%
Teton	0%	0%	0%	0%	0%	0%

Table 2-2
Percentage of Cases in Which Attorneys
Used Experts By Year and By County²⁸²

	<u>FY98</u>	<u>FY99</u>	<u>FY00</u>	<u>FY01</u>	<u>FY02</u>	<u>FY03</u>
Butte-Silver Bow	4.5%	3.3%	1.6%	2%	3.5%	1%
Flathead	3.3%	4.5%	2%	1%	3.4%	3.9%
Glacier	0%	0%	0.8%	3.1%	0.7%	0%
Lake	1.1%	2.9%	3.4%	2.4%	2.1%	2.5%
Ravalli	2.3%	2.8%	7%	3.4%	1.3%	3.4%
Teton	0%	0%	0%	0%	8.6%	2.2%

²⁸¹ Attorney time and expense records indicate that, between FY1998 and FY2003, defenders in Glacier and Teton Counties have never requested the use of an investigator, defenders in Ravalli County have requested only 2, defenders in Lake County have requested 9 and defenders in Butte-Silver Bow have requested 23. Flathead defenders have requested 164 investigators, more than the other five assigned counsel counties combined.

²⁸² Defender time and expense records show that, between FY1998 and FY2003, defenders in Teton County retained three experts, Glacier County defenders retained five, Lake County defenders retained 30, Ravalli County defenders retained 33, Butte-Silver Bow defenders retained 42, and Flathead County defenders retained 118.

5. Infrequent Motion Practice

Substantive motions are infrequent. One Butte-Silver Bow defender defined motion practice in that county as “fairly rare.”²⁸³ A Glacier County attorney claimed that he did not like to file motions because “they’ll alienate the prosecutor against your client.”²⁸⁴ A Missoula attorney stated that while “[y]ou could probably find a briefable issue, if not five, in every case that you get,” he did not have time to raise those issues with the court.²⁸⁵

The Case Registry Report produced by the Flathead District Court indicates that of the two defenders with the largest felony caseloads in calendar year 2002, one filed substantive motions in 3 of the 63 cases he disposed of during that year and another filed motions in 6 of the 74 cases he closed. The Case Registry Report produced by the Ravalli District Court for calendar year 2002 note that of the two attorneys with the largest felony caseloads, one filed substantive motions in 1 of the 46 cases disposed of during that year, and the second filed substantive motions in 6 of the 53 cases he closed.

The motions that are filed are also often not filed in a timely manner. The Missoula Chief Public Defender, for example, testified that she did not believe a client had a good speedy trial claim despite the fact that he had served over 23 months in pre-trial incarceration for a charge with a maximum sentence of 13 months. The court ultimately granted the motion she reluctantly filed at the urging of the client and she conceded that had she filed the motion sooner, there was a chance her client could have been released from custody earlier.²⁸⁶

6. Infrequent Trials

Trials are also infrequent. A Butte-Silver Bow attorney stated that he had not had a felony trial in at least five years.²⁸⁷ Another claimed that he has had between 8 and 10 trials in the 10 plus years he has been a public defender and asserted that he was one of the few attorneys in Butte who tries cases.²⁸⁸

²⁸³ Deposition of David Vicevich (Dec.19, 2003), at 163.

²⁸⁴ Deposition of Nathan Hoines (July 28, 2003), at 144.

²⁸⁵ Deposition of Wade Zolynski (July 9, 2003), at 121-22.

²⁸⁶ Deposition of Margaret Borg (June 11, 2004), at 522-23.

²⁸⁷ Deposition of Brad Belke (Jan. 15, 2003), at 209.

²⁸⁸ Deposition of Patrick McGee (Jan. 16, 2003), at 63-64.

A Flathead defender testified that he has had one felony criminal trial in his legal career.²⁸⁹ Another stated that he had not “had any criminal trials. I haven’t even come close.”²⁹⁰ A third contended that he has had one felony trial in his five years as a public defender.²⁹¹ And a fourth claimed to have had five trials in five years.²⁹²

A Teton public defender has not had a felony trial during her tenure as a public defender.²⁹³ A Glacier attorney stated, “[a]ll I can tell you it’s been more than five years ago that I actually – we actually tried an indigent case in Glacier County.”²⁹⁴ The situation is no better in Missoula, where one attorney testified that in her five years at the Public Defender Office, she has had “maybe six trials.”²⁹⁵ Another testified: “I was at that office a year before I got to take anything to trial. I mean, nothing went to trial.”²⁹⁶

7. Prioritizing Speedy Dispositions

In some counties, attorneys appear to be in such a hurry to resolve cases that they pressure clients to plead guilty within weeks of arraignment, often times to the highest charge. According to Case Registry Reports produced by the Ravalli County District Court, of the 144 felony cases disposed of during calendar year 2002 in Ravalli County, 59 clients pled guilty to the top charge. According to Flathead Case Registry Report, of the 85 cases disposed of by one Flathead attorney during calendar year 2002, 48 clients pled guilty to the top charge. Of the 74 cases closed by another Flathead attorney in the same year, 29 clients pled guilty to the top charge.

Although the Case Registry Reports do not indicate how much work defenders do on each case, attorney time records submitted to the State for payment and reimbursement purposes reveal that it cannot have been much. While none of the national caseload standards *requires* an attorney to spend a particular number of hours on any given case, the NAC standards contemplate that an attorney working 35 hours per week, or roughly 1800 hours per year,²⁹⁷ will devote an average of 12 hours to each

²⁸⁹ Deposition of Sean Hinchey (July 16, 2003), at 18-19.

²⁹⁰ Deposition of Glen Neier (July 16, 2003), at 103.

²⁹¹ Deposition of David Stufft (Dec. 5, 2003), at 42, 50-51.

²⁹² Deposition of Mark Sullivan (July 18, 2003), at 34.

²⁹³ Deposition of Laurie McKinnon (Aug. 1, 2003), at 63.

²⁹⁴ Deposition of Robert Olson (July 29, 2003), at 73.

²⁹⁵ Deposition of Alice Kennedy (June 10, 2004), at 94.

²⁹⁶ Deposition of Colleen Ambrose (June 9, 2004), at 16.

²⁹⁷ It is necessary for any workload analysis to establish some baseline for a work year. For non-exempt employees who are compensated for each hour worked, the establishment of a baseline work year is quite simple. If an employee is paid to work a 35-hour workweek, the baseline work year is 1,820 hours (or 35 hours times 52 weeks). For exempt employees who are paid to fulfill the parameters of their job regardless

felony matter, or 9 hours to each juvenile matter and 4.5 hours to each misdemeanor. The time records indicate, that with the exception of a very few attorneys, almost none of the defenders in the seven counties reviewed for this Report spent anywhere near an average of 12 hours per felony matter.

In Missoula, for example, attorney time records indicate that they spent on average less than 5 hours on each felony matter prior to closing the case. One attorney, in FY 1999, spent an average of 45 minutes on each felony assigned to her. As noted below in Table 4-1, Flathead attorneys spend, on average, no more than seven hours per felony case.

Table 3-1
Average Number of Hours
Spent By A Public Defender On A Single Felony Matter

	<u>Missoula</u>	<u>Butte</u>	<u>Lake</u>	<u>Flathead</u>	<u>Ravalli</u>	<u>Teton</u>	<u>Glacier</u>
2000	3.6	13.9	10.2	6.8	10.47	21.9	6.8
2001	4.9	14.26	8.8	7	5.39	5.6	12.4
2002	4.2	9.3	10	5.8	5.65	5.3	7.7
2003	n/a	10.32	8.3	5.8	7.79	7.3	9.7
2004	n/a	5.1	6.2	5.4	9.7	17.9	7.3

These statistics comport with the deposition testimony of some defenders.

- “I have absolutely spent less time than I need to on criminal cases when the press of business has been there in civil court cases . . . I’m unable to meet with my clients to discuss trial strategy, to discuss plea agreement versus a trial, what the advantages and disadvantages of each are. I have to say that mostly it takes me away from being able to do motions and research.”²⁹⁸

of hours worked, the establishment of a work year is more problematic. An exempt employee may work 35 hours one week, and 55 hours the next. NLADA uses a 40-hour workweek for exempt employees for two reasons. First, a 40-hour work week has become the *maximum* workweek standard used by other national agencies for determining workload capacities of criminal justice exempt employees (See: National Center for State Courts, *Updated Judicial Weighted Caseload Model*, November 1999; The American Prosecutors Research Institute, *Tennessee District Attorneys General Weighted Caseload Study*, April 1999; U.S. Department of Justice, Office of Juvenile Justice and Delinquency Programs, *Workload Measurement for Juvenile Justice System Personnel: Practice and Needs*, November 1999; The Spangenberg Group, *Tennessee Public Defender Case-Weighting Study*; April 1999.) Second, discussions with Mr. Don Fisk and Mr. Arthur Young of the U.S. Department of Labor, Bureau of Labor Statistics, suggest that using a 40-hour work week for measuring workload of other local and state government exempt employees is the best method of approximating staffing needs.

²⁹⁸ Deposition of Deirdre Caughlan (Dec. 9, 2002), at 72-73.

- “It concerned me as a professional that we were shortchanging somebody somewhere. And in my opinion that would have to be the client.”²⁹⁹

8. Waiving the Right to a Speedy Trial

When clients do not plead guilty quickly, some attorneys waive their speedy trial rights in what appears to be an effort to use the threat of prolonged pre-trial incarceration to induce the clients to change their minds. According to the Flathead Case Registry Reports, for example, the three Flathead attorneys with the heaviest felony caseloads during calendar year 2002 waive their client’s right to a speedy trial in roughly one-third of all cases – often within one or two months of arraignment. In one case, the attorney waived the right within 15 days of arraignment. The clients usually plead guilty shortly thereafter.

9. Infrequent Appeals

Appeals are also infrequent. The Flathead Chief Public Defender has taken no appeals in the last two years.³⁰⁰ A Butte-Silver Bow attorney stated that he had filed 10 to 12 appeals over approximately 17 years.³⁰¹ Another stated that he had filed just two appeals in the more than 10 years that he has been a public defender,³⁰² and yet another admitted that he had never filed an appeal in a felony case.³⁰³

In fact, a former Missoula County Public Defender said that he did not even inform his clients who pled guilty of their right to appeal unless he personally thought there was an appealable issue. Instead, he told them that if they pled guilty there was no right to appeal.³⁰⁴ Similarly, a Flathead attorney testified that he consistently pled clients guilty without reserving their right to appeal.³⁰⁵

Because there are so few appeals, claims of ineffective assistance of counsel, a roundabout mechanism of quality control, do not get raised and practice behavior does not change. The standard makes clear that the main reason for independence of the appellate function is to allow for “independent review of the competence and performance of trial counsel.”

²⁹⁹ Deposition of Vanessa Ceravolo (July 17, 2003), at 34-35.

³⁰⁰ Deposition of Robert Allison (July 8, 2003), at 106.

³⁰¹ Deposition of Brad Belke (Dec. 16, 2002), at 84.

³⁰² Deposition of Patrick McGee (Jan. 16, 2003), at 62-3.

³⁰³ Deposition of Frank Joseph (Dec. 12, 2003), at 71.

³⁰⁴ Deposition of Larry Mansch (Aug. 6, 2003), at 151-2, 160.

³⁰⁵ Deposition of Glen Neier (July 16, 2003), at 67-8.

III. Conclusion

The State of Montana was informed of the shortcomings of its indigent defense services nearly thirty years ago by the National Center for Defense Management, a project of the National Legal Aid & Defender Association. Many of the conclusions reached then are still pertinent today:

- “The movement of fiscal responsibility from county to state may violate the conventional wisdom regarding the funding and control of local services. But experience has shown that indigent defense services are often unpopular among the voting public, that constitutional rights are fragile assets in troubled times, and that local control generally produces an impoverished system.”
- “The consulting team finds no legitimate need for control at the local level. The independence and integrity of defense counsel must not be compromised for the sake of speed or economy.”
- “There is no equal justice when clients ‘handicapped’ by indigency must be represented by counsel handicapped by inadequate investigative assistance, insufficient clerical support and negligible research resources.”
- “Effective representation requires early representation. NCDM (and NLADA) concludes that, consistent with the letter of court decisions and the spirit of equal justice, Montana must provide representation to eligible persons at any stage of the proceedings, including lineups, custodial and non-custodial interrogations, and before, during and after arrest.”
- “Too often, counsel for the indigent in Montana has little knowledge of the criminal law...[O]rientation, training and continuing legal education must be made available to defenders and panel attorneys.”
- “NCDM (and NLADA) concludes that the absence of a thorough and uniform caseload and cost-reporting system is an impediment to the cost-effective delivery of quality indigent defense services. This situation must be remedied.”

Montana does not meet the prevailing criteria to ensure adequate representation for poor people faced with criminal prosecutions that may result in the loss of liberty. The only justice system all Americans will accept as fair and just must ensure that the quality of justice people receive does not depend on how much money they have; every citizen, no matter their economic status, must have equal access to quality representation. As Justice Hugo Black opined in the *Gideon* decision: “The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”³⁰⁶

³⁰⁶ *Gideon v. Wainwright*, 372 U.S. at 334.

Appendix A

A Discussion of National Indigency Screening Procedures

Although *Gideon v. Wainwright* requires states to provide counsel for those unable to afford counsel, it does not state explicitly how to determine financial eligibility. Jurisdictions across the country have weighed various interests when considering how best to make such determinations. Policy-makers must decide to what extent the need to ensure the public that money is being spent efficiently justifies the cost of eligibility verification processes. If it is determined to move ahead with more rigorous screening, national standards can be used to structure the process.

The *Guidelines for Legal Defense Systems in the United States* issued by the National Study Commission on Defense Services state that, “[e]ffective representation should be provided to anyone who is unable, without substantial financial hardship to himself or to his dependents, to obtain such representation.”³⁰⁷ “Substantial hardship” is also the standard promulgated by the ABA.³⁰⁸ While ABA Defense Services Standard 5-7.1 makes no effort to define need or hardship, it does prohibit denial of appointed counsel 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. In practice, the “substantial hardship” standard has led many jurisdictions to create a tiered screening system. At some minimum asset threshold, a defendant is presumed eligible without undergoing further screening. Defendants not falling below the presumptive threshold are then subjected to a more rigorous screening process to determine if their particular circumstances (including seriousness of the charges being faced, monthly expenses, local private counsel rates) would result in a “substantial hardship” were they to seek to retain private counsel. The great majority of defendants currently being offered the services of public defenders in Montana should qualify for public counsel under the presumptive standard, thus minimizing the need to use a more expansive screening and verification process. Examples of such presumptive standards include:

- A defendant is presumed eligible if he or she receives public assistance, such as Food Stamps, Aid to Families of Dependent Children, Medicaid, Disability Insurance, or resides in public housing.³⁰⁹
- A defendant is presumed eligible if he or she is currently serving a sentence in a correctional institution or is housed in a mental health facility.

³⁰⁷ Guideline 1.5.

³⁰⁸ *ABA Standard for Criminal Justice: Providing Defense Services 5-7.1*, *supra* n.146, states: “Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship.”

³⁰⁹ An additional benefit to using public aid as a presumptive threshold is that other agencies already rigorously screen and verify the person to qualify for such assistance. Using these standards allows a jurisdiction to, in effect, “piggy-back” onto the verification process without duplicating efforts.

For those who do not meet the presumptive standard but who may still qualify under the “substantial hardship” standard, many jurisdictions have developed financial eligibility formulas that take into account a household’s net income, liquid assets, “reasonable” necessary expenses and other “exceptional” expenses. The National Study Commission on Defense Services guidelines are more comprehensive than other national standards in guiding this second tier of eligibility determinations. The first step is to determine a defendant’s net income (usually verified through documented pay stubs) and liquid assets. Under Guideline 1.5, liquid assets include cash in hand, stocks and bonds, bank accounts and any other property that can be readily converted to cash. Factors not to be considered include the person’s car,³¹⁰ house,³¹¹ household furnishings, clothing, any property declared exempt from attachment or execution by law, the person’s release on bond, or the resources of a spouse, parent or other person.

Next, the screening agency assesses a defendant’s reasonable necessary expenses and other money owed for exceptional expenses, like medical care not covered by insurance, or court-ordered family support. Though jurisdictions vary as to what constitutes “necessary” expenses, most include rent, day-care and utilities.

Screeners then determine an individual’s available funds to contribute toward defense representation by adding the net income and liquid assets and subtracting from the total the sum of reasonable and exceptional expenses. [(Net Income + Liquid Assets) – (Reasonable + Exceptional Expenses) = Available Funds]. The resulting “available funds” can then be measured against a second-tier presumptive eligibility standard. In many jurisdictions, this second presumptive level is tied to a percentage of the Federal Poverty guidelines. For instance, Florida sets its presumptive standard at 250% of the Federal Poverty guideline.³¹² Table A-1 (below) shows the 2002 Health and Human Services Poverty Guidelines, by family size and annual income, and compares the 250% and 150% standard for both annual and monthly income.

³¹⁰ A defendant’s vehicle may be the only thing keeping him and her off of public assistance by allowing him or her the means to get to work, or comply with conditions of probation or pretrial release such as drug or mental health treatment, or family counseling. In large geographically expansive counties, including a car in a person’s liquid assets may be ultimately more costly than appointing the person a public defender.

³¹¹ It is assumed that the goals of the criminal justice system are not served by rendering homeless a charged-but-unadjudicated defendant, or his or her family.

³¹² Fla. Stat. Ann. §27.52 (2004). Though a state-by-state, county-by-county study has not been conducted to determine the total number of jurisdictions that use the Federal Poverty guidelines and some presumptive percentage thereof, the evaluation team’s range of experience suggests a national norm of approximately 150% of the federal rate.

Table A-1 Federal Poverty Guidelines ³¹³					
Family Size	Poverty Index	150%		250%	
		Annual	Monthly	Annual	Monthly
1	\$8,860	\$13,290	\$1,107.50	\$22,150	\$1,845.83
2	\$11,940	\$17,910	\$1,492.50	\$29,850	\$2,487.50
3	\$15,020	\$22,530	\$1,877.50	\$37,550	\$3,129.17
4	\$18,100	\$27,150	\$2,262.50	\$45,250	\$3,770.83
5	\$21,180	\$31,770	\$2,647.50	\$52,950	\$4,412.50
6	\$24,260	\$36,390	\$3,032.50	\$60,650	\$5,054.17

In some jurisdictions, eligibility screening is terminated if a person’s net income and liquid assets exceed these income thresholds, and the person is deemed ineligible for public appointment of counsel. In others, persons can be deemed eligible if their net income and liquid assets exceed these thresholds, but reasonable and exceptional expenses bring them under the threshold.

One example of jurisdiction employing such a financial determination system is New York City. There, the formula also takes into account the seriousness of the charge. As with most jurisdictions, defendants in New York City whose gross income falls at or below the current federal poverty index are presumptively eligible for assigned counsel. However, even defendants with household gross incomes above these levels are eligible for assigned counsel if they are financially unable to retain counsel. In determining whether a defendant is unable to retain counsel, the court considers the household’s other financial commitments, including rent or mortgage payments, the cost of food and utilities, debts, the likely cost of counsel, unusual expenses, and available liquid assets.³¹⁴

As in Florida, New York City’s guidelines provide that defendants charged with misdemeanors are presumptively eligible for assigned counsel when the gross household income is at or below 250% of the federal poverty standard. The guidelines similarly provide that defendants charged with felonies are presumptively eligible for assigned counsel when the gross household income is at or below 350% of the federal poverty

³¹³ Annual Update of the HHS Poverty Guidelines, 67 Fed. Reg. 6931-33 (Feb. 14, 2002). For each additional household member, add \$3,080.

³¹⁴ Once the public defender has been assigned, a court may not relieve it on the ground of non-indigency unless the defender agency first moves to be relieved. Construing County Law §722-d, the Appellate Division has stated that “the report of counsel [is] a predicate to any action on the part of the court to relieve counsel of the assignment.” *Legal Aid Soc. v. Samenga*, 333 N.Y.S.2d 51, 53 (N.Y. App. Div. 1972). Thus, for example, where a court suspects that a defendant has the resources to retain counsel because bail has been posted, at most it would ask the assigned attorney to review the accused’s eligibility, keeping in mind that persons who contribute to bail cannot be required to assign their money for purposes of hiring an attorney unless they also are obligated to contribute to the defendant’s support. Therefore, where bail is posted by the accused’s spouse, that money can be considered as an asset in evaluating eligibility, but bail money posted by an employer, family friend or member of the defendant’s extended family (aunt, uncle, cousin) ordinarily should not be considered as an asset of the accused.

standard.

In lieu of the Federal Poverty guidelines, other jurisdictions take into account the going rate for private counsel to represent a defendant on various case types. For instance, private attorneys in some jurisdictions may routinely ask for a \$5,000 retainer to represent a person on a felony indictment, in which case a defendant may fall above the 150% Federal Poverty index (\$1,107.50 monthly available funds) but would still face a “substantial hardship” if he or she were to retain private counsel.

The three-tiered screening system described above provides an added benefit to the overall justice system. In many jurisdictions, public defenders employ investigation interns to conduct these eligibility screenings at little or no cost.³¹⁵ These interns regularly go to the jail each morning and afternoon to conduct the financial screening on all people brought in on new charges. The appointment of the public defender can be made as soon as the eligibility is determined, and attorneys are able to make bail recommendations earlier, reducing the number of beds in the County jail used for pre-trial detention. Early appointment of counsel also enables earlier investigation, discovery and preparation, which results in more prompt decisions regarding either negotiated dispositions or going to trial.

³¹⁵ As mentioned above, other jurisdictions employ Pre-Trial Services departments that conduct financial eligibility determinations at the same time that they screen charged persons to determine their eligibility for release on their own recognizance.

Appendix B

NLADA has promulgated guidelines to assist jurisdictions in establishing independent oversight boards. These guidelines are designed to ensure that the defense function remains insulated from political pressures. NLADA's *Guidelines for Legal Defense Services* (Guideline 2.10) states:

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: The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director.

- a. The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics.
- b. No single branch of government should have a majority of votes on the Commission.
- c. Organizations concerned with the problems of the client community should be represented on the Commission.
- d. A majority of the Commission should consist of practicing attorneys.
- e. 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.

Additionally, state legislatures have established independent indigent defense commissions that incorporate these NLADA guidelines. Statutory language creating the North Carolina Commission on Indigent Defense Services is included below as an example of how such a commission functions in practice. The North Carolina Commission is an autonomous body within the judicial branch of government for fiscal and budgetary purposes only. Please note that the Commission does not comply with the guideline excluding members of the judiciary from the board, but does explicitly prevent prosecutors and law enforcement officials from being board members:

Chapter IX, § 7A-498.4

(a) The Commission on Indigent Defense Services is created within the Office of Indigent Defense Services and shall consist of 13 members. To create an effective

working group, assure continuity, and achieve staggered terms, the Commission shall be appointed as provided in this section.

(b) The members of the Commission shall be appointed as follows:

1. The Chief Justice of the North Carolina Supreme Court shall appoint one member, who shall be an active or former member of the North Carolina judiciary.
2. The Governor shall appoint one member, who shall be a non-attorney.
3. The General Assembly shall appoint one member, who shall be an attorney, upon the recommendation of the President Pro Tempore of the Senate.
4. The General Assembly shall appoint one member, who shall be an attorney, upon the recommendation of the Speaker of the House of Representatives.
5. The North Carolina Public Defenders Association shall appoint one member, who shall be an attorney.
6. The North Carolina State Bar shall appoint one member, who shall be an attorney.
7. The North Carolina Bar Association shall appoint one member, who shall be an attorney.
8. The North Carolina Academy of Trial Lawyers shall appoint one member, who shall be an attorney.
9. The North Carolina Association of Black Lawyers shall appoint one member, who shall be an attorney.
10. The North Carolina Association of Women Lawyers shall appoint one member, who shall be an attorney.
11. The Commission shall appoint three members, who shall reside in different judicial districts from one another. One appointee shall be a non-attorney, and one appointee may be an active member of the North Carolina judiciary. One appointee shall be Native American.

The North Carolina statute has additional experiential requirements to ensure appropriate exercise of the indigent defense function within the criminal justice system:

Persons appointed to the Commission shall have significant experience in the defense of criminal or other cases subject to this Article or shall have demonstrated a strong commitment to quality representation in indigent defense matters. No active prosecutors or law enforcement officials, or active employees of such persons, may be appointed to or serve on the Commission. No active judicial officials, or active employees of such persons, may be appointed to or serve on the Commission, except as provided in subsection (b) of this section.

Appendix C

In 1997, NLADA adopted the national *Defender Training and Development Standards* to guide indigent defense organizations, and to support the provision of “training opportunities that insure the delivery of zealous and quality representation to clients.” NLADA’s Training and Development Standards establish a model for creating, establishing and offering “training opportunities for all employees”. In addition to creating a written training plan based upon a meaningful training needs assessment, the standards also require specially designated and trained training personnel as well as the development and maintenance of written training materials and the inclusion of new technologies as part of training planning and functions. The standards encourage specialized training programs for death penalty and other complex cases or practice areas, and for management and leadership skills building.

The NLADA Training and Development Standards also establish a leadership norm for public defender agency directors. Compliance with the norm requires adequate public (“governmental”) funding to meet staff training resource needs and to support the commitment to employee training, education, and development. Effective employee training and education programs not only substantially contribute to the competency and quality of individual case representation, but also sustain a dynamic public defense program that brings new energy and renewed commitment to its employees, and renewed commitment to providing excellent representation.

Some of the most important training that any public defender receives is that provided when s/he is just out of law school or a clerkship and is about to begin representing clients. This training ideally teaches the new attorney how to interview a client, the level of investigation, legal research and other preparation necessary to provide a competent defense, trial tactics, relevant case law, and ethical obligations. It includes a thorough introduction to the workings of the public defender’s office, the district attorney’s office, the court system, and the probation and sheriff’s departments as well as any other corrections components. And it makes use of role playing and other mock exercises to record student work on required skills such as direct and cross-examination. These recorded exercises are then played back and critiqued by a more experienced attorney or supervisor.