

National Advisory Commission on Criminal Justice Standards and Goals: The Defense

The National Advisory Commission on Criminal Justice Standards and Goals was appointed in 1971 by the Administrator of the Law Enforcement Assistance Administration and supported by \$1.75 million in LEAA grants, to formulate for the first time national criminal justice standards and goals for crime reduction and prevention at the State and local levels. The Commission's work was to build upon the report of the 1967 President's Commission on Law Enforcement and Administration of Justice, entitled "The Challenge of Crime in a Free Society," and the reports of its task forces, including the Courts Task Force. In 1973, the National Advisory Commission issued six extensive reports, each developed by a separate Task Force with dozens of staff members, including NLADA consultants, on the following topics: 1) A National Strategy to Reduce Crime; 2) Criminal Justice System; 3) Police; 4) Courts; 5) Corrections; and 6) Community Crime Prevention. The Report of the Task Force on the Courts sets standards for the flow of cases through each stage of the criminal justice process, as well as basic standards for each of the system's component parts, including courts, court administration, prosecution and defense. Printed here are the black letter standards from Chapter 13 of that report, entitled "The Defense," omitting commentary, references and related standards. The introduction to the chapter summarizes the approach taken by the standards by identifying four needs that the standards are designed to meet: 1) There is a need for more professional staff resources, supporting resources and staff, and education. 2) There is a need to insure that lawyers provided at public expense are experienced and well-educated. 3) There is a need to involve the entire bar in the provision of public defense services, and to avoid the provision of defense services from becoming the realm of a limited clique of practitioners, whether in a public defender's office or a private capacity. 4) There is a need to deal with the special problems raised by the provision of public defense services. The lawyer rendering services at public expense is liable to be caught between public resentment at having to pay for the defense of guilty criminals and defendants' resentment at not having available as effective a defense as those with private counsel

Chapter 13

In its consideration of the provision of defense services to those accused of a crime, the Commission addressed itself almost entirely to the provision of defense services at public expense. This was done for several reasons. First, public representation is a statistically significant part of overall defense services. The best available estimates are that about 60 percent of felony defendants, and 25 to 50 percent of misdemeanor defendants, cannot pay anything toward their defense, and therefore must be represented at public expense. (Silverstein, *Defense of the Poor* 8-9 (1965)). The proportion of defendants actually represented at public expense varies. One recent study of several Arkansas counties, for example, found that the percent of felony defendants represented by appointed counsel ranged from 18.2 percent to 59.5 percent. (Gitelman, *The Relative Importance of Appointed and Retained Counsel in Arkansas Felony Cases-An Empirical Study*, 24 Ark. L. Rev. 442 (1971).)

A second reason for this focus on public representation is that confidence in the adequacy of public representation has been shaken. Public criticism of certain defense tactics by private counsel has been overshadowed by doubts concerning the effectiveness of public representation.

The task of providing public representation has grown tremendously, in part because of the increased functions publicly provided counsel must — as a matter of

constitutional mandate — perform. The right to representation at trial no longer is confined to those defendants charged with more serious criminal offenses; in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the U.S. Supreme Court held that no indigent person may be incarcerated as the result of a criminal trial at which he was not given the right to be represented by publicly provided defense counsel.

Nor is the right to counsel confined to trial. Publicly provided lawyers now are involved in the investigatory stages of a criminal case, in appeals and, to some extent, in collateral attacks upon conviction and procedures within the correctional process, such as parole decisions. Not only has the number of points in each criminal proceeding at which the defendant is entitled to representation increased, but the legal tasks of functioning at each of these points have become more complex. While the psychology of convincing a jury of a client's innocence has changed little, the procedural opportunities for defense counsel to aid his client have increased significantly.

The infusion of Federal constitutional law into criminal procedure — and the corresponding increase in opportunities for defense counsel to gain procedural advantages for his client — have more than made up for any decrease in emphasis by courts upon complexities of pleading and technical questions concerning the definition of various offenses. Finally, clients have become more sensitive to the quality of the representation they receive and more vocal in their disappointments.

Disappointments with the provision of public representations have been frequent. An especially distressing description of public defense services, which in effect catalogs the concerns of the Commission, is contained in a recent study of an unidentified county. Because this effectively describes those aspects of public defense services with which this chapter deals, it is worth quoting at length:

[X] County employs a public defender system to provide for defense of the poor in the criminal courts; no defense attorneys are supplied poor defendants who appear before municipal or magistrates' courts. The criminal court judges appoint the public defenders on a partisan political basis, although they do not clear their appointments with the local political organizations. Public defenders generally leave office with the appointing judge. Although the applicable statute is silent on the matter, it appears to be generally accepted that the judges may dismiss as well as appoint their public defenders. Several attorneys interviewed said that public defenders had been fired.

