Ethical Obligations of Indigent Defense Attorneys to Their Clients

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I. INTRODUCTION

This Article is a basic introduction to the provision of indigent defense services in state courts throughout the country and the ethical obligations of the attorneys who provide those services. First, the Article briefly quantifies what currently exists in our right to counsel systems – what we know, and what we do not know.[1] The Article then discusses the rules that generally govern the ethics of representation provided by indigent defense attorneys. Third, the Article examines the measures by which attorneys can know whether they are fulfilling and will continue to fulfill their ethical obligations. Finally, the Article discusses the responsibilities of the broader justice system to ensure ethical representation of indigent defendants and why that goal is rarely achieved.

II. WHAT DO WE MEAN WHEN WE SAY "INDIGENT DEFENSE?"

Before discussing the ethical obligations of lawyers who provide indigent defense representation, it is necessary to first define the term "indigent defense." Each public defense professional works primarily within a single jurisdiction, and so tends to apply a definition of indigent defense that reflects the makeup of that jurisdiction's system. Often, public defense professionals mistakenly believe that others assign the same definition to these words. Because of the variations in indigent defense systems and services throughout the country, and from jurisdiction to adjacent jurisdiction, it is highly unlikely that each public defense professional applies the same definition of indigent defense as that applied by every, or any, other professional.

There is no single indigent defense system in our country; the very use of the word *system* is a misnomer. Instead, each jurisdiction applies its own unique combination of answers to: the administration, funding, and service delivery model by which they provide representation; the individuals who receive that representation; the types of cases in which representation is provided; and, the celerity with which counsel is appointed.

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1. For an encyclopedic review of indigent defense services in America, see THE CONSTITUTION PROJECT, THE NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009) [hereinafter JUSTICE DENIED].

A. How Indigent Defense Representation Is Provided

This Article focuses solely on indigent defense representation provided in state courts and does not address the federal public defense and Criminal Justice Act (CJA) panel system.[2] In the forty-seven years since the *Gideon v. Wainwright* decision,[3] the federal government and courts have been largely hands-off about the manner in which the states attempt to carry out the Sixth Amendment mandates of the Constitution.[4]

1. Administration and Funding

The administration of public defense services varies by jurisdiction and may be carried out by a state, a county, a city, an individual judge, or by every possible combination of these.[5] Eighteen states have statewide commissions overseeing statewide public defense systems that are theoretically responsible for all public defense services within each state.[6] Two states have

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2. The Criminal Justice Act, 18 U.S.C. § 3006A (2006), governs the provision of appointed counsel in federal courts. All federal indigent defense representation today is provided through a federal public defender organization, a community defender organization, or a panel of private attorneys who accept assignments in individual cases. *See id.* For more information about the federal public defense system, see Appointment of Counsel, http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel.aspx (last visited July 19, 2010).

3. 372 U.S. 335 (1963).

4. The new *Access to Justice* initiative within the U.S. Department of Justice (DOJ) was revealed on the same day this paper was presented at the *2010 Missouri Law Review Symposium*. Ari Shapiro, *Justice Dept. To Launch Indigent Defense Program*, NPR, Feb. 26, 2010, http://www.npr.org/templates/story/story.php?storyId=124094017; Carrie Johnson, *Prominent Harvard Law Professor Joins Justice Department*, WASH. POST, Feb. 26, 2010, http://www.washingtonpost.com/wpdyn/content/article/2010/02/25/AR2010022505697.html. Time will tell what support this new initiative of the DOJ lends to states in their efforts to provide constitutionally effective assistance of counsel to the poor.

5. *See infra* App. B.

6. *See infra* App. B. Those eighteen states are:

Arkansas. *See* ARK. CODE ANN. §§ 16-87-201 to 216 (2010) (creating the Arkansas Public Defender Commission); ARK. R. CRIM. P. R. 37.5 (requiring a hearing for all defendants sentenced to death to determine the appointment of an attorney for representation in post-conviction proceedings); *see also* ARK. PUB. DEFENDER COMM'N REPORT, *available at* http://www.dfa.arkansas.gov/offices/budget/budgetRequests/0324_public_defender.pdf (detailing history and organization); State v. Independence County, 850 S.W.2d 842 (Ark. 1993), *superseded by statute*, ARK. CODE ANN. §§ 16-87-201 to 216 (2010), *as recognized in* State v. Crittenden County, 896 S.W.2d 881 (Ark. 1995) (holding that insuring indigents a right to counsel is a function of the State of Arkansas and not a county obligation).

Colorado (separate boards and chief executives for primary and conflict services). *See* COLO. REV. STAT. §§ 21-1-101 to -106 (2010) (passed in 1969, estab-

lishing the office of the State Public Defender); COLO. CT. RULES Chap. 29.3. (passed in 1979, creating Public Defender Commission); COLO. REV. STAT. §§ 21-2-101 to -106 (2010) (passed in 1996, creating the office of Alternate Defense Counsel).

Connecticut. *See* CONN. GEN. STAT. ANN. §§ 51-289 to -300 (West 2010); *see also* SUSAN O. STOREY, CONN. DIV. OF PUB. DEFENDER SERVS., THE ANNUAL REPORT 2009 OF THE CHIEF PUBLIC DEFENDER 3-4 (2010), *available at* http://www.ocpd.state.ct.us/C-ontent/AnnualDPDS/PublicDefenderAR2009.pdf (detailing history and organization of the Connecticut Division of Public Defender Services).

Hawaii. *See* HAW. REV. STAT. ANN. §§ 802-1 to -12 (LexisNexis 2010).

Louisiana. *See* Louisiana Public Defender Act of 2007, LA. REV. STAT. ANN. §§ 15:141-:184 (2010).

Maine. *See* An Act to Establish the Maine Commission on Indigent Legal Services, ME. REV. STAT. ANN. tit. 4 §§ 1801-1805 (2010) (establishing the Maine Commission on Indigent Legal Services).

Maryland. *See* MD. CODE ANN., CRIM. PROC. §§ 16-101to -403 (LexisNexis 2010); *see also* NANCY S. FORSTER, MARYLAND OFFICE OF THE PUBLIC DEFENDER, FISCAL YEAR 2008 ANNUAL REPORT 4-5 (2008), *available at* http://www.opd.state.md.us/News%20Assets/annual%20rep-ort%202008.pdf (describing the history and organization of the Maryland Office of the Public Defender).

Massachusetts. *See* MASS. GEN. LAWS ANN. ch. 211D §§ 1-16 (West 2010) (establishing the Committee for Public Counsel Services); *see also* Lavallee v. Justices in the Hampden Superior Court, 812 N.E.2d 895 (2004).

Minnesota. *See* MINN. STAT. ANN.§ 611.215 (West 2010); *see also* Minnesota House of Representatives House Research, Minnesota's Public Defender System, http://www.house.leg.state.mn.us/hrd/pubs/ss/ssmpds.htm#Q7 (last visited Aug. 31, 2010) (describing structure, funding, and services generally); OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINN., PUBLIC DEFENDER SYSTEM EVALUATION REPORT 9-13 (2010), *available at* http://www.auditor.leg.state.mn.us/ped/pedrep/pubdef.pdf (describing history, organization, work duties, and funding).

Missouri. *See* MO. REV. STAT. §§ 600.015-.101 (2000); *see also* J. MARTY ROBINSON, STATE OF MO. PUB. DEFENDER COMM'N FISCAL YEAR 2009 ANNUAL REPORT, 1-2 (2009), *available at* http://www.publicdefender.mo.gov/about/FY-2009AnnualR-eport.pdf (describing the history and organization of the Missouri State Public Defender System).

Montana. *See* MONT. CODE ANN. §§ 47-1-201 to -216 (2010) (establishing the Office of the State Public Defender).

New Hampshire. *See* N.H. REV. STAT. ANN. §§ 604-A:1-:10, 604-B:1-:8 (2010).

North Carolina. In 2000, North Carolina established the Commission on Indigent Defense Services to oversee the provision of legal representation to indigent defendants and others entitled to counsel under North Carolina law. *See* N.C. GEN. STAT. §§ 7A-498 to-499; *see also* N.C. COMM'N ON INDIGENT DEF., REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES (2010), *available at* http://www.aoc.state.nc.us/www/ids/Reports%20&%20Data/Latest%20Releases/IDS%20leg%20report%202010,%20final.pdf; N.C. COMM'N ON INDIGENT DEF., RULES FOR THE CONTINUED DELIVERY OF SERVICES IN NON-CAPITAL CRIMINAL AND NON-CRIMINAL CASES AT THE TRIAL LEVEL 6-7 (2010), *available at*

elected public defenders for each county or jurisdiction, who are directly accountable to the voters.[7] Eight states have a state public defender operating the public defense system throughout the state, but the chief executive of the state public defender office is appointed by and serves at the pleasure of the governor without any public defense commission to insulate the provision of counsel to the poor from politics.[8] Eleven states fall into a hybrid category.[9]

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http://www.aoc.state.nc.us/www/ids/Rules%20&%20Procedures/IDS%20Rules/IDS%20Rules%20Part%201.pdf.

North Dakota. *See* N.D. CENT. CODE §§ 54-61-01 to –04 (2010) (establishing the commission on legal counsel for indigents).

Oregon. *See* OR. REV. STAT. ANN. §§ 151.211-.505 (West 2010).

South Carolina. *See* S.C. CODE ANN. §17-3-310 to -380 (2009) (creating the Commission on Indigent Defense).

Virginia. *See* VA. CODE ANN. §§ 19.2-163.01 to 163.04 (2010); *see also* VA. INDIGENT DEFENSE COMM'N, ANNUAL REPORT 2008, *available at* http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD2672-008/$file/RD267.pdf.

Wisconsin. *See* WISC. STAT. ANN. §§ 977.01-.09 (West 2010).

7. *See infra* App. B. Those two states are:

Florida. FLA. STAT. ANN. § 27.50.

Tennessee (with the exception of Davidson and Shelby counties). In 1989, Tennessee established that the district public defenders in each of the state's 31 counties (with the exception of Davidson and Shelby counties) are to be elected. TENN. CODE ANN. § 8-14-202(b)(1)(A) (2010). They also established the District Public Defenders Conference. *See* TENN. CODE ANN. §§ 8-14-301 to -306 (2010). In 1990, the public defenders from Davidson and Shelby counties were added to the conference. H.B. No. 1899, 96th Gen. Assem. (Tenn. 1990).

8. *See infra* App. B. Those states are:

Alaska (has two statewide chief executives, one for primary representation and one for conflicts representation) . *See* ALASKA STAT. §§ 18.85.010-.180(2010) (establishing the Public Defender Agency); *id.* § 18.85.030 (providing that the governor shall appoint the public defender subject to confirmation by the legislature); *id.* §§ 44.21.400-470 (establishing the Office of Public Advocacy); *id.* § 44.21.410(a)(5) (providing that the Office of Public Advocacy shall represent indigents who cannot be represented by the public defender due to conflicts of interest); *see also* ALASKA PUB. DEFENDER AGENCY & OFFICE OF PUB. ADVOCACY, DEP'T OF ADMIN., ELIGIBILITY ISSUES AND OTHER PROGRAM ASPECTS 3-5 (1995), *available at* http://www.legaudit.state.ak.us/pages/audits/1995/pdf/4507.pdf (describing the history and organization of the Office of Public Advocacy and the Public Defender Agency).

