



Justice Impaired:
The Impact of the
State of New York's Failure to Effectively
Implement the Right to Counsel

JEFFERSON COUNTY

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Produced on Behalf
of
The New York State Defenders Association

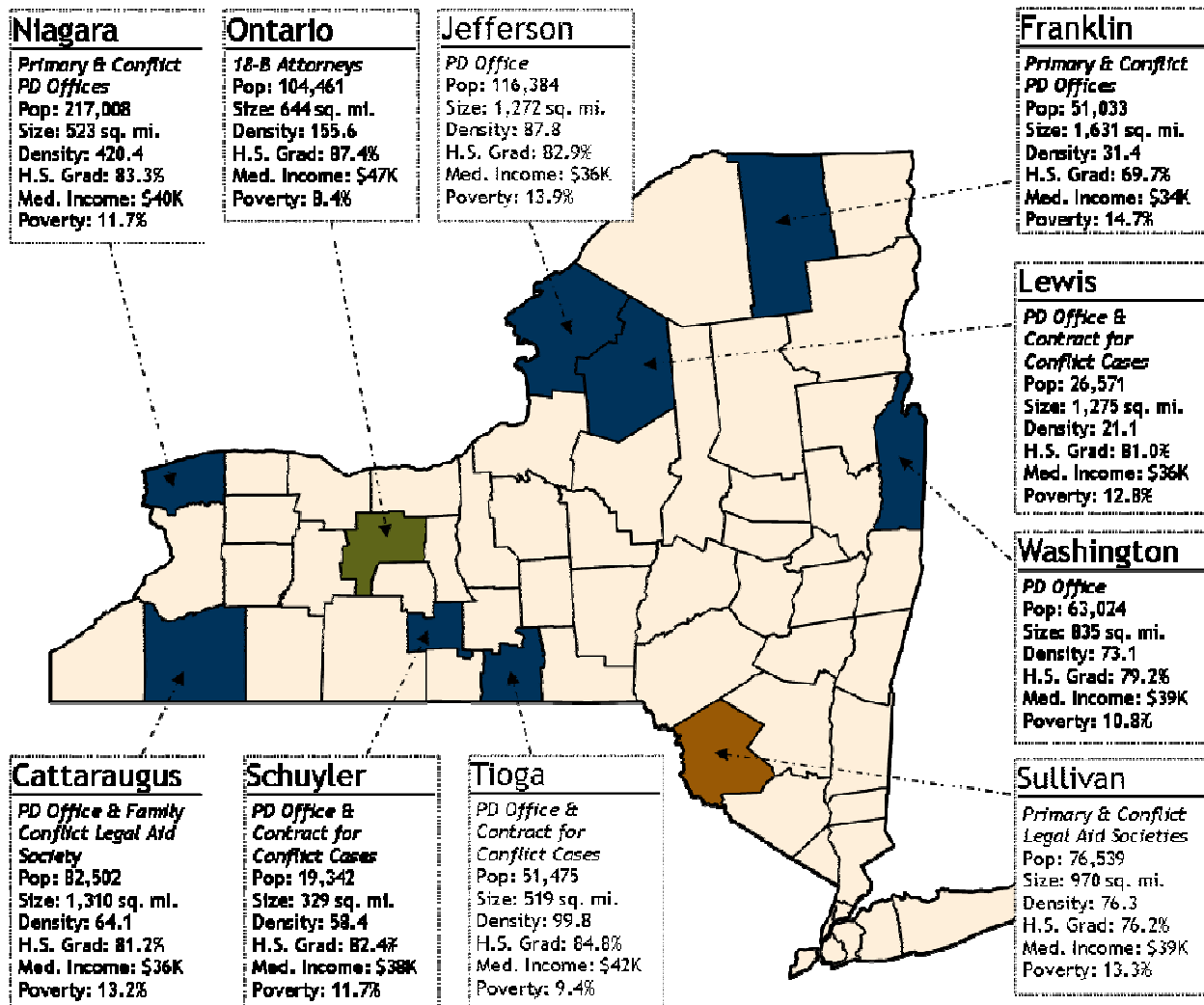
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TEN COUNTY OVERVIEW

Jefferson County was one of ten upstate counties chosen for an assessment by NLADA. None of the ten counties were previously studied as part of Chief Judge Kaye's Commission on the Future of Indigent Defense Services, but were instead selected by the New York State Defenders Association as representative of each type of plan under Article 18-B of the County Law and distributed across judicial districts.