In the summer of 1969, each judge appointed four public defenders; in the past, some judges had appointed three. The positions are part-time, and all public defenders practice law on a full-time basis. All public defenders were allowed to practice in civil and criminal courts other than the court to which they were assigned. Some criminal court judges have allowed their public defenders to handle private cases in their own courts.

The resources furnished the public defenders are extremely limited. They operate without the support of a central office and depend for advice solely on informal consultation with former or present public defenders or fellow attorneys. One former public defender stated that the county commissioners would not pay his travel expenses to a public defender's clinic in New York City, even though he was able to attend the clinic free. He attended, paid his own way and indicated that the knowledge gained greatly enhanced his service as a public defender. Nor does the public defender receive an allowance for secretarial services or office rent. These expenses are paid by the public defender from his own salary.

No investigation staff is assigned to the public defenders. Virtually all the individuals interviewed stated that this was a weakness of the system, resulting in the presentation of poorly prepared cases. Several public defenders indicated that a white public defender investigating a case in a black neighborhood frequently is distrusted and unable to secure information.

No money is set aside specifically for travel expenses of the public defenders, expert witness fees or incidental expenses. One former public defender said that the judge under whom he served occasionally was able to supply such funds from the county. Sometimes expert witnesses testify without charge, and occasionally the defendants' families supply small amounts of money. At other times, the public defenders stated, they take the necessary funds out of their own pockets. Some of the public defenders and former public defenders said that they had little need for such expenses; others stated that the lack of such funds was a definite handicap and may have affected the outcome of some cases.

Public defenders are not supplied to poor defendants for any proceedings (including preliminary hearings) in the municipal or magistrates' courts. Occasionally a judge may ask an attorney, if one is present, to advise a defendant of his rights. The attorney gives immediate, on-the-spot advice for which he is not compensated. However, even this limited representation is not supplied regularly in these courts.

As a result of the failure to supply public defenders in municipal or magistrates courts, the poor are not assigned counsel until arraignment in criminal court. Thus police arrest, initial appearance, filing of the affidavit or grand jury indictment and preliminary hearing will have preceded the assignment of counsel. Generally a defendant will have to wait at least 2 weeks following arrest, and frequently much longer, for his arraignment. This is particularly the case when the prosecutor asks for a grand jury indictment. When the grand jury has a heavy backlog of cases, an occasional defendant may wait as long as 3 months following his arrest before arraignment.

There is no provision made for defense of the poor prior to arraignment day. There is no public defender office to visit or telephone listing to call. The police do not put the defendants in touch with the public defenders.

On arraignment day, the judge assigns a public defender to represent poor defendants. Assignment is made by rotation; the public defenders in each court are given approximately equal numbers of defendants. Determination that a defendant cannot afford to hire his own attorney is made at this time. If a defendant has neither posted bail nor hired an attorney and states that he does not have the means to hire an attorney, he will be determined to be without sufficient funds and assigned a public defender. If a defendant is able to post bail, he generally will not be assigned a public defender. No investigation of lack of means is made other than the judge's brief questioning on arraignment day. After the assignment of a public defender, the defendant and public defender confer privately for a few minutes. This is the public defender's first contact with his client, who has been arrested, imprisoned, and perhaps questioned by the police; who either will have been indicted by a grand jury or will have had an affidavit filed against him, and who may have signed a written confession or made damaging oral admissions. Almost without exception, the poor defendant then waives reading of the affidavit or indictment, pleads not guilty and asks for an early trial.

Frequently, the public defender client later will change his plea from not guilty to guilty.

When a poor defendant pleads guilty, the total court time spent by the judge rarely exceeds 10 to 20 minutes. Court trials generally do not take longer than an hour or two; some are finished in 30 minutes. The judges occasionally may express irritation with lengthy testimony and take steps to shut off testimony they deem irrelevant. Jury trials require elaborate preparations, are more formal and generally require one or more days to try. A trial for a major offense, such as first-degree murder, may take a week or two.

After the public defender client has been found guilty and sentenced, he is no longer represented by the public defenders attached to the criminal courts. Appellate procedure is handled by a different group of public defenders and is beyond the defined limits of this study. (Kittel, *Defense of the Poor: A Study in Public Parsimony and Private Poverty*, 45 Ind. L.J. 90, 91-95 (1971).)

Attempts to evaluate, in statistical terms, the impact of public representation on actual case outcome have provided varying results. A recent study in Arkansas, for example, reported little variation in impact when results for nine cities were lumped together. In cases where the defendant was represented by appointed counsel, guilty pleas were entered in 65 percent of the cases; with privately retained counsel, 55.2 percent of the defendants pleaded guilty. Appointed counsel obtained dismissals in 12.8 percent of their cases, and retained counsel, in 15.8 percent. But particular cities showed wider variations. In Little Rock, for example, appointed counsel entered guilty pleas in 64.2 percent of their cases while in only 41.19 percent of cases did retained counsel do so. (See Gitelman, *The Relative Performance of Appointed and Retained Counsel in Arkansas Felony Cases — An Empirical Study*, 24 Ark. L. Rev. 442). The criticism has not been confined to representation by appointed counsel.