Delaware. *See* Delaware Model Defender Act, DEL. CODE ANN. tit. 29, §§ 4601-4608 (2010).

Iowa (state PD does not oversee conflict representation). *See* IOWA CODE Ann. §§ 13B.1-.11 (West 2010); *id.* § 815.10; *id.* § 13B.2 ("The governor shall appoint the state public defender, who shall serve at the pleasure of the governor").

New Jersey (state PD does not oversee conflict representation). *See* N.J. STAT. ANN. § 2A:158A-1 to -25 (West 2010); *id.* § 2A:158A-4 (providing that the Public Defender shall be appointed by the governor).

New Mexico. *See* N.M. STAT. ANN. § 31-15-1 to 12 (West 2010); *id.* § 31-15-4(A) ("The governor shall appoint the chief who shall be the administrative head of the department.").

Rhode Island (state PD does not oversee conflict representation). *See* R.I. GEN. LAWS § 12-15-1 to -11 (2010); *id.* § 12-15-2 (providing that the governor shall appoint the public defender).

Vermont. *See* VT. STAT. ANN. tit. 13 § 5201-5277; *id.* § 5252(a) ("The defender general shall be appointed by the governor.").

Wyoming (state PD does not oversee conflict representation). *See* Public Defender Act, WYO. STAT. ANN. § 7-6-101 to -114 (2010); *see also* OFFICE OF THE PUB. DEFENDER, STRATEGIC PLAN (2009), *available at* http://wyodefender.state.wy.us/files/strategicplan.pdf; DIANE M. LOZANO, OFFICE OF THE PUBLIC DEFENDER, ANNUAL REPORT (2009), *available at* http://wyodefender.state.wy.us/files/2009Annual.pdf (describing organization, duties, caseloads, and funding).

9. *See infra* App. B. Kentucky and Oklahoma both have statewide commissions and state public defense systems, though in each there are jurisdictions that remain outside the statewide system. Georgia and Ohio both have statewide commissions and state public defense systems, but counties can opt in or out of the state public defender system. Kansas has both a statewide commission and a state public defender system, but only for felony and appellate representation. Nevada has a state public defense system but allows rural counties to opt in or out of the state system, and there is no statewide commission. Indiana, Nebraska, Texas, Washington, and West Virginia each have agencies that serve as a funding pass-through to provide financial assistance to counties through state funding, but control over service-delivery is maintained locally.

Georgia. Funding of the Georgia system was provided by House Bill 1EX:

> In the 2004 legislative session, House Bill 1EX, the funding mechanism for the new state-wide system, was passed. This legislation funded the state's portion of the funding for the Standards Council through court "user fees" including a $50 waivable application fee, a $15 add on for civil filing fees, a 10% add on for traffic and criminal fines, and a 10% add on with a $50 cap for bail and bonds. This fund is projected to collect between $37 and $40 million per year.

GA. PUB. DEFENDER STANDARDS COUNCIL, 2005 ANNUAL REPORT 6 (2005), *available at* http://www.gpdsc.com/docs/cpdsystem-reports-annual_report_2005.pdf. The counties were left responsible for fully funding the cost of "appropriate offices, utilities, telephone expenses, materials, and supplies as may be necessary" for "the office or offices of the circuit public defender." GA. CODE ANN. § 17-12-34 (2010). The state funded the salary of the circuit public defender, *id.* § 17-12-25(a), one assistant public defender for each superior court judge in the circuit, *id.* § 17-12-27, one investigator, *id.* § 17-12-28, and two administrative paraprofessional personnel, *id.* §§ 17-12-29 to -30. Counties were allowed to supplement the salaries and benefits of any of these state employees and to fully fund additional positions. *Id.* §§ 17-12-25(b), -30(6)-(7), -31, -32. Additionally, single county judicial circuits could opt to continue an alternative delivery system if: (1) the existing system had a full-time director and staff and had been operational for at least two years on July 1, 2003; (2) GPDSC determined the system meets or exceeds standards; (3) the county submits a resolution to the GPDSC by September 30, 2004 requesting to opt out; and (4) the county fully

funds the system. *Id.* § 17-12-36(a). "The Cobb, Gwinnett, Houston, Douglas, Blue Ridge and Bell-Forsyth Circuits applied and were approved for opt out." GA. PUB. DEFENDER STANDARDS COUNCIL, *supra*, at 6.

Indiana. IND. CODE ANN. § 33-40-4-1 to -5 (West 2010) (establishing the Public Defender Council to "assist in the coordination of the duties of the attorneys engaged in the defense of indigents at public expense"). As the website of the Public Defender Council advises, "[t]he Council does not provide legal representation." Indiana Public Defender Council http://www.in.gov/ipdc/index.html (last visited Aug. 31, 2010). Indiana also has a State Public Defender, but its only duties are in post-conviction. IND. CODE ANN. § 33-40-1-1 et seq.

Kansas. *See* Indigents' Defense Services Act, KAN. STAT. ANN. §§ 22-4501 to -4529 (2010);. *id.* § 22-4503(a) ("A defendant charged with . . . any felony is entitled to have the assistance of counsel."); KAN. ADMIN. REGS. § 105-1-1(a). The State Board of Indigents' Defense Services is required to provide representation "for each indigent person accused of a felony and for such other indigent persons as prescribed by statute." KAN. STAT. ANN. § 22-4522(a). The Board *may* provide representation on misdemeanors, but at the expense of the city or county. *Id.* §§ 22-4523(f), 22-4526.

> Legal representation at state expense shall not be provided in the following types of cases: (1) services on behalf of juvenile offenders, unless the juvenile is charged with commission of a felony offense as an adult under the criminal laws of Kansas; (2) services on behalf of a defendant charged with a misdemeanor or a defendant appealing a misdemeanor conviction; (3) any case in which the defendant or other person represented has not been determined to be indigent or partially indigent by a judge, using guidelines developed by the board of indigents' defense services; and (4) any case in which an attorney has not been appointed by a judge to represent the defendant.

KAN. ADMIN. REGS. § 105-1-1(b).

Kentucky. *See* KY. REV .STAT. ANN. §31.010-.250 (West 2010). The Louisville-Jefferson County Public Defender office was established in 1971, prior to the statutory creation of the Kentucky Department of Public Advocacy. Similarly, Fayette County (Lexington) provided public defense through Fayette County Legal Aid until FY2007, when that responsibility was taken over by DPA's Lexington Public Defender Office. In both counties, the county government provided funding for indigent defense services in addition to that provided by DPA. *See id.* §§ 31.060, .065; COMMONWEALTH OF KY. DEP'T OF PUB. ADVOCACY, REALIZING JUSTICE: DEFENDER CASELOAD REPORT FISCAL YEAR 2007 8 (2007), *available at* http://apps.dpa.ky.gov/libr-ary/DefenderCaseloadReport07.pdf. DPA assumed full operational and financial responsibility for Fayette County during FY 2008. *See* EDWARD C. MONAHAN, COMMONWEALTH OF KY. DEP'T OF PUB. ADVOCACY, Annual Litigation Report Fiscal Year 2008 4 (2008), *available at* http://dpa.ky.gov/NR/rdonlyres/1140A71A-FE51-464D-A2BD-20E1E79B7B11/0/DPA_2008_Caseload Report.pdf.

Nebraska. Nebraska's ninety-three counties each determine the manner in which they will provide public defense services: some have an elected public defender, some use an assigned counsel system, and some contract for services. *See* NEB. REV. STAT. ANN. §§ 23-3401, 29-3909–3918 (LexisNexis 2010); NEB. MINORITY &

JUSTICE TASK FORCE/IMPLEMENTATION COMM., THE INDIGENT DEFENSE SYSTEM IN NEBRASKA: AN UPDATE (2004), *available at* http://ppc.nebraska.edu/userfiles/file/Documents/projects/MinorityJusticeCommittee/Reports/Update_October_2004.pdf. In 1995, the Nebraska Commission on Public Advocacy was established to provide assistance to county public defense systems. *See* County Revenue Assistance Act, 1995 Neb. Laws LB 646 §1, 2001 Neb. Laws LB 335 § 2; NEB. REV. ANN. STAT. §§ 29-3919 to -3933 (establishing Nebraska Commission on Public Advocacy); *see also* JAMES R. MOWBRAY, THE NEB. COMM'N ON PUB. ADVOCACY, THE 2007/2008 ANNUAL REPORT, *available at* http://www.ncpa.ne.gov/2007-2008AnnualReport.htm.

Nevada. NEV. REV. STAT. ANN. §§ 180.010-.110 (LexisNexis 2010). The statutory creation of the State Public Defender expressly excludes that office from providing trial-level services in counties that have created an office of public defender. *Id.* § 180.090. Nevada counties with populations of 100,000 or greater – Clark County (Las Vegas) and Washoe County (Reno) – are required to create a county public defender office. *Id.* § 260.010(1). All other counties may choose to either create their own public defender office or avail themselves of the services of the State Public Defender, but the county public defender office does not have to be a full-time staffed governmental office. *Id.* § 260.040(2)-(5). In 1980, Clark, Washoe, and Elk counties all operated county public defender offices, and the remaining thirteen counties and Carson City received services through the State Public Defender. The state initially provided about 80% of the funding of indigent defense, with counties providing the other 20%. But by 2005, the state provided less than 3% of the funding for indigent defense services in the state, with the counties bearing over 97% of the costs. THE SPANGENBERG GROUP, STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES IN FISCAL YEAR 2005 38 (2006), *available at* http://www.abanet.org/legalservices/sclaid/defender/downloads/FINAL_REPORT_FY_2005_Expenditure_Report.pdf. In 2005, the total statewide expenditure for indigent defense services was estimated at $27,532,286, of which $726,178 (2.6%) was provided by the state and $26,806,108 was provided by the counties. *Id.* By 2007, only five counties used the State Public Defender (Carson City, Storey, Eureka, Lincoln, and White Pine) and nine counties were contracting with local private attorneys to provide public defense services. *See* Nevada State Public Defender, http://dhhs.nv.gov/PublicDefender.htm (last visited Aug. 31, 2010).

Ohio. OHIO REV. CODE ANN. § 120.01-.08 (LexisNexis 2010). The statutory creation of the Public Defender Commission and the State Public Defender expressly allowed counties to operate their own county public defender's office. *Id.* §§ 120.13-.18. Seventy-seven of Ohio's counties have chosen to operate their own public defender offices. The State Public Defender provides trial level services only in Trumbull County through the Trumbull County Branch Office established in 1984 and in ten additional counties through the Multi-County Branch Office Program established in 1991. *See* OHIO PUB. DEFENDER COMM'N, 2008 ANNUAL REPORT 14-15 (2008), *available at* http://www.opd.ohio.gov/AboutUS/us_2008.pdf. Counties are only required to submit reports to the Public Defender Commission if they desire to receive reimbursement from the state. OHIO REV. CODE ANN. § 120.18. Under the statutory scheme, counties were to be reimbursed for fifty percent of their costs in operating their public defender offices. *Id.* §§ 120.18, .28, .33. However, "[i]f the amount appropriated by the general assembly in any fiscal year is insufficient to pay fifty per cent of the total cost . . . the amount of money paid . . . shall be reduced proportionately so that each county is paid an equal percentage . . . ." *Id.* § 120.34. By 2008,

"[r]eimbursement from the state to the counties [was] at an all-time low of 25%." OHIO PUBLIC DEFENDER COMMISSION, *supra*, at 2.

Oklahoma. Indigent Defense Act, OKLA. STAT. ANN. tit. 22 §§ 1355-1386 (West 2010); *see* OKLA. INDIGENT DEF. SYS., 2009 ANNUAL REPORT 1-2 (2009), *available at* http://www.ok.gov/OIDS/documents/2009%20Annual%20Report.pdf ("OIDS is subject to appointment to provide trial representation in non-capital criminal cases in 75 of Oklahoma's 77 counties."). Both Oklahoma County (Oklahoma City) and Tulsa County (Tulsa) operate entirely separate public defense systems. *See* OKLA. STAT. ANN. §§ 138.1a-.10; Oklahoma County Public Defender, http://www.oklahomacounty.org/departments/publicdefender/aboutus.asp (last visited Aug. 31, 2010).

Texas. In 2001, Texas created the Task Force on Indigent Defense to oversee state fiscal assistance to counties in exchange for which the local judiciaries report their county plan for delivering indigent defense services. *See* Texas Fair Defense Act, TEX. GOV'T CODE ANN. §§ 71.051-.063 (Vernon 2010); *see also* TEX. TASK FORCE ON INDIGENT DEF., 2009 ANNUAL AND EXPENDITURE REPORT 9-12 (2009), *available at* http://www.courts.state.tx.us/tfid/pdf/09AnnualReportFINAL011-110.pdf (detailing methods of funding distribution to counties). "The Task Force supports local control and understands that indigent defense services are provided and funded primarily at the local level." *Id.* at 1. Control of the system for appointing counsel remains with the judges of the courts within each county. TEXAS CODE CRIM. PROC. ANN. art. 26.04 (Vernon).

Washington. The Office of Public Defense administers state fiscal assistance to the counties in providing indigent defense services but does not provide direct representation of clients. WASH. REV. CODE ANN. § 2.70.020 (West 2010); *see also* WASH. STATE OFFICE OF PUB. DEF., 2009 STATUS REPORT ON PUBLIC DEFENSE IN WASHINGTON STATE (2010), *available at* http://www.opd.wa.gov/Reports/TrialLevelServices/2009_PublicDefenseStatusReport.pdf. County boards of commissioners may, but are not required to, establish a public defender office for the county. WASH. REV. CODE ANN. § 36.26.020. Counties and cities that wish to obtain funding through the Office of Public Defense must meet certain requirements. *See* Indigent Defense Services Act of 2005, 2005 Wash. Laws ch. 157, WASH. REV. CODE ANN. §10.101.005-.080. "As of 2009 . . . Washington state still is funding less than 5 percent of the total expended on trial-level public defense, with counties and cities funding the balance." WASH. STATE OFFICE OF PUB. DEF., 2009 STATUS REPORT ON PUBLIC DEFENSE IN WASHINGTON STATE 15 (2010), *available at* http://www.opd.wa.gov/Reports/TrialLevelServices/2009_PublicDefenseStatusReport.pdf.

West Virginia. In 1981, West Virginia established Public Defender Services to administer the provision of legal representation to indigent persons. W.V. Code Ann. §§ 29-21-1 to -21 (LexisNexis 2010). The agency "does not represent clients but rather funds . . . and assists representation." JOHN A. ROBERTS, W. VA. PUB. DEFENDER SERVS., ANNUAL REPORT FISCAL YEAR 2008-2009 2 (2009), *available at* http://www.wvpds.org/. The Indigent Defense Commission was established in 2008. 2008 W. Va. Acts 117; W. VA. CODE ANN. § 29-21-3b. Circuit courts establish and maintain panels of attorneys eligible to serve as counsel through appointment. W. VA. CODE ANN. § 29-21-9. All fifty-five counties operate an appointed counsel system. ROBERTS, *supra*, at 4. Authorization was granted to establish a Public Defender Corporation in each judicial circuit "to provide legal representation" through either

In the remaining eleven states, the individual counties and/or cities control the administration of trial-level indigent defense services, and there is no state oversight.[10]

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full-time or part-time attorneys, W. VA. CODE ANN. § 29-21-8, but "the decision as to whether to 'activate' a specific office was left to the discretion of local residents." INDIGENT DEF. COMM'N, REPORT TO THE LEGISLATURE 1 (2009), *available at* http://www.wvpds.org/. The board of directors of each public defender corporation is made up of residents of the circuit appointed by the county commissioners, the county bar association or attorneys, and the governor, and is responsible for overseeing the provision of counsel within the circuit. W. VA. CODE ANN. § 29-21-15. Twenty-nine of the fifty-five counties use a Public Defender Corporation system. ROBERTS, *supra*, at 5-7.

10. *See infra* App. B. Those states are:

Alabama. The presiding circuit judge within each judicial circuit administers the indigent defense system. ALA. CODE § 15-12-3 (LexisNexis 2010). Compensation of counsel is paid by the state. *Id.* § 15-12-6.

Arizona. Each county board of supervisors may establish a public defender office. ARIZ. REV. STAT. ANN. § 11-581(2010). If there is no public defender office, then the court appoints a private attorney. ARIZ. R. CRIM. P. R. 6.5(c). In municipal court, the judge appoints a private attorney. ARIZ. REV. STAT. ANN. § 9-499.09. As of 2003, nine counties had a public defender office and two of those counties also had a conflict public defender office. ARIZ. CRIM. JUSTICE COMM'N, THE RISING COST OF INDIGENT DEFENSE IN ARIZONA 5-6 (2003), *available at* http://azmemory.lib.az.us/cdm4/item_viewer.php?CISOROOT=/statepubs&CISOPTR=3135&CISOBOX=1&REC=1. The remaining six counties appoint private attorneys. *Id.* at 6.

California. Each county's board of supervisors may, but is not required to, establish a public defender office for the county with either an appointed or elected public defender. CAL. GOV'T CODE § 27700 (2010). The courts assign counsel to defend the indigent and determine the amount that is paid to the lawyer where there is no public defender or where the public defender or contract counsel is conflicted. CAL. PENAL CODE § 987.2. The state may reimburse counties for not more than 10 percent of the funds expended for providing counsel to indigents. *Id.* § 987.6. The State Public Defender office provides counsel only in post-conviction appellate representation in death sentence cases. CAL. GOV'T CODE §§ 15400-15404, 15420-15425; CAL. PENAL CODE §§ 1239(b), 1240.1(e)(1).

Idaho. The board of county commissioners in each county provides for representation of indigent defendants and may do so by establishing a public defender office, through a coordinated plan for assignment of attorneys, or through a combination. Idaho Code Ann. § 19-859 (2010). The State Appellate Public Defender Act of 1998 created a statewide office for appeals and for capital post-conviction, but only for those counties participating in the capital crime defense fund. *Id.* §19-867 to -872.

Illinois. All counties having a population of over 35,000 have a statutorily created Public Defender Office, while in other counties the county board may establish a Public Defender Office if they wish. 55 ILL. COMP. STAT. ANN. 5/3-4001 to -4004.2 (West 2010). The Public Defender is appointed either by the judges of the circuit or by the President of the county board. *Id.* §§ 5/3-4004 to -4004.1. The courts appoint the Public Defender in counties where the office has been established or appoints a private attorney in conflict situations and where there is not a Public

Just as administration of services varies by jurisdiction, so too does the source of funds to provide those services.[11] Twenty-eight states provide 100% of the funding for trial-level indigent defense (or the amount provided by local jurisdictions is negligible).[12] An additional six states provide the majority of the funding for trial-level representation.[13] In nine states, the

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Defender Office. 725 ILL. COMP. STAT. 5/113-3. The State Appellate Defender Act created a statewide office for appellate representation. *Id.* § 105/1-105/11.

Michigan. The district courts hold the power to appoint attorneys to represent the indigent. MICH. COMP. LAWS ANN. §§ 600.8317, 775.16. The Appellate Defender Act of 1978 created the State Appellate Defender Office to provide statewide representation in felony appeals and post-conviction proceedings. MICH. COMP. LAWS ANN. § 780.711-.719.

Mississippi. The court appoints counsel to represent the indigent. MISS. CODE ANN. § 99-15-15 (2010). The Office of Capital Defense Counsel was created in 2000 to provide assistance and some direct representation at trial and on appeal in death penalty cases. *Id.* § 99-18-1 to -19.

New York. In each county, the governing body establishes the plan for providing counsel to indigent defendants, and judges then appoint counsel pursuant to the adopted plan. N.Y. COUNTY LAW § 722 (McKinney 2010).

Pennsylvania. Each county, except Philadelphia, is required to establish a public defender office, with the public defender appointed by the board of county commissioners. Public Defender Act, 16 PA. CONS. STAT. ANN. §§ 9960.1-.13 (West 2010). The court of common pleas may appoint private attorneys in addition to the public defender. *Id*. § 9960.7.

South Dakota. S.D. CODIFIED LAWS §§ 7-16A-1 to -18, 23A-40-7 (West 2010) ("The board of county commissioners of each county and the governing body of any municipality shall provide for the representation of indigent persons . . . .").

Utah. Indigent Defense Act, UTAH CODE ANN. § 77-32-101 to -704 (West 2010); *id.* § 77-32-306 (making the provision of indigent defense a county or municipal obligation).

11. *See infra* App. A.

12. *See infra* App. A. These states are: Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming (some counties choose to provide additional funding but are not required to do so). *See supra* notes 6-10 and sources cited therein.

13. *See infra* App. A. Two states do not require counties to contribute any local funding: Kentucky (funding for the Louisville system is a combination of both local and state funding, though they could opt in to the state system and would have no funding responsibility) and Louisiana (parishes have no funding responsibilities; however, significant funds are collected locally and remain in the parish where collected rather than being redistributed through the state system). Four states require local governments to contribute funds: Georgia (each county is responsible for funding approximately 40% of their services), Kansas (all services other than felony and appellate are locally funded), Oklahoma (funding for the Tulsa and Oklahoma City systems are entirely locally funded), and South Carolina (state funding is intended to augment local funding; counties are intended to provide funding, but some counties

counties provide the majority of funding, though the state makes some contribution, even if minimal, toward the cost of trial-level indigent defense.[14] And, in seven states, the counties are left to provide the entirety of funding for trial-level representation with no assistance at all from the state.[15]

2. Service Delivery Model

Each jurisdiction (whether state, county, city, or individual judge) determines the delivery method by which it provides representation. There are three basic forms of delivery: a public defender office; a contract system; or an assigned counsel/appointment system.[16] Yet such simple titles are deceptive because, regardless of the primary delivery system that a jurisdiction claims to use, few systems conform wholly to the structures that these titles appear to dictate.

Public Defender Office Model. Many jurisdictions claim to have a public defender office as their model for delivering public representation services. In one jurisdiction, this may be the private law office of a single attorney who has been designated as *the public defender*, yet that attorney may carry a full private-pay caseload of clients in addition to her public defense work.[17]

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have discontinued providing funding). *See supra* notes 6-10 and sources cited therein.

14. *See infra* App. A. Illinois (state pays only the salary of chief public defender in each county), Indiana (those counties that choose to meet state standards receive some state funding), Nebraska (state agency provides funding to assist counties with capital representation), Nevada (state provides very limited funding for those rural counties that opt in to the state public defense system), New York (state provides limited funding to each county), Ohio (state provides limited funding to each county), South Dakota (state matches county funding only for catastrophic cases), Texas (state provides limited funding to each county and makes short-term grants for specific programs), and Washington (state provides limited funding to counties). *See supra* notes 6-10 and sources cited therein.

15. *See infra* App. A. Arizona (state provides less than 1/10% of funding solely for catastrophic cases); California (state provides funding for the capital Habeas Corpus Resource Center and for counsel in juvenile dependency cases); Idaho (state provides funding for the State Appellate Public Defender); Michigan (state provides funding for appeals); Mississippi (state provides funding for capital post-conviction); Pennsylvania; and Utah. *See supra* notes 6-10 and sources cited therein.

16. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUBLIC DEFENDER OFFICES, 2007 – STATISTICAL TABLES 2 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pdo07st.pdf.

17. Throughout this Article, descriptive examples are given to illustrate differences among jurisdictions in various aspects of public defense provision. The author has elected *not* to identify specific jurisdictions as examples of each description because the purpose of this Article is to explain the vast and myriad variations of public defense systems and to begin to itemize the specific areas in which data is lacking – the purpose is *not* to critique the methods or combination of methods employed in any given jurisdiction.

In another jurisdiction, all of the public defender attorneys may work part-time, or in their own separate private law offices, or maintain private-pay client caseloads, or all of the above. These are public defender offices in name only, and in fact they are much more like a contract system. In contrast, other jurisdictions may have established a true public defender office as a government agency, with staff working together in a single office and paid as full-time government employees.

Contract Model. Some jurisdictions claim to have contract systems. This may mean that the jurisdiction has an annually renewable contract with a non-profit corporation that employs several full-time attorneys who only represent public defense clients. Such a system looks and behaves much more like a "public defender office" than do many other offices operating under that moniker. Another jurisdiction may have a contract with an attorney for a given sum of money to represent all of the primary conflicts; this arrangement is known as a flat-fee contract.

Assigned Counsel Model. Assigned counsel systems are structured in myriad ways. Some jurisdictions have a single assigned counsel administrator who selects the attorney to be appointed in each case. In others, the chief public defender has responsibility for administering the appointment rotation. In still others, each judge selects an attorney from a pre-approved list. A jurisdiction may claim to have an assigned counsel system, but, if a single lawyer is paid a fee to handle all of a certain type of case and the lawyer does almost exclusively public defense, a contract system actually results.

Most jurisdictions employ a combination of these three methods in delivering indigent defense representation. This is because, in both the public defender office model and the contract model, the jurisdiction must provide unconflicted representation in conflict of interest cases. These conflicts arise in three ways. The most common is in cases of multiple co-defendants, each of whom must have his or her own independent attorney. There are also direct conflicts of interest between particular clients and their attorneys (with those conflicts imputed to every attorney working in the same office). The third type of conflict results from case overload, where a public defender office or contract attorney cannot accept the next case because they would then have too many cases to be able to provide effective assistance of counsel. In all of these conflict situations, some secondary method of delivering representation is necessary to overcome the conflict.

3. Attorneys Providing Indigent Defense Representation

No one knows the identity of all of the attorneys who provide indigent defense representation in America. On November 19, 2009, the Bureau of Justice Statistics (BJS) released its *Public Defender Offices, 2007 – Statistical Tables*, which examined offices that provide representation "through a salaried staff of full-time or part-time attorneys who are employed as direct gov-

ernment employees or through a public, nonprofit organization."[18] The information in the tables was derived from the *Census of Public Defender Offices* conducted by BJS.[19] The *Census* gathered information from 1,015 offices in forty-nine states and the District of Columbia, but it excluded "[o]ffices that provided primarily contract or assigned council [sic] services with private attorneys, were privately-funded or principally funded by tribal or federal government, or provided primarily appellate or juvenile services."[20] Though this is likely the most comprehensive census of public defense service providers ever conducted by the federal government, it falls well short of being complete. The BJS has indicated an intention to augment this census by gathering data on contract attorneys and assigned counsel.[21] Though there is a dearth of data, the relatively small number of public defender offices sprinkled across all the jurisdictions in the country means that the greatest number of indigent clients is being represented by assigned counsel and attorneys appointed case-by-case, rather than by attorneys employed in public defender offices.

B. Who Is Being Represented?

No one knows the actual number of clients or cases who receive public defense representation each year. Anecdotally, an estimated 80-90% of all defendants prosecuted in criminal cases throughout the country is represented by publicly funded counsel (or could have been, had they not waived that right).[22]

1. Types of Cases

There are several types of cases in which defendants who cannot afford to hire a private attorney are constitutionally entitled to receive appointed counsel. These are: felonies;[23] misdemeanors;[24] suspended/probated sen-

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18. Bureau of Justice Statistics, Public Defender Offices, 2007 - Statistical Tables, http://bjs.ojp.usdoj.g-ov/index.cfm?ty=pbdetail&iid=1758 (last visited Aug. 30, 2010).

19. BUREAU OF JUSTICE STATISTICS, *supra* note 16, at 3.

20. *See* Bureau of Justice Statistics, Census of Public Defender Offices, http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=401 (last visited July 19, 2010).

21. *See* Laurie Robinson, Assistant Attorney Gen., Office of Justice Programs, Remarks at the National Public Defender Symposium Dinner (May 20, 2010), *available at* http://www.ojp.gov/newsroom/speeches/2010/10_0520lrobinson.htm.

22. Although these percentages are generally cited and recognized as being accurate in the field of public defense, it is not possible to provide support for these numbers because this data has not been collected.

23. Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (where loss of liberty is a potential outcome).

tences;[25] juveniles, in juvenile delinquency cases;[26] direct appeals;[27] appeals of sentence from guilty plea;[28] probation revocation (to some extent);[29] and parole revocation (to some extent).[30]

Yet there remain open questions about entitlement to counsel in many categories, including: parents/guardians facing loss of custody of children;[31] children in cases where the state is temporarily or permanently terminating parental rights;[32] civil loss of liberty based on mental health; treatment court proceedings;[33] civil contempt/collection proceedings; and post-conviction and habeas corpus proceedings, especially in death penalty cases. In addition, some jurisdictions provide publicly funded counsel to at least some of the

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24. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (where loss of liberty is a potential outcome).

25. Alabama v. Shelton, 535 U.S. 654, 662 (2002) (where loss of liberty is a potential outcome).

26. *In re* Gault, 387 U.S. 1, 36-37 (1967).

27. Douglas v. California, 372 U.S. 353, 357 (1963).

28. Halbert v. Michigan, 545 U.S. 605, 621 (2005).

29. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) ("We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. . . . [T]here will remain certain cases in which fundamental fairness – the touchstone of due process – will require that the State provide at its expense counsel for indigent probationers or parolees. . . . Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.").

30. *Id.*; *cf.* Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (leaving open the question "whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent").

31. *Cf.* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31-32 (1981).

32. Often called "child in need of care" (CINC) or "child in need of services" (CHINS) or "family in need of services" (FINS).

33. *See e.g.*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 30-41 (2009) (suggesting that the structures of many drug courts undermine defense counsels' abilities to carry out their basic ethical duties). Treatment courts are a relatively new phenomenon in the criminal justice system, and the structure of treatment courts vary greatly from one jurisdiction to the next. *See e.g.*, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, DRUG COURTS: THE SECOND DECADE 1-3 (2006), *available at* http://www.ncjrs.gov/pdffiles1/nij/211081.pdf. Within those varying structures, the role of defense counsel varies to an even greater extent. Courts are only just now beginning to consider and rule on challenges involving the right to counsel of defendants in treatment courts.

parties in cases, such as those involving child custody or truancy, where the federal constitution has not been held to require appointed counsel.[34]

There is no common definition for what constitutes a "case" and many jurisdictions do not have any definition. Some jurisdictions use the definition developed by the Conference of State Court Administrators and the National Center for State Courts: "[c]ount each defendant and all the charges involved in a single incident as a single case."[35] Most jurisdictions, however, tabulate the number of cases according to the prosecuting agency's charging decisions. As a result, in some jurisdictions, every individual offense with which a defendant is charged is considered a separate case (no matter how many offenses were alleged against a single defendant and no matter whether those offenses were alleged in one or multiple charging instruments). In other jurisdictions, each docket number or charging instrument will be considered as one case (no matter how many offenses are charged therein and without regard to whether those offenses arose out of a single incident or multiple incidents). Other jurisdictions simply count defendants, with each defendant counting as a single case (no matter how many offenses, docket numbers, or charging instruments are pending against a single defendant at the same time).

2. Waiver of Right to Counsel

Even in cases where indigent defendants are entitled to appointment of counsel, many of these defendants waive their right to counsel and proceed to a guilty plea or trial without representation, particularly in misdemeanor cases.[36] Voices as diverse as the Department of Justice[37] and defense advocacy

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34. For example, New York provides a statutory right to counsel for those who cannot afford to hire an attorney for all interested parents and guardians in any case involving custody of a child, including civil actions between parents. N.Y. FAM. CT. ACT § 262 (McKinney 2010); *see also In re* Ella B., 30 N.Y.2d 352, 356 (1972).

35. CONFERENCE OF STATE COURT ADM'RS & NAT'L CTR. FOR STATE COURTS, STATE COURT MODEL STATISTICAL DICTIONARY 19 (1989).

36. *See, e.g.*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 14-16 (2009); THE CONSTITUTION PROJECT, NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 88-89 (2009).

37. *See, e.g.*, Attorney General Eric Holder, Remarks to the Department of Justice National Symposium on Indigent Defense (Feb. 18, 2010), *available at* http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html; Assistant Attorney General Laurie Robinson, Remarks to the American Bar Association National Public Defender Symposium (May 20, 2010), *available at* http://www.ojp.usdoj.gov/newsroom/speeches/2010/10_0520lrobinson.htm; Laurence H. Tribe, Senior Counselor for Access to Justice, U.S. Dep't of Justice, Keynote Remarks at the Annual Conference of Chief Justices (July 26, 2010), *available at* http://ccj.ncsc.dni.us/speeches/Key-

organizations[38] have expressed grave concern as to whether these purported waivers are informed and voluntary or whether they are implicitly coerced. Whatever the situation is for waivers of the right to counsel by adults, it is believed likely to be even worse among children.[39]

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note%20Remarks%20at%20the%20Annual%20Conference%20of%20Chief%20Justices%20to%20deliver.pdf.

38. *See, e.g.*, NAT'L LEGAL AID & DEFENDERS ASS'N, THE GUARANTEE OF COUNSEL: ADVOCACY & DUE PROCESS IN IDAHO'S TRIAL COURTS 45-48 (2010); NAT'L LEGAL AID & DEFENDER ASS'N, A RACE TO THE BOTTOM: SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS 15-34 (2008).

39. *See, e.g.*, NAT'L JUVENILE DEFENDER CTR., JUVENILE LEGAL DEFENSE: A REPORT ON ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION FOR CHILDREN IN NEBRASKA 21-31 (2009); CHILDREN & FAMILY JUSTICE CTR. ET AL., ILLINOIS: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 33-36 (2007); NAT'L JUVENILE DEFENDER CTR. & MISS. YOUTH JUSTICE PROJECT, MISSISSIPPI: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN YOUTH COURT PROCEEDINGS 30-31 (2007); NAT'L JUVENILE DEFENDER CTR., FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 19-20, 27-34 (2006); NAT'L JUVENILE DEFENDER CTR. & CENTRAL JUVENILE DEFENDER CTR., INDIANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 30-34 (2006); AM. BAR ASS'N JUVENILE JUSTICE CTR. & MID-ATLANTIC JUVENILE DEFENDER CTR., MARYLAND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 25-29 (2003); AM. BAR ASS'N JUVENILE JUSTICE CTR., MONTANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 27-28 (2003); AM. BAR ASS'N JUVENILE JUSTICE CTR. & JUVENILE LAW CTR., PENNSYLVANIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 43-44 (2003); AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., WASHINGTON: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE OFFENDER MATTERS 26-30 (2003); AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., JUSTICE CUT SHORT: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN OHIO 25-29 (2003); AM. BAR ASS'N. JUVENILE JUSTICE CTR. & MID-ATLANTIC JUVENILE DEFENDER CTR., VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 23-24 (2002); AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., KENTUCKY: ADVANCING JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 28-29 (2002); AM. BAR ASS'N JUVENILE JUSTICE CTR. & S. CTR. FOR HUMAN RIGHTS, GEORGIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 19-22 (2001); AM. BAR ASS'N JUVENILE JUSTICE CTR., THE CHILDREN LEFT BEHIND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN LOUISIANA 59-62 (2001); TEX. APPLESEED ET AL., SELLING JUSTICE SHORT: JUVENILE INDIGENT DEFENSE IN TEXAS 13-18 (2000).

3. Indigency Determinations

States and jurisdictions vary in the ways by which they determine who is *indigent* and thus eligible for publicly funded representation. This inconsistency means that a person who would be entitled to public representation in one county is often denied it in the next county; entitled in one state but denied in a sister state. Each jurisdiction throughout the country (and sometimes each court within a given city or county) makes its own rules about what constitutes indigence. In some jurisdictions, any person who requests appointed counsel will receive an attorney, without officials taking any steps to evaluate the person's ability to hire an attorney. This is justified by the jurisdictions following this policy on the basis that the cost of verifying financial information for defendants is greater than the cost of providing counsel. In other jurisdictions, defendants are asked to provide information relating to assets, income, and liabilities, and this information is accepted as true. Again, officials justify this practice on the basis that verification would be more expensive than providing counsel to those who facially appear to qualify. Some jurisdictions obtain extensive financial information from defendants seeking counsel and then subject that information to rigorous verification before deeming a defendant indigent. These jurisdictions argue that fiscal responsibility to taxpayers warrants the cost of verification because those who are able to hire their own attorney are not entitled to receive one at taxpayer expense.

Among jurisdictions that obtain any amount of financial information from defendants seeking appointed counsel, there is a wide range in the level of income and/or assets that will render a person *not indigent* and prevent the appointment of public counsel. Some jurisdictions have a specific income cutoff, such that no one who earns more than a set amount in a given year can receive appointed counsel. Often this income cut-off level is quite low. Other jurisdictions presume that anyone receiving federal benefits, such as low-income housing, food stamps, or Social Security benefits, is unable to hire his or her own attorney. Some systems look at the amount of time it would take a defendant to secure sufficient cash to hire an attorney, and therefore appoint counsel to people who have relatively high income and asset to liability ratios. Other locales design complex matrices that consider income and asset to liability ratios, family size, the type of case with which the defendant is charged, the cost of securing privately paid counsel to defend on the type of charge in the jurisdiction, and other factors. This type of scheme creates a stair-step eligibility for appointed counsel arising out of all of these factors. Finally, it is an unfortunate fact that, in some jurisdictions, whether any given person will receive appointed counsel truly depends on how a judge is feeling that day.

C. When Is Counsel Provided?

Despite relatively clear case law from the United States Supreme Court, the point in a proceeding when a defendant is provided publicly funded counsel varies among jurisdictions so that it is difficult to determine when indigent defendants will actually receive counsel. In the types of cases set out in Part II.B.1, *supra*, there are defined instances in the course of those cases (beyond the period between arraignment on the charge and dismissal, acquittal, or sentencing) when defendants are entitled to have representation by counsel: custodial interrogation;[40] initiation of adversarial process and without regard to involvement of the prosecutor;[41] critical stages pretrial, including preliminary hearings;[42] lineups[43] and show-ups[44] at or after initiation of adversary judicial criminal proceedings;[45] arraignment;[46] and plea negotiations.[47] Many jurisdictions throughout the country simply do not provide counsel at the times required by the Sixth Amendment and instead rely on their own sense as to when counsel should be appointed, if at all.[48]

III. WHAT ARE THE ETHICAL DUTIES OF LAWYERS IN PROVIDING INDIGENT DEFENSE REPRESENTATION?

Despite how little commonality there is among the indigent defense systems across the nation, the duties of each individual lawyer in each case are almost exactly the same everywhere. Representation, whether retained or appointed, is provided case-by-case, client-by-client, by individual attorneys who are licensed to practice law jurisdiction-by-jurisdiction. In return for the privilege of being a lawyer, every attorney has professional and ethical obligations that must be met in all cases. Those obligations do not change, whether the attorney is hired and paid a lot of money to represent Microsoft or the President of the United States, or whether the lawyer accepts an appointment to represent a person facing loss of liberty who cannot afford to hire his or her own attorney.[49]

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40. Miranda v. Arizona, 384 U.S. 436, 444-45 (1966); Brewer v. Williams, 430 U.S. 387, 399 (1977).

41. Rothgery v. Gillespie County, 554 U.S. 191, (2008).

42. Coleman v. Alabama, 399 U.S. 1, 9-10 (1970).

43. United States v. Wade, 388 U.S. 218, 236-38 (1967).

44. Moore v. Illinois, 434 U.S. 220, 231 (1977).

45. Kirby v. Illinois, 406 U.S. 682, 689-90 (1972).

46. Hamilton v. Alabama, 368 U.S. 52, 54-55 (1961).

47. Brady v. United States, 397 U.S. 742, 748 n.6 (1970); McMann v. Richardson, 397 U.S. 759, 770-71 (1970).

48. *See e.g.*, JUSTICE DENIED, *supra* note 1, at 85-89.

49. *See generally* MODEL RULES OF PROF'L CONDUCT (2010), *available at* http://www.abanet.org/cpr/mrpc/mrpc_toc.html.

A. Rules of Professional Conduct

Virtually every law student in the country studies the American Bar Association Model Rules of Professional Conduct.[50] Forty-nine states and the District of Columbia have professional conduct rules that follow the format of the ABA Model Rules.[51] The rules as adopted by each state govern the conduct of the attorneys licensed within a state, but the relatively minor variations from the ABA Model Rules[52] do not much affect the basic duties of a criminal defense attorney to her client. This section discusses how the Model Rules provide a basic understanding of the duties owed by all criminal defense attorneys, whether public or private.

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50. *Id.* This most recent version of the *Model Rules* was adopted February 5, 2002. *Id.* at Preface. The ABA adopted the original *Canons of Professional Ethics* on August 27, 1908. *Id.* Over time, the *Canons* were recast as the *Model Code of Professional Responsibility*, adopted August 12, 1969. *Id.* This led to the adoption of the *Model Code of Professional Conduct* on August 2, 1983, which has been amended fourteen times between adoption and the current version. *Id.*

The ABA, in its *Standards and Rules of Procedure for Approval of Law Schools*, requires that:

> A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession" and "[a] law school shall require that each student receive substantial instruction in the history, goals, structure, values, rules and responsibilities of the legal profession and its members.

Standards 301(a) and 302(a)(5). A passing score on the *Multistate Professional Responsibility Examination*, which tests bar applicants on their knowledge of the ABA *Model Rules of Professional Conduct* and the ABA *Model Code of Judicial Conduct*, is required for admission to the bar in all United States jurisdictions except Maryland, Puerto Rico, Washington, and Wisconsin. *See generally* Description of the MPRE, http://www.ncbex.org/mul-tistate-tests/mpre/mpre-faqs/description0/ (last visited Sept. 23, 2010) and Jurisdictions Using the MPRE in 2010, http://www.ncbex.org/multistate-tests/mpre/mpre-faqs/jurs0/ (last visited Sept. 23, 2010).

51. California is the one state that differs. Richard Acello, *New York Makes Itself a 'Model' State: California Now The Only Holdout on Adopting the ABA Model Rules*, A.B.A. J., Sept. 1, 2009, *available at* http://www.abajournal.com/magazine/article/new_york_makes_itself_a_model_state. New Jersey was the first to adopt the model rules on July 12, 1984, and Illinois was the most recent on January 1, 2010. *See* Dates of Adoption, http://www.abanet.org/cpr/mrpc/chron_states.html (last visited July 19, 2010).

52. State variations from the *Model Rules* are available at Charts Comparing Individual Professional Conduct Model Rules, http://www.abanet.org/cpr/pic/rule_charts.html (last visited July 19, 2010).

1. What Is a Lawyer Supposed to Do When Representing a Client?

The Rules state: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[53] The Rules go on to explain that "'[r]easonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer."[54] So, the most straightforward duty owed by a criminal defense lawyer to his or her client is to provide the legal knowledge, skill, thoroughness, and preparation that a prudent and competent criminal defense lawyer would believe is necessary for the representation.

The Rules provide: "A lawyer shall act with reasonable diligence and promptness in representing a client."[55] Furthermore, "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."[56] So, the lawyer is to work promptly, diligently, and expeditiously, consistent with the interests of the client.

The Rules provide straightforward information about how a lawyer is to go about carrying out ethical representation. Although the detail contained in these Rules is crucial for a lawyer defending herself against a claim of ineffective assistance, for a lawyer seeking to provide effective assistance, there are three broad instructions that, if followed, will likely achieve that result. These instructions can be summed up as: talk to the client; exercise independent professional judgment; and know the law and prepare the case.

Talk to the Client. The Rules provide that a lawyer "shall abide by a client's decisions concerning the objectives of representation" and "shall consult with the client as to the means by which they are to be pursued."[57] Unless a lawyer talks with the client, the lawyer cannot know the client's desires and decisions. And, unless a lawyer talks with his or her client, the client will not have any basis upon which to make decisions and express desires regarding the representation. For this reason, the Rules provide that the lawyer shall "promptly inform the client," "reasonably consult with the client," "keep the client reasonably informed," "promptly comply with reasonable requests for information," and, again, "consult with the client."[58] The Rules require the lawyer to do all of this while explaining a matter "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[59] The Rules go on to clarify that informed consent of a client means agreement to a "course of conduct after the lawyer has communicated

53. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002).
54. *Id.* at R. 1.0(h).
55. *Id.* at R. 1.3.
56. *Id.* at R. 3.2.
57. *Id.* at R. 1.2(a).
58. *Id.* at R. 1.4(a).
59. *Id.* at R. 1.4(b).

adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[60]

Exercise independent professional judgment. Each lawyer represents a single client on whose behalf and in whose interest the lawyer is acting. To make clear that the manner in which the lawyer comes to represent the client cannot affect the lawyer's allegiance, the Rules expressly provide that the lawyer shall not permit any third party "to direct or regulate the lawyer's professional judgment in rendering such legal services."[61] This is required when a client's friend pays the attorney's fee, when an employer retains a lawyer on behalf of an employee, when a state or county pays the salary of a public defender to represent an indigent client, and equally required when a judge appoints a lawyer and oversees payment to that lawyer for representing an indigent client.

The lawyer's duty, under the Rules, is to bring to bear the entirety of his or her knowledge, skill, and experience that together form the lawyer's professional judgment in order to render candid advice to the client.[62] The Rules expressly provide that this is advice not only about the law and its effects on the client's situation but also about the "moral, economic, social and political factors[] that may be relevant to the client's situation."[63] Of course, before the lawyer can fully provide this sort of candid advice about every aspect of the client's situation, the lawyer must take all the steps necessary to be familiar with the facts and the law of the case as well as the facts of the client's life and circumstances.

Know the Law and Prepare the Case. The Rules require the lawyer to provide competent representation to each and every client by employing "the legal knowledge, skill, thoroughness and preparation" that a reasonably prudent, competent criminal defense attorney would provide.[64] There are no special exceptions for lawyers who are not earning an income adequate to pay their bills, no exceptions for lawyers who find themselves representing too many clients at the same time, no exceptions when courthouse dockets are overly full and jails overpopulated, and no exceptions when Wall Street and Main Street are experiencing a fiscal meltdown.

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60. *Id.* at R. 1.0(e).
61. *Id.* at R. 5.4(c).
62. *Id.* at R. 2.1.
63. *Id.*
64. *Id.* at R. 1.1, 1.0(h).

2. What if the Lawyer Cannot Meet These Ethical Requirements?

To summarize, then, what the Rules require of an indigent defense attorney in representing her client is: (1) the legal knowledge, skill, thoroughness, and preparation that a reasonably prudent and competent criminal defense lawyer would believe was necessary for the representation (2) provided promptly, diligently, and expeditiously, consistent with the interests of the client (3) by talking to the client, exercising independent professional judgment, knowing the law, and preparing the case. Many types of circumstances can stand in the way of a public defense attorney (or any attorney) meeting these ethical duties of representation. These circumstances generally constitute a conflict of interest under the Rules.

The general rule on conflicts of interest states, in pertinent part:

> [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.[65]

In other words, a lawyer can have a conflict of interest between two or more clients being represented at the same time, between some third person and the client, or between the client and the lawyer.

For example, if a public defense attorney represents 300 clients who all face felony charges and the court or the attorney's office decides to appoint the attorney to represent an additional client, this could result in a situation referred to as "case overload." In such a situation, the lawyer's ability to fulfill the ethical requirements of representing this new client could be materially limited by the lawyer's responsibilities to his 300 existing clients, because the lawyer simply does not have any time left to devote to the new client. If the public defender office budget for hiring experts and investigators has been fully committed to defending the existing 300 clients, such that there are no resources to secure experts and investigators for the new client, then the ability of the lawyer to fulfill the ethical requirements of representing the new client will be materially limited by the lawyer's responsibilities to his or her 300 existing clients.

Without attributing bad intent to any person in the criminal justice system, it must be said that lawyers, judges, and politicians are human and susceptible to being unconsciously influenced. For an example of how unconscious influence might occur, consider a public defender who is hired by and serves at the pleasure of an elected official and is intended to carry out the

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65. *Id.* at R. 1.7(a)(2).

policies of that elected official. Suppose the elected official ran on a policy of cutting taxes, and taxes are the only source of funding for the defense of a potential client. In this instance, the public defender's responsibilities to the elected official – this "third person" under the rule[66] – could materially limit the lawyer's ability to advocate for resources necessary to defend the client, because the lawyer might subconsciously be fearful of losing his or her job. Lawyers must consider responsibilities to a third person that may limit the lawyer's ability to ethically represent a client; this consideration helps to protect against this unconscious influence.

The third type of conflict is where ethical representation of the client is limited by the lawyer's own personal interest. No one would disagree that, for example, a lawyer should not be appointed to represent a particular client if the client is charged with committing an offense against a member of the lawyer's family. It is understood that the lawyer could not be expected to set aside his or her own personal interest in the case and devote himself or herself to the interest of the client. A lawyer's financial interest can be every bit as compelling. For example, if a lawyer is paid a flat fee to represent a client and must pay all the expenses of the client's case out of that sum, then from the outset it is in the lawyer's personal financial interest not to spend a penny in defense of the potential client. This is a material limitation on the lawyer's representation.

In all of these situations, the Rules are clear about what the lawyer must do. "[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest."[67] As if that were not explicit enough, there is a specific rule under the heading "Declining Or Terminating Representation" that states: "[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: . . . the representation will result in violation of the rules of professional conduct or other law . . . ."[68]

As with so many things in the law, there is an exception to this general rule on conflicts, but in the scenarios described above – the type of scenarios encountered day after day by indigent defense counsel – this exception has no application. The Rules provide that, where a lawyer has a concurrent conflict of interest, the lawyer may nonetheless be appointed to represent a client if "(1) the lawyer reasonably believes [she] will be able to provide competent and diligent representation to [the] client," *and* (2) "each affected client gives informed consent, confirmed in writing."[69] "Informed consent" means the client agrees to be represented by the lawyer "after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives" to the client being represented by the law-

66. *Id.*
67. *Id.* at R. 1.7(a).
68. *Id.* at R. 1.16(a)(1).
69. *Id.* at R. 1.7(b)(1), (4).

yer.[70] A lawyer suffering under the types of conflicts described above lacks, from the very beginning, either the time, resources, or independence, or all three, that the Rules require for competent representation. As a result, the lawyer cannot gather sufficient information to provide to the client the explanation necessary for the client to give informed consent to being represented by the conflicted lawyer.

IV. APPLYING ETHICAL DUTIES TO THE REAL WORLD CIRCUMSTANCES OF INDIGENT DEFENSE

A. Performance Standards

The ABA Model Rules of Professional Conduct apply to attorneys practicing every type of law, whether he or she practices in the area of patents, bankruptcy, real estate, oil and gas, or criminal defense; the same rules are applicable to every lawyer.[71] This is why the Rules define competent representation as that "reasonably necessary for the representation,"[72] because each kind of law has its own needs. The knowledge and skills necessary to prepare a last will and testament for a couple are very different from the knowledge and skills necessary to ensure that an innocent person is not convicted of murder in a jury trial.

So, how does an indigent defense attorney know what is "reasonably necessary for the representation" of a client charged with a crime? The Rules point to "the conduct of a reasonably prudent and competent lawyer,"[73] which, in a criminal case, means a prudent and competent criminal defense lawyer. In the decades since the *Gideon* decision, performance standards have been developed to help individual lawyers know specifically what they must do in each case for each and every client, in order to act as reasonably prudent and competent lawyers and thereby meet their ethical obligations.[74]

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70. *Id.* at R. 1.0(e).

71. *See generally id.* at Preamble, Scope.

72. *Id.* at R. 1.1.

73. *Id.* at R. 1.0(h).

74. Many organizations have adopted indigent defense standards since *Gideon*. *See* STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEF. SERVS. (1967), *available at http*://www.abanet.org/crimjust/standards/providingdefense.pdf; MODEL PUB. DEFENDER ACT (Unif. Law Comm'rs 1970); STANDARDS FOR CRIMINAL JUSTICE: THE DEF. FUNCTION (1971), *available at* http://www.abanet.org/crimjust/standards/dfunc_toc.html; STANDARDS FOR THE DEF. (Nat'l Advisory Comm'n on Criminal Justice 1973); GUIDELINES FOR LEGAL DEF. SYS. IN THE UNITED STATES (Nat'l Study Comm'n on Def. Servs. 1976), *available at* http://new.abanet.org/Death Penalty/RepresentationProject/PublicDocuments/NLADAStandards.pdf; JUVENILE JUSTICE STANDARDS (Inst. of Judicial Admin. & Am. Bar. Ass'n 1979-1980); STANDARDS & EVALUATION DESIGN FOR APPELLATE DEFENDER OFFICES (Nat'l Legal Aid & Pub. Defender Ass'n 1980), *available at* http://www.nlada.org/Defender/ Defend-

Because *Gideon* for the first time imposed a clear obligation on the states to provide counsel at public expense for those facing loss of liberty who cannot afford their own attorney,[75] the earliest national standards were aimed at creating constitutionally effective indigent defense systems. Jurisdictions established various service delivery methods for the provision of indigent defense services.[76] The earliest standards address these basic methods. Later standards address provision of services in specific types and stages of criminal cases, such as juvenile delinquency cases, appeals, and death penalty cases. Other standards – the performance standards discussed here – address what the individual attorney within any of those systems must do to provide effective assistance of counsel.[77]

The United States Supreme Court has clearly indicated that these standards are "guides to determining what is reasonable"[78] and that they describe the obligations of the defense attorney "in terms no one could misunders-

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er_Standards/Standards_For_Appellate_Defender_Offices; GUIDELINES FOR NEGOTIATING & AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEF. SERVS. (Nat'l Legal Aid & Pub. Defender Ass'n 1984); STANDARDS FOR THE APPOINTMENT OF COUNSEL IN DEATH PENALTY CASES (Nat'l Legal Aid & Defender Ass'n 1988), *available at* http://new.abanet.org/DeathPenalty/RepresentationProject/PublicDocuments/NLADA%20Counsel%20Standards%201985.pdf; GUIDELINES FOR THE APPOINTMENT & PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (1989), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf (2003 version); STANDARDS FOR THE ADMIN. OF ASSIGNED COUNSEL SYS. (Nat'l Legal Aid & Defender Ass'n 1989), *available at* http://www.nasams.org/Defender/Defender_Standards/Standards_For_The_Administration_Of_Assigned_Counsel; PERFORMANCE GUIDELINES FOR CRIMINAL DEF. REPRESENTATION (Nat'l Legal Aid & Defender Ass'n 1995), *available at* http://www.nlada.org/Defender/Defender_Standards/Performance_Gui-delines; BLUE RIBBON ADVISORY COMM. ON INDIGENT DEF. SERVS. (Nat'l Legal Aid & Defender Ass'n 1997), *available at* http://www.nlada.org/Defender/Defender_Standards/Blue_Ribbon; DEFENDER TRAINING & DEV. STANDARDS (Nat'l Legal Aid & Defender Ass'n 1997), *available at* http://www.nlada.org/Defender/Defender_Standards/Defender_Training_Standards; TEN PRINCIPLES OF A PUBLIC DEF. DELIVERY SYSTEM (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf. *See generally* AM. BAR. ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, REPORT TO THE HOUSE OF DELEGATES 8 (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/10principles.pdf; NLADA Defender Legal Services Publications, http://www.nlada.org/Defender/Defender_Publications/Defender_Pubs_IndigentDefense (last visited July 22, 2010).

75. Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963).

76. *See* discussion *supra* Part II.A.2.

77. *See supra* Part III.A.

78. Wiggins v. Smith, 539 U.S. 510, 524 (2003) (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)); *see also* Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010) (quoting *Strickland*, 466 U.S. at 688).

tand."[79] States throughout the country are similarly adopting criminal defense performance standards,[80] whether as voluntary/aspirational guidelines or mandatory/contractual standards, adopted through administrative rules, legislation, or court order.

B. Specific Standards for Criminal Defense Cases

The Performance Guidelines for Criminal Defense Representation[81] are considered the national standard for the necessary work that must be carried out, or at least prepared to be carried out, by the defense attorney in every criminal case. The broad categories of work that the indigent defense attorney must be prepared to accomplish in each case include: pretrial release,[82] talking to the client to provide and obtain information,[83] arraignment and probable cause,[84] investigation,[85] obtaining and providing discovery,[86] developing and having a theory of the case,[87] pretrial motions,[88] plea negotiations,[89] trial preparation,[90] trial,[91] sentencing,[92] appeal,[93] and preparing the client for what comes next.[94] A lawyer need only read these Guidelines to know the minimum amount of "legal knowledge, skill, thoroughness and preparation reasonably necessary"[95] in each case in which he or she agrees to provide representation. In addition, the lawyer cannot determine step-by-step whether he or she has the time, resources, and independence to competently represent the client – *before* accepting appointment, the lawyer must be able

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79. Rompilla v. Beard, 545 U.S. 374, 375, 387 & n.7 (2005).

80. *See, e.g.*, Trial Court Performance Standards, 35 La. Reg. 663 (Apr. 2009); Order at Exhibit A, *In re* the Review of Issues Concerning Representation of Indigent Defendants in Criminal & Juvenile Delinquency Cases, ADKT No. 411 (Nev. Oct. 16, 2008) (containing *Nevada Indigent Defense Standards of Performance*).

81. PERFORMANCE GUIDELINES FOR CRIMINAL DEF. REPRESENTATION (Nat'l Legal Aid & Defender Ass'n 1995), *available at* http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines [hereinafter NLADA PERFORMANCE GUIDELINES].

82. *Id.* at Guideline 2.1.

83. *Id.* at Guideline 2.2.

84. *Id.* at Guideline 3.1.

85. *Id.* at Guideline 4.1.

86. *Id.* at Guideline 4.2.

87. *Id.* at Guideline 4.3.

88. *Id.* at Guidelines 5.1-.3.

89. *Id.* at Guideline 6.1-.4.

90. *Id.* at Guideline 7.1.

91. *Id.* at Guidelines 7.2-.7.

92. *Id.* at Guidelines 8.1-.7.

93. *Id.* at Guidelines 9.1-.3.

94. *Id.* at Guidelines 9.4-.6.

95. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002).

to say that he or she does not have any conflict that will materially limit his or her ability to represent the client all the way through to the end.[96]

C. Circumstances Indicating Material Limitations on Representation

1. Lack of Independence

Lack of independence that materially limits a lawyer's ability to provide competent representation – a conflict arising out of responsibilities owed to a third person – is likely the most difficult conflict for the individual attorney to recognize and address. For this reason, national standards call on the indigent defense system to be established and operated in a manner that ensures the independence of each attorney appointed under the system. Principle 1 of the American Bar Association's *Ten Principles of a Public Defense Delivery System* provides:

> The public defense function, including the selection, funding, and payment of defense counsel, is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.[97]

When an attorney accepts representation of indigent clients through a system that is not independent, the attorney is likely to be beholden to some third party such that his or her representation of the clients is materially limited.

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96. *See* NLADA PERFORMANCE GUIDELINES, *supra* note 81, at Guideline 1.3(a): Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.

97. TEN PRINCIPLES OF A PUB. DEF. DELIVERY SYS. 2 (2002).

2. Lack of Time

Perhaps the simplest and most straightforward method for an attorney to know whether he or she has sufficient time to competently represent one more client is by looking at the number of cases the attorney is currently defending. National standards adopted in 1973 provide for the maximum number of criminal cases that a defense attorney should work on in a given year, presuming that the lawyer is working full-time on only those cases and nothing else.[98] A single attorney should not handle, in a single year, more than 150 felonies, or 400 misdemeanors, or 200 juvenile court cases, or 200 mental health court cases, or 25 appeals, or the equivalent in a combined case load.[99]

For attorneys who feel that caseload maximum standards are arbitrary, it is equally simple to just "do the math." Attorneys, like all other human beings, have fifty-two weeks in a year. If vacation, sick time, holidays, required continuing legal education, administrative work, and all other professional commitments only consume two weeks, then the lawyer is left with fifty work weeks. Many, if not most, criminal defense attorneys can be found at their work far more than forty hours each week. Lawyers nonetheless have about forty hours per week available to devote to representing clients, or two thousand work hours in a year, because for however many hours each day an attorney is at work, some number of those hours are simply not productive and are consumed by normal human necessities. The caseload limits set by national standards allow 13 1/3 hours per felony case, 5 hours per misdemeanor case, 10 hours per juvenile court case, 10 hours per mental health court case, and 80 hours per appeal. This is the total amount of time, on average, that an attorney operating at maximum caseload levels would have to devote to each client's case to accomplish all of the categories of work that the indigent defense attorney must be prepared to accomplish in each case.

Workload, in addition to caseload, can provide an even more realistic measure of the working hours the lawyer has available to spend in representing each client. Lawyers have professional responsibilities beyond representing indigent clients. They may accept appointments from multiple state court jurisdictions or also from the federal courts; accept appointments or provide *pro bono* representation in other types of cases besides criminal defense; represent private paying clients; supervise other attorneys; manage a private law office; accept bar association responsibilities; or travel significant distances to reach courthouses where cases are set. An analysis of the time spent on these other, non-case-related responsibilities most likely reveals a truer picture of the time the lawyer has to devote to each client's case.

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98. *See* STANDARDS FOR THE DEF. 13.12 (Nat'l Legal Aid & Defender Ass'n 1973), *available at* http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense#thirteentwelve.

99. *Id.*

3. Lack of Resources

Lack of resources is likely the easiest set of circumstances that a lawyer can recognize and prove as giving rise to a direct conflict between the interests of the lawyer and the interests of the client. If the attorney does not have an investigator to assist in the case, then the attorney must either pay out of his or her own pocket to hire an investigator or materially limit the representation of the client by not having an investigator on the case. If the attorney is appointed through a system that does not provide funds to hire needed experts, then the attorney must either pay out of his or her own pocket to hire those experts or materially limit the representation of the client by not having necessary expertise in the case. If the net income to the lawyer will be reduced by paying for expenses such as copies or mileage or long-distance telephone calls, then the attorney must either pay for the privilege of representing the client or materially limit the representation of the client by not making copies of exhibits, not traveling by car to interview witnesses and examine crime scenes, and not accepting collect calls from the client in jail, for example.

V. CONCLUDING THOUGHTS

A. Duties of Others in the Justice System

The ethical obligations discussed in this Article apply to all lawyers who accept the responsibility to represent an indigent person in a criminal case, not just to those who call themselves public defenders. When a courageous indigent defense attorney steps up and says it would be a violation of the Rules of Professional Conduct for him or her to represent a client due to lack of independence, time, and resources, it is likely true that it would be a violation of those Rules for any other attorney to accept the appointment under the same circumstances. This is true because, when a public defender or a public defender office is declining cases, the cost of providing that representation does not go away; it merely shifts to a different line item in the budget. The clients do not disappear, nor are their cases dismissed; they are still indigent, they still face loss of liberty, and they still must be represented by an attorney who is paid and resourced at public expense. The private bar – those who consider themselves to be private attorneys, whether civil or criminal, rather than public defenders – must stand shoulder to shoulder with indigent defense attorneys to ensure that every attorney is able to fulfill his or her ethical duties and that every client receives competent representation.

Prosecuting attorneys are also bound by the same Rules of Professional Conduct. A few of those rules specifically apply to the manner in which prosecutors deal with indigent defendants. First, the Rules provide for "Special Responsibilities Of A Prosecutor," requiring every prosecutor to make

reasonable efforts to ensure defendants are given reasonable opportunity to acquire an attorney and that they are told how to do so.[100] The Rules also instruct that the prosecutor "shall . . . not seek to obtain . . . a waiver of important pretrial rights" from defendants while they do not have an attorney.[101] While an indigent defendant is waiting to get an appointed lawyer, the prosecutor "shall not" give that defendant legal advice, because the interests of the prosecutor's client (the state or the people) directly conflict with the interests of the defendant.[102] Once an attorney is appointed to represent the defendant, the prosecutor may not talk to that defendant about the case without the defense attorney's permission.[103] In short, prosecutors violate their ethical duties if they attempt to secure a plea agreement directly with an unrepresented indigent defendant who is asking for an attorney or by dealing directly with a represented indigent defendant without the defense attorney's permission.

Like lawyers, judges are also subject to a code of conduct governing their behavior.[104] Some expectations of judges are obvious: they must "avoid impropriety and the appearance of impropriety"[105] and must be impartial.[106] Under the *Model Code of Judicial Conduct*, a judge shall not appoint a lawyer to represent an indigent defendant if the lawyer has made significant campaign contributions to the judge's election campaign, unless the lawyer will not be paid a fee for the appointment, the lawyer was appointed in rotation from a list of available qualified lawyers compiled without regard to political contributions, or there is no other lawyer who is "willing, competent, and able to accept the [appointment]."[107] Perhaps most importantly, a judge cannot stand idly by and allow a lawyer – whether prosecutor or defense attorney – to violate the Rules of Professional Conduct.[108] As the commentary explains, "[i]gnoring or denying known misconduct among . . . members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system."[109]

100. MODEL RULES OF PROF'L CONDUCT R. 3.8(b).
101. *Id.* at R. 3.8(c).
102. *Id.* at R. 4.3.
103. *Id.* at R. 4.2.
104. MODEL CODE OF JUDICIAL CONDUCT (2007).
105. *Id.* at Canon 1.
106. *Id.* at Canon 2.
107. *Id.* at R. 2.13(B).
108. *Id.* at R. 2.15(B), (D).
109. *Id.* at R. 2.15 cmt.1.

B. Failure to Protect the Right to Counsel

The ethical duties of indigent defense attorneys are clear, as are the standards those attorneys must meet and the evidence demonstrating when attorneys are materially limited in representing an indigent client. In addition to defense attorneys, both prosecutors and judges have ethical duties to ensure that defense attorneys provide competent representation. Why, then, is the right to counsel so frequently violated?

1. Little Likelihood of Discovering Errors Resulting from Ethical Violations

The indigent innocent often cannot afford the costs of the criminal justice process. People waive their right to counsel and plead guilty to misdemeanors and even felonies every day, even where they are wholly innocent, because of the time and money it will cost them to return to court over and over again in the attempt to prove their innocence. In these cases, the defendant loses the right to an appeal after the guilty plea. They pay their unjust fines, they serve their unjust sentences, and they attempt to move on with their lives.

An indigent defendant is only entitled to appointed counsel at trial and on direct appeal.[110] Where a defendant claims innocence and yet is convicted at trial, the direct appeal considers only the record from the trial – evidence that was presented and objections made during the trial. Once that direct appeal is completed, an indigent defendant normally will not have an attorney appointed to challenge the conviction in post-conviction/habeas proceedings, and, if the defendant is incarcerated, he or she is unlikely to be able to conduct investigation leading to the evidence that should have been but was not presented at his trial.

It tends to be only in very serious cases, where a defendant is serving a very long sentence (most often where the defendant is facing execution), that there is much likelihood of discovering a wrongful conviction of an innocent person. These are generally the only cases where most indigent defendants will have a lawyer to assist them. For the largest number of indigent defendants, their only hope is to file a disciplinary complaint alleging ineffective assistance of their appointed trial attorney. Disciplinary complaints filed against lawyers by people convicted of crimes traditionally have not been taken very seriously by bar associations and courts.

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110. *See* Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963); Douglas v. California, 372 U.S. 353, 357 (1963).

2. Financial and Human Costs Are Largely Hidden

Discovery of a wrongful conviction can take several years or even decades,[111] if the discovery occurs at all. By then, no one within the system has any interest in going back to look at the actual dollar cost incurred by the justice system in obtaining that wrongful conviction, which includes law enforcement costs, prosecution costs, defense costs, judicial costs, and incarceration costs.

The human costs are even more opaque. When a person is dressed in an orange jumpsuit, handcuffs, and shackles, he or she becomes a non-human. Instead of a presumptively innocent person, the defendant is a symbol of evil that is not entitled to concern or compassion. This orange jumpsuit is automatically guilty in our minds – a repository for hurt, fear, anger, and vengeance. Any effort to protect a defendant's constitutional rights is often cast as being soft on crime, inconsiderate toward victims, and unconcerned for taxpayer safety. If it is later discovered that the defendant is innocent, it is nearly impossible to quantify the value of the contributions that person would have made to the community. It is equally impossible to quantify the harm done to victims in those cases.

3. The Dirty Little Secrets of Our Failed Indigent Defense Systems

Many indigent defense systems regularly pay the most money to those lawyers who do the worst jobs for their clients.[112] In a flat-fee system, if a lawyer is unscrupulous and is willing to accept money from a court or system, then does virtually nothing in the way of representation, that lawyer will make more money than the conscientious, caring, hard-working litigating lawyer. Many appointment systems most benefit those few judges who care the least about justice. If a judge is unscrupulous, has authority over the indigent defense budget, and controls which lawyers receive appointments, that judge can ensure political contributions for re-election. Present systems are much more efficient and less messy than a fair and equitable system would

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111. *See, e.g.*, THE INNOCENT PROJECT, 250 EXONERATED TOO MANY WRONGFULLY CONVICTED 2-3, (2010), *available at* http://www.innocenceproject.org/docs/InnocenceProject_250.pdf ("Of the first 250 people exonerated through DNA*: They served an average of 13 years in prison – and a combined total of 3,160 years.").

112. *See, e.g.*, *Grant County Man Awarded $3M for Bad Lawyer*, SEATTLE TIMES, Jan. 31, 2009, *available at* http://seattletimes.nwsource.com/html/localnews/2008692998_apwapublicdefenderverdict1stldwritethru.html; Adam Liptak, *A Lawyer Known Best for Losing Capital Cases*, N.Y. TIMES, May 17, 2010, *available at* http://www.nytimes.com/2010/05/18/us/18bar.html; Lise Olsen, *Hundreds Kept Jailed for Months Pretrial*, HOUSTON CHRONICLE, Oct. 4, 2009, *available at* http://www.chron.com/disp/story.mpl/metropolitan/6650826.html?plckFindCommentKey=CommentKey:73f02b7c-0c09-4141-99f0-7fb297af8cfd.

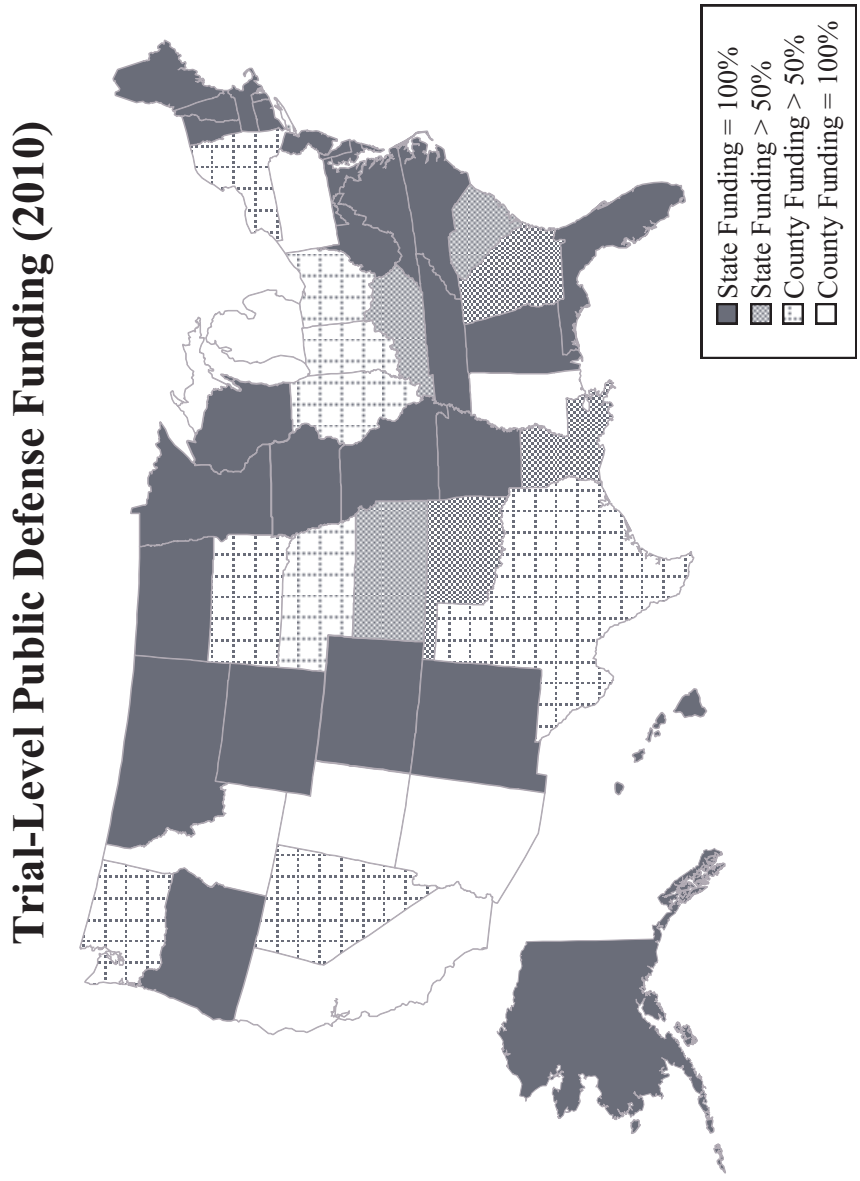
be. When law enforcement can quickly arrest someone for every crime and quickly convict everyone who is arrested, citizens have the false sense that they are safe. Unscrupulous law enforcement officers and prosecutors – those few who are interested only in marking wins in a column – then appear to be effective.

The people who benefit the least and are hurt the most by our failed indigent defense systems are crime victims and the clients of the indigent defense systems of our country. Victims of crimes are used to secure convictions, only to be victimized again when they learn that an innocent person was convicted and the true perpetrator has remained at large. And, the clients of our indigent defense systems are wrongfully convicted, convicted of more serious crimes than those actually committed, or sentenced to excessive punishments, all because they had the misfortune of being poor.

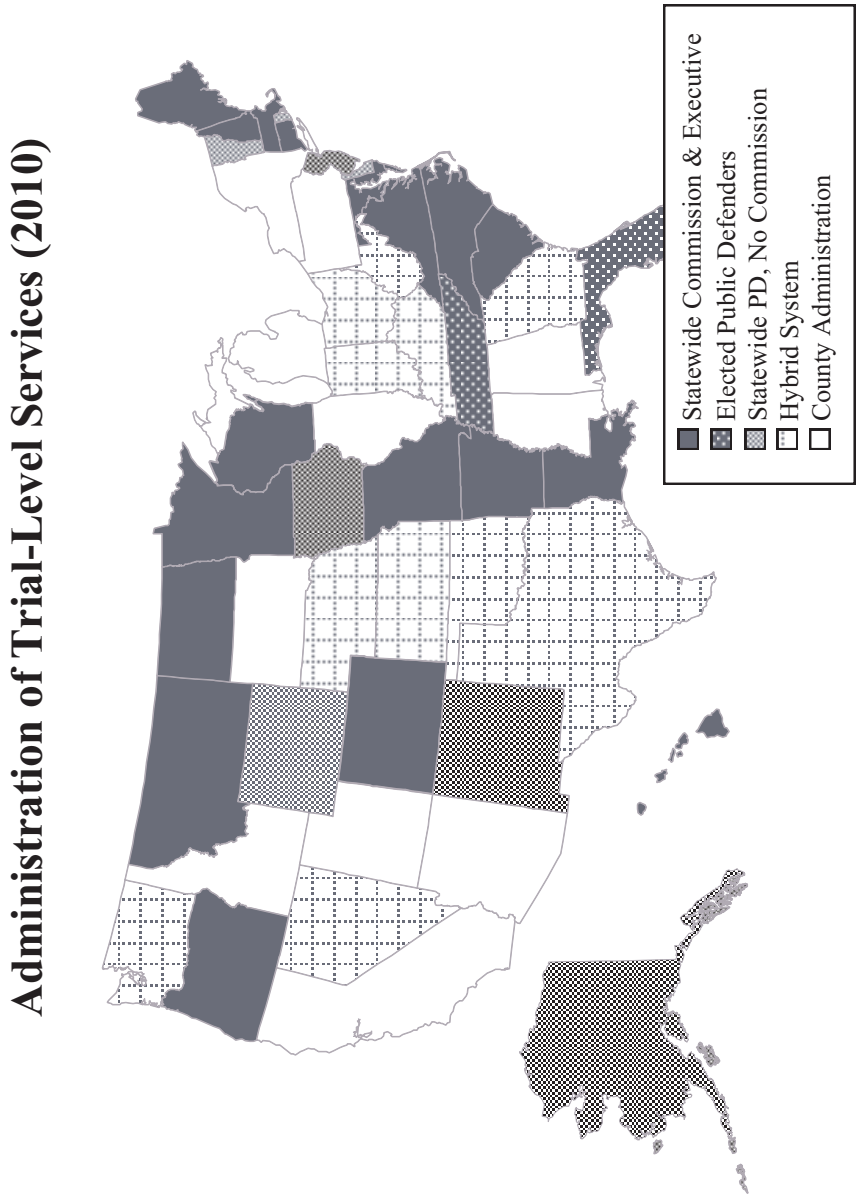
C. Tying it All Together – Carrying Out Ethical Responsibilities Leads to Better Criminal Justice

The lawyers who represent indigent defendants in criminal cases have clear ethical duties that are no different than those of any other lawyer. From jurisdiction to jurisdiction across the country, the processes for providing lawyers to represent clients vary greatly, but the ethical duties of the attorneys remain the same. Judges, prosecutors, and defense attorneys are all equally responsible to ensure that indigent clients receive ethical representation. Following ethics rules in indigent defense systems from the outset will save the criminal justice system time and taxpayers money, discourage the perversion of our justice systems by the unscrupulous, provide greater certainty and comfort to the victims of crimes, assure more just outcomes for defendants including minimizing the likelihood of convicting the innocent, and lead to greater safety for the public.

APPENDIX A


Trial-Level Public Defense Funding (2010)
State Funding = 100%
State Funding > 50%
County Funding > 50%
County Funding = 100%

APPENDIX B


Administration of Trial-Level Services (2010)
Statewide Commission & Executive
Elected Public Defenders
Statewide PD, No Commission
Hybrid System
County Administration