Introduction

In the case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court concluded that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Declaring it an "obvious truth" that "lawyers in criminal courts are necessities, not luxuries," the Court ruled that states must provide counsel to indigent defendants in felony cases. That mandate has been consistently extended to any case that may result in a potential loss of liberty.¹

Despite the importance of the right to counsel to the justice system's overall health, *Gideon's* "obvious truth" has been obscured or lost at the hands of the State of New York over the past forty-six years. Numerous reports have detailed the failures of the State of New York to adequately fund and effectively implement the constitutional right to counsel in its cities, towns, county and family courts over the years.² Rather than add to the already voluminous materials detailing how the state fails to safeguard the right to counsel, this report reaffirms the existing scholarship that the system is in a "state of crisis"³ and looks instead at the impact the State of New York's abdication of its constitutional duties under *Gideon* and its progeny has on people of insufficient means in one jurisdiction – Jefferson County.

The New York State Defenders Association (NYSDA)⁴ retained the services of the National Legal Aid & Defender Association (NLADA) to conduct a study of the public defense

¹ *Gideon* established the right to counsel for felony trials. Subsequent cases extend that right to: direct appeals – *Douglas v. California*, 372 U.S. 353 (1963); custodial interrogation – *Miranda v. Arizona*, 384 U.S. 436 (1966); juvenile proceedings resulting in confinement – *In Re Gault*, 387 U.S. 1 (1967); critical stages of preliminary hearings – *Coleman v. Alabama*, 399 U.S. 1 (1970); misdemeanors involving possible imprisonment – *Argersinger v. Hamlin*, 407 U.S. 25 (1972); and misdemeanors involving a suspended sentence – *Shelton v. Alabama*, 535 U.S. 654 (2002). Most recently, the Roberts Court found that indigent defendants who plead guilty at the trial-level do not give up their right to counsel on appeal to challenge their sentencing - *Halbert v. Michigan*, 545 U.S. 605 (2005).

² See for example: 1) Commission on the Future of Indigent Defense Services. *Final Report to the Chief Judge of the State of New York*. June 2006; 2) The Spangenberg Group. *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services*. June 2006; 3) N.A.A.C.P., Legal Defense Fund, Inc. *The Status of Indigent Defense in Schuyler County*. 2004; 4) Bonstelle, Sheri and Christine Schlessler. *Adjourning Justice: New York State's Failure to Support Assigned Counsel Violates the Rights of Families in Child Abuse and Neglect Cases*. Fordham University School of Law, Fordham Urban Law Journal. April 2001; 5) Chester Mirsky. *The Political Economy and Indigent Defense: New York City 1917-1998*. New York University School of Law, Annual Survey of American Law. 1997; 6) The Center for Research in Crime and Justice, American University Criminal Courts Technical Assistance Project. *Review of Existing Case Management Practices and Procedures and Recommendations for Improvement for the Oneida Public Defender Office, Utica New York*. Prepared on behalf of the United States Department of Justice, Bureau of Justice Assistance. CCTAP Technical Assistance Report 98-013. August 1999; 7) The New York Legal Aid Society. *The Defense of Indigents in New York City: The View from the Front Line*. August 1985; 8) New York University School of Law. *Criminal Defense of the Poor in New York City*. Michael McConville and Chester Mirsky. 1985; 9) The New York State Defenders Association. *Assigned Counsel Fees in New York State: Time For a Change*. March 1985; 10) The New York State Defenders Association. *Public Defense Services in Ontario County: A Study of the Assigned Counsel System*. August 1985; 11) The New York State Defenders Association. *Public Defense Services in Schenectady County: An Assessment of the Assigned Counsel Program*. March 1984; 12) The Prison Reform Task Force of the New York Society for Ethical Culture. *Inmate Study of 18-B Indigent Defense Counsel (Court Appointed Counsel)*. Prepared on behalf of the Inmate Committee for Judicial and Legislative Reform. May 1977; and, 13) New York City Board of Corrections. *Legal Representation of Indigent Criminal Defendants in New York City*. March 1973.