Another study reports that public defenders in the county under study made no effort to influence which judge their clients appeared before for trial or sentencing. As a result, the study concludes, a client represented by the public defender statistically was more likely to appear before a severe judge than a client represented by a privately retained attorney. For the public defender's client, this meant a higher likelihood of conviction and, upon conviction, of a sentence of imprisonment rather than probation. (Wettick, *A Study of the Assignment of Judges to Criminal Cases in Allegheny County — The Poor Fare Worse*, 9 Duquesne L. Rev. 51 (1970).)

While the Commission has found no evidence that public representation is always, or even generally, worse than private representation, it recognizes widespread suspicion that this is the case, and concludes that this suspicion is itself a major problem. Moreover, the Commission believes that when high quality public representation is lacking, steps should be taken to improve it. This chapter is addressed to these concerns. The overall approach of the standards can be summarized by the following:

1. There is a need for more professional staff resources, supporting resources and staff, and education.
2. There is a need to insure that lawyers provided at public expense are experienced and well-educated.
3. There is a need to involve the entire bar in the provision of public defense services, and to avoid the provision of defense services from becoming the realm of a limited clique of practitioners, whether in a public defender's office or a private capacity.
4. There is a need to deal with the special problems raised by the provision of public defense services. The lawyer rendering services at public expense is liable to be caught

between public resentment at having to pay for the defense of guilty criminals and defendants' resentment at not having available as effective a defense as those with private counsel.

The standards in this chapter are designed to meet these needs.

Standard 13.1 Availability of Publicly Financed Representation in Criminal Cases

Public representation should be made available to eligible defendants (as defined in Standard 13.2) in all criminal cases at their request, or the request of someone acting for them, beginning at the time the individual either is arrested or is requested to participate in an investigation that has focused upon him as a likely suspect. The representation should continue during trial court proceedings and through the exhaustion of all avenues of relief from conviction.

Defendants should be discouraged from conducting their own defense in criminal prosecutions. No defendant should be permitted to defend himself if there is a basis for believing that:

- 1. The defendant will not be able to deal effectively with the legal or factual issues likely to be raised;**
- 2. The defendant's self-representation is likely to impede the reasonably expeditious processing of the case; or**
- 3. The defendant's conduct is likely to be disruptive of the trial process.**

Standard 13.2 Payment for Public Representation

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

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

- 1. Counsel should not be denied to any person merely because his friends or relatives have resources adequate to retain counsel or because he has posted, or is capable of posting, bond.**

2. Whether a private attorney would be interested in representing the defendant in his present economic circumstances should be considered.

3. The fact that an accused on bail has been able to continue employment following his arrest should not be determinative of his ability to employ private counsel.

4. The defendant's own assessment of his financial ability or inability to obtain representation without substantial hardship to himself or his family should be considered.

Standard 13.3 Initial Contact with Client

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

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

2. If, at the initial appearance, no request for publicly provided defense services has been made, and it appears to the judicial officer that the accused has not made an informed waiver of counsel and is eligible for public representation, an order should be entered by the judicial officer referring the case to the public defender, or to appointed counsel. The public defender or appointed counsel should contact the accused as soon as possible following entry of such an order.

3. Where, pursuant to court order or a request by or on behalf of an accused, a publicly provided attorney interviews an accused and it appears that the accused is financially ineligible for public defender services, the attorney should help the accused obtain competent private counsel in accordance with established bar procedures and should continue to render all necessary public defender services until private counsel assumes responsibility for full representation of the accused.

Standard 13.4 Public Representation of Convicted Offenders

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

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

Standard 13.5 Method of Delivering Defense Services

Services of a full-time public defender organization, and a coordinated assigned counsel system involving substantial participation of the private bar, should be available in each jurisdiction to supply attorney services to indigents accused of crime. Cases should be divided between the public defender and assigned counsel in a manner that will encourage significant participation by the private bar in the criminal justice system.

Standard 13.6 Financing of Defense Services

Defender services should be organized and administered in a manner consistent with the needs of the local jurisdiction. Financing of defender services should be provided by the State. Administration and organization should be provided locally, regionally, or statewide.

Standard 13.7 Defender to be Full Time and Adequately Compensated

The office of public defender should be a full-time occupation. State or local units of government should create regional public defenders serving more than one local unit of government if this is necessary to create a caseload of sufficient size to justify a full-time public defender. The public defender should be compensated at a rate not less than that of the presiding judge of the trial court of general jurisdiction.

Standard 13.8 Selection of Public Defenders

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

An updated list of qualified potential nominees should be maintained. The commission should draw names from this list and submit them to the Governor. The commission should select a minimum of three persons to fill a public defender vacancy unless the

commission is convinced there are not three qualified nominees. This list should be sent to the Governor within 30 days of a public defender vacancy, and the Governor should select the defender from this list. If the Governor does not appoint a defender within 30 days, the power of appointment should shift to the commission.

A public defender should serve for a term of not less than four years and should be permitted to be reappointed.

A public defender should be subject to disciplinary or removal procedures for permanent physical or mental disability seriously interfering with the performance of his duties, willful misconduct in office, willful and persistent failure to perform public defender duties, habitual intemperance, or conduct prejudicial to the administration of justice. Power to discipline a public defender should be placed in the judicial conduct commission provided in Standard 7.4.

Standard 13.9 Performance of Public Defender Function

Policy should be established for and supervision maintained over a defender office by the public defender. It should be the responsibility of the public defender to insure that the duties of the office are discharged with diligence and competence.

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

The relationship between the law enforcement component of the criminal justice system and the public defender should be characterized by professionalism, mutual respect, and integrity. It should not be characterized by demonstrations of negative personal feelings on one hand or excessive familiarity on the other. Specifically, the following guidelines should be followed:

1. The relations between public defender attorneys and prosecution attorneys should be on the same high level of professionalism that is expected between responsible members of the bar in other situations.

2. The public defender must negate the appearance of impropriety by avoiding excessive and unnecessary camaraderie in and around the courthouse and in his relations with law enforcement officials, remaining at all times aware of his image as seen by his client community.

3. The public defender should be prepared to take positive action, when invited to do so, to assist the police and other law enforcement components in understanding and developing their proper roles in the

criminal justice system, and to assist them in developing their own professionalism. In the course of this educational process he should assist in resolving possible areas of misunderstanding.

4. He should maintain a close professional relationship with his fellow members of the legal community and organized bar, keeping in mind at all times that this group offers the most potential support for his office in the community and that, in the final analysis, he is one of-them. Specifically:

a. He must be aware of their potential concern that he will preempt the field of criminal law, accepting as clients all accused persons without regard to their ability or willingness to retain private counsel. He must avoid both the appearance and fact of competing with the private bar.

b. He must, while in no way compromising his representation of his own clients, remain sensitive to the calendaring problems that beset civil cases as a result of criminal case overloads, and cooperate in resolving these.

c. He must maintain the bar's faith in the defender system by affording vigorous and effective representation to his own clients.

d. He must maintain dialogue between his office and the private bar, never forgetting that the bar more than any other group has the potential to assist in keeping his office free from the effects of political pressures and influences.

Standard 13.10 Selection and Retention of Attorney Staff Members

Hiring, retention, and promotion policies regarding public defender staff attorneys should be based upon merit. Staff attorneys, however, should not have civil service status.

Standard 13.11 Salaries for Defender Attorneys

Salaries through the first 5 years of service for public defender staff attorneys should be comparable to those of attorney associates in local private law firms.

Standard 13.12 Workload of Public Defenders

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

Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.

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

Standard 13.13 Community Relations

The public defender should be sensitive to all of the problems of his client community. He should be particularly sensitive to the difficulty often experienced by the members of that community in understanding his role. In response:

1. He should seek, by all possible and ethical means, to interpret the process of plea negotiation and the public defender's role in it to the client community.

2. He should, where possible, seek office locations that will not cause the public defender's office to be excessively identified with the judicial and law enforcement components of the criminal justice system, and should make every effort to have an office or offices within the neighborhoods from which clients predominantly come.

3. He should be available to schools and organizations to educate members of the community as to their rights and duties related to criminal justice.

Standard 13.14 Supporting Personnel and Facilities

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

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

The budget of a public defender for operational expenses other than the costs of personnel should be substantially equivalent to, and certainly not less than, that provided for other components of the justice system with whom the public defender must interact, such as

the courts, prosecution, the private bar, and the police. The budget should include:

1. Sufficient funds to provide quarters, facilities, copying equipment, and communications comparable to those available to private counsel handling a comparable law practice.

2. Funds to provide tape recording, photographic and other investigative equipment of a sufficient quantity, quality, and versatility to permit preservation of evidence under all circumstances.

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

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

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

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

Standard 13.15 Providing Assigned Counsel

The public defender office should have responsibility for compiling and maintaining a panel of attorneys from which a trial judge may select an attorney to appoint to a particular defendant. The trial court should have the right to add to the panel attorneys not placed on it by the public defender. The public defender's office also should provide initial and inservice training to lawyers on the panel and support services for appointed lawyers, and it should monitor the performance of appointed attorneys.

Standard 13.16 Training and Education of Defenders

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

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

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

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

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