³ The Spangenberg Group. *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services*. June 2006, p. 155.

⁴ The New York State Defenders Association is a not-for-profit, membership organization that provides support to New York's public defense community. Founded in 1967, NYSDA's mission is "to improve the quality and scope of publicly supported legal representation to low income people" in the State of New York NYSDA has a contractual obligation to "review, assess and analyze the public defense system in the state, identify problem areas and propose solutions in the form of specific

systems in ten New York counties under a generous grant from the Open Society Institute. NLADA is a national, non-profit membership association dedicated to quality legal representation for people of insufficient means. Created in 1911, NLADA has been a leader in supporting equal justice for over ninety years.⁵ NLADA has long played a leadership role in the development of national standards for public defense systems⁶ and processes for evaluating a jurisdiction's compliance with those standards.

Assessing County Defender Systems Against National Public Defense Standards

The concept of using standards to assess uniform quality is not unique to the field of public defense. In fact, the strong pressures on public officials created by favoritism, partisanship, and/or self-interest underscore the need for standards to assure fundamental quality in all facets of government and all components of the justice system. For instance, realizing that standards are necessary to both compare bids equitably and to assure quality products, policy-makers long ago standardized requests for proposals and ceased taking the lowest bid to build a hospital, school or a bridge and required winning contractors to meet minimum quality standards of safety. Ensuring the rights of the individual against the undue taking of his or her liberty by the state merits no less consideration.

The use of national standards of justice in this way also reflects the demands of the United States Supreme Court in *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 374 (2005). In *Wiggins*, the Court recognized that national standards, including those promulgated by the American Bar Association (ABA), should serve as guideposts for assessing ineffective assistance of counsel claims. The ABA standards define competency, not only in the sense of the attorney's personal abilities and qualifications, but also in the systemic sense that the attorney practices in an environment that provides her with the time, resources, independence, supervision and training to effectively carry out her charge to adequately represent her clients. *Rompilla* echoes those sentiments, noting that the ABA standards describe the obligations of defense counsel "in terms no one could misunderstand."⁷

recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities." For more information, see: www.nysda.org.

⁵ NLADA currently supports a number of initiatives, including the American Council of Chief Defenders (ACCD), a leadership forum that brings together the top defender executives nationwide, and the National Defender Leadership Institute (NDLI), an innovative training project to support current managers and develop future leaders. The Defender Division also supports the National Alliance of Sentencing Advocates and Mitigation Specialists which sponsors national trainings and technical assistance services for professionals evaluating and developing appropriate sentencing alternatives for clients of assigned and contract legal counsel as well as public defenders. For more information please see: www.nlada.org.

⁶ *Guidelines for Legal Defense Systems in the United States* (National Study Commission on Defense Services, U.S. Department of Justice, 1976); *The Ten Principles of a Public Defense Delivery System* (adopted by the ABA, 2002) *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* (NLADA, 1988; adopted as Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ABA, 1989), *Defender Training and Development Standards* (NLADA, 1997); *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995); *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* (NLADA, 1984; ABA, 1985); *Standards for the Administration of Assigned Counsel Systems* (NLADA, 1989); *Standards and Evaluation Design for Appellate Defender Offices* (NLADA, 1980); *Evaluation Design for Public Defender Offices* (NLADA, 1977); and *Indigent Defense Caseloads and Common Sense: An Update* (NLADA, 1994).

⁷ Citation to national public defense standards in court decisions is not limited to capital cases. See for example: 1) *United States v. Russell*, 221 F.3d 615 (4th Cir. 2000) [Defendant was convicted of prisoner possession of heroin; claimed ineffective assistance of counsel; the court relied, in part on the ABA Standards to assess the defendant's claim]; 2) *United States v. Blaylock*, 20 F.3d 1458 (9th Cir. 1993) [Defendant convicted of being a felon in possession of a weapon; filed appeal arguing, in part, ineffective assistance of counsel Court stated: "In addition, under the *Strickland* test, a court deciding whether an attorney's performance fell below reasonable professional standards can look to the ABA standards for guidance. *Strickland*, 466 U.S. at 688." And, "While

The American Bar Association's *Ten Principles of a Public Defense Delivery System* present the most widely accepted and used version of national standards for public defense. Adopted in February 2002, the ABA *Ten Principles* distill the existing voluminous ABA standards for public defense systems to their most basic elements, which officials and policymakers can readily review and apply. In the words of the ABA Standing Committee on Legal Aid and Indigent Defendants, the *Ten Principles* "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney."⁸

Methodology

With these standards, NLADA utilizes a modified version of the Pieczenik Evaluation Design for Public Defender Offices, which has been used since 1976 by leading criminal justice organizations, such as the National Defender Institute and the Criminal Courts Technical Assistance Project of the American University Justice Programs Office. The NLADA protocol combines a review of a jurisdiction's budgetary, caseload and organizational information with site visits to observe courtroom practices and/or to interview defense providers and other key criminal justice policy-makers (e.g., judges, prosecutors, county officials). This methodology ensures that a variety of perspectives is solicited and enables NLADA to form as complete and accurate a picture of an indigent defense system as possible.

NLADA assembled a site-visit team of professional researchers and leading public defense practitioners to conduct in-court observations and interviews with defense providers and other key players in the local criminal justice system. On-site work was conducted on April 10-12, 2007.⁹

Strickland explicitly states that ABA standards "are only guides," *Strickland*, 466 U.S. at 688, the standards support the conclusion that, accepting Blaylock's allegations as true, defense counsel's conduct fell below reasonable standards. Based on both the ABA standards and the law of the other circuits, we hold that an attorney's failure to communicate the government's plea offer to his client constitutes unreasonable conduct under prevailing professional standards."]; 3) *United States v. Loughery*, 908 F.2d 1014 (D.C. Cir. 1990) [Defendant pleaded guilty to conspiracy to violate the Arms Control Export Act. The court followed the standard set forth in *Strickland* and looked to the ABA Standards as a guide for evaluating whether defense counsel was ineffective.]

⁸ American Bar Association. *Ten Principles of a Public Defense System*, from the introduction. at: http://72.14.207.104/search?q=cache:li1_aP9C2sJ:www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf+ABA+Ten+Principles&hl=en&gl=us&ct=clnk&cd=1. The *Ten Principles* are attached as Appendix B.

⁹ The New York county site team included members of the American Council of Chief Defenders and NLADA staff. Though not all members visited each site, each reviewed data and compared site notes from each of the other counties in reaching our conclusions. Biographical information for each member of the team is included as Appendix A.

Jefferson County's Public Defense System

Jefferson County is located in the northern part of the state on the western slope of the border with Canada. The county has a population of approximately 114,000 and a geographic area of approximately 1,300 square miles. The county is also the home to Fort Drum, an army base that is expected to expand significantly in troop strength beginning in 2008, causing Jefferson to be reportedly "the fastest growing county in New York State." Jefferson has one County court, one Family Court (with one judge and four magistrates), one City Court and 32 Town & Village Courts.

The county has had a full-time public defender office for more than 20 years. The county administrator determines all funding and resources to the public defender office. The chief public defender is hired by the county legislature and serves at its pleasure. The staff attorneys of the public defender office are the first appointed in both criminal and family cases. The starting salary for a staff public defender attorney is \$47 - \$51,000. Conflicts are handled by approximately 25 assigned counsel attorneys, who are paid according to the state hourly rates, but who must bear the cost of their overhead. The county has an assigned counsel administrator who compiles and distributes to the courts the list of attorneys available for appointment and who processes assigned counsel vouchers. In 2006, the county spent \$978,623 on public defense services (\$8.76 per capita), and received \$252,776 from the state (\$2.62 per capita) in supplemental Indigent Legal Services Fund money.

There are no stated qualifications for the Chief Public Defender, staff attorneys, or assigned counsel attorneys. The county does not require any of the public defense system attorneys to have any on-going training beyond the state-required 12 hours each year of Continuing Legal Education (CLE), and public defense system attorneys are not required to have on-going training in the areas of criminal defense and family law where they are appointed. The county pays the tuition for staff attorneys to attend the 12 state-required hours of CLE each year, however criminal defense CLE is typically not available within the county and the county will not pay for travel and hotel to attend CLE outside the county. All new public defender office staff attorneys "shadow" another attorney for at least one month in all of the night courts, and new Family Court staff attorneys accompany the chief to court for a few weeks until both she and they are comfortable with them appearing on their own. The county does not provide any funding for CLE or training of assigned counsel. There are no accountability standards in place or method of implementing accountability of the attorneys within the public defender system.

The public defender office is made up of the Chief Public Defender and four full-time assistant public defenders, with an unfilled opening for an additional public defender. The office also employs one part-time investigator and two full-time secretaries. There has been significant turnover among attorney staff in the public defender office, with 28 attorneys coming through the office during its 20 year existence; only seven attorneys remained with the office for more than five years and 15 attorneys stayed with the office for less than two years. The staff attorneys occupy shared offices and do not have private spaces within which to meet confidentially with their clients. The office does not have a copier or access to on-line legal research. The chief and one assistant handle the primary family caseload and each also staff some Town & Village Courts. Two of the assistants handle all primary felony cases and each staff some Town & Village Courts. The remaining assistant handles all City of Watertown cases and some Town & Village Courts. The part-time investigator does not perform investigative services; rather he receives all notices of appointment from the courts, reviews the financial

eligibility decisions made by some judges or makes them in the first instance for courts whose judges do not do so, and runs conflict checks.

The office maintains accurate and detailed caseload information on the number of cases handled by the public defense system attorneys. The office has also acquired client database software which has aided them in identifying conflicts more quickly, so that assigned counsel can be appointed more quickly than in the past, however only the support staff has access to this database.

Attorneys are not present at the initial appearance before a magistrate following the arrest of a defendant. Many Town and Village Court justices do not provide appointed counsel to those charged with violations. The public defender office does not have any space for confidential attorney-client meetings. Public defender staff attorneys most often meet their criminal clients for the first time at the courthouse when the client appears for formal arraignment on the charge, and at most of the courthouses there are no private spaces wherein to conduct confidential meetings. The county jail is most often full, so many pretrial defendants are housed out to other counties. In Family Court, judges often hold off on appointment of counsel and meet with the parties first to determine whether an agreed disposition can be reached before appointing counsel.

Below, we assess Jefferson County against the ABA *Ten Principles*. For ease of analyzing the jurisdiction-specific issues, the discussion does proceed in the numeric sequence in which the principles were promulgated. Note: The principles used as headings in the text are taken from the *Ten Principles*, but do not include footnotes from the annotated Principles and may not include the full language of a black-letter Principle. The full *Ten Principles* are attached as Appendix B.

Independence

ABA Principle 1: The public defense function, including the selection, funding, and payment 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.

There is no independent board or commission that oversees public defense services in Jefferson County. The Chief Public Defender is appointed by the County Legislature and serves at its pleasure. The Chief Public Defender must make all requests for funding and resources to the County Administrator, who is wholly unsympathetic to the needs of the public defense system, and to criminal defendants in particular. Despite crippling caseloads and minimal resources, the County has been largely unwilling to provide for the public defender office. The Public Defender office literally had to threaten to begin conflicting itself out on the basis of caseload before the County would approve the addition of a sixth attorney, authorized effective January 1, 2008. There is no institutional independence that allows the current or future public defenders the freedom to challenge decisions of the Legislature or the County Administrator, and the County regularly engages in micromanagement of staffing and budgetary issues, primarily by saying "no." For example, in 2007 the office lost a staff attorney, but the Chief Public Defender was unable to hire a replacement attorney or even to begin advertising the position until the County gave approval, despite this position being fully funded in the budget. There are serious

problems with the support staff, their funding, and their duties, but the public defender attorneys have little to no control over the staffing in their office. There is no one to advocate on behalf of the public defense representation system and its clients and to promote efficiency and quality of services.

Delivery Model & Funding

***ABA Principle 2:** Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.... Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.*

The County uses a mixed system of a full-time public defender office to represent all eligible criminal and Family Court parties, backed up by an hourly-rate assigned counsel system to provide counsel in multi-party and other conflict cases. However the County has virtually ensured, through inadequate resources and funding, that Jefferson County attorneys cannot provide representation of a quality required by standards or comparable to that provided in other counties in New York. Turnover in the full-time public defender office is very high, as a result primarily of low pay, excessive caseloads, and a total inability to progress professionally, and to some extent because of the disdain with which public defenders are treated by the County. There have been 28 attorneys in the Public Defender office during its 20 year existence; only seven attorneys have ever remained with the office for more than five years; and 15 attorneys have stayed with the office for less than two years. Public defender attorneys occupy shared offices, do not have a copier of their own and do not have a law library or access to on-line legal research in the Public Defender office (they must go next door to the County Attorney office to use the copier or conduct legal research), do not have private spaces within which to meet confidentially with their clients despite their constitutional obligation to do so, and in short are treated like second-class citizens. Meanwhile, the County is wasting resources on the Assigned Counsel Administrator position. The Administrator is meant to manage the appointment and payment of assigned counsel, which in theory he does. In reality, the entire job consists of preparing a list of some approximately 25 names (of attorneys who have said they want to be appointed in various types of cases) and sending their bills on for payment to the County after approval by the Judge. This is a 5- or 10-minute process that provides no oversight.

Prompt Appointment of Counsel

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

While New York state law requires that a defendant be brought immediately before a judge following arrest, there are no attorneys present at these initial appearances in Jefferson County, preventing defendants from having anyone to advocate on their behalf at the crucial point of having bail set. As one public defender said, "that first decision affects everything along the way" for the client and their case. Justices, under a court rule, are supposed to notify the

public defender office when a newly arrested client has been jailed, and while some do and will even call the Chief at her home to so advise her, some of the justices do not and instead hold the client's paperwork without notifying either the Public Defender or the District Attorney of a new arrest. These individuals simply sit in jail with no one who could advocate for them being aware of their existence. Even when the Public Defender office is aware of the arrested and detained clients, they do not have enough attorneys or support staff to see the newly jailed defendants each day. Many justices do not provide appointed counsel to those charged with violations, even though they are constitutionally and statutorily entitled to appointed counsel; this policy, which was apparently established by a predecessor chief defender and has been implemented by the Public Defender investigator, is encouraged by the public defender office. In contrast, the County Judge has implemented a plan intended to expedite the handling of felony cases in his court, whereby he conducts a felony screening pretrial conference with the prosecution and defense just two to three weeks after the filing of a case in his court, in an effort to determine whether an agreed disposition can be reached. In Family Court, the judges often hold off on appointment of counsel and meet with the parties to determine whether an agreed disposition can be reached before appointing counsel.

Client Confidentiality

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

In criminal cases, the Public Defender office will receive paperwork from the courts notifying them when they have been appointed, and will then send a letter to the client asking them to come in to the office for an appointment. However very few clients (approximately ¼) are actually able to make that appointment – these are poor people who often lack telephones, transportation, childcare, etc. As a result, the Public Defender attorneys end up meeting most of their clients for the first time at the courthouse, and at most of the courthouses there is no private space in which to conduct confidential meetings. There is at least a confidential area to talk at the County Courthouse, where one of the felony attorneys prefers to meet with detained clients prior to court appearances and thus rarely if ever goes to the jail. The other felony attorney, by contrast, typically visits clients at the jail on 2 days every week. None of the public defenders ever go to the home of a client to meet with them. When the Jefferson County jail is full -- as it most often is -- pre-trial defendants are housed out to other counties, perhaps hours away, where it is unlikely that they will be able to consult with their attorneys in advance of court. For clients who are able to come to the public defender office, there is nowhere for the attorney to meet privately with them, as the attorneys share very small offices and there is no client meeting area or conference room; they often end up meeting in hallways.

Reasonable Workloads

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

The workload imposed on the staff public defense attorneys ensures that they are not able to do much more than address the most pressing matters and are almost never able to provide considered and prepared quality representation to their clients. They are all full-time county employees and none of them engage in any outside practice, devoting all of their time to their appointed cases. The caseloads that they carry are excessive under national standards.

Each of the public defenders handles misdemeanor and violation cases. If the total number of these cases were split evenly among the attorneys, each would handle 442 such cases which means that each public defender is already above the national misdemeanor workload standard of 400 such cases per year. But on top of this, each public defender has additional duties as well. For example, two of the public defenders handle all of the County Court felony cases (estimated to be 725 cases for 2007), or 363 felony cases per year. Their felony caseload alone is more than twice the national standard for felony representation (150 cases per year). This means each felony attorney handles a caseload requiring 3.5 attorneys under national standards. Such excessive caseload is further impacted by the fact that one of these felony attorneys also handles all pre-disposition restitution cases for all public defender clients while the other felony attorney handles Drug Court. Two of the public defenders handle all of the Family Court cases (estimated to be 675 cases for 2007), or 338 Family Court cases per year. Combined with the misdemeanor work each attorney is handling, recognized standards suggest the caseload of this one person should be handled by 4.5 attorneys. Moreover, one of the Family Court attorneys is the Chief, who also has administrative responsibility for the office and personally handles all murder cases. The remaining public defender handles all City of Watertown cases, estimated to be 1765 cases for 2007. This means this one lawyer is handling cases that national standards suggest should more appropriately be handled by 5.5 attorneys. The County has finally approved the addition of another attorney to the public defender staff, but this is not sufficient to bring the caseloads within nationally accepted standards – not even close. And caseloads are expected to continue growing at an ever-increasing rate as the number of troops at Fort Drum, a major presence in the county, increases in 2008, including troops returning from deployment in Iraq and Afghanistan.

To the extent that any investigation is done in public defense cases, the attorneys must do it themselves. Although there is a part-time "investigator" on staff, this person does not perform any investigative function for the office and his working hours are 8:30 a.m. to noon, a time during which very little investigation could productively take place. There are two full-time secretaries on staff who open and close files, open the mail and give it to the appropriate attorney, and generate very basic form correspondence. However, the attorneys do almost all of their own typing of correspondence and pleadings and as often as not must also answer their own telephones. Jefferson County does not have any workload standards for public defense attorneys and does not have any method in place to monitor the workloads of the attorneys or to protect them and their clients from excessive workloads. The public defender office keeps accurate caseload information, but no mechanism exists to enforce any workload limits, and neither the

County nor the State of New York are providing sufficient resources to the public defender office with which to constitutionally represent their clients.

Minimum Qualifications

ABA Principle 6: Defense counsel's ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.

The County does not have any minimum qualifications in place for attorneys appointed to represent the poor. The County lacks any standards or formalized procedures to ensure that counsel have the experience and training necessary to provide ethical and high quality representation appropriate to the complexity of the cases and areas of law to which they are appointed. There are also no criteria by which the County Legislature selects the Chief Public Defender nor for the selection of assistant public defenders or assigned counsel. All that is required is that attorneys have passed the NY bar exam in order to be hired. Due to low salaries, unreasonable workloads, and little hope of professional advancement, the public defender office has struggled to hire and retain attorneys, much less to attract experienced counsel to the job. Almost all of the public defenders have come to the office directly out of law school. The Chief attempts to hire the best possible applicants, but it is difficult to draw attorneys to Jefferson County and in particular to the public agencies. The District Attorney office has a similar difficulty in filling attorney positions. The Chief advertises open positions with the law schools once she is allowed to do so by the County. She is only provided with \$500 per year in her advertising/recruiting budget, so she cannot do much in the way of travel in order to recruit or interview applicants. At least in the public defender office, there is a Chief who exercises a modicum of discretion in hiring public defenders. The only requirement to be assigned counsel is admission to practice in New York and a willingness to do appointed work at the state established hourly rate. Thus, in Jefferson County even the most inexperienced attorneys can be appointed to the most complex criminal or family court law case.

Continuous Representation

ABA Principle 7: The same attorney continuously represents the client until completion of the case. Often referred to as vertical representation, the same attorney should continuously represent the client from initial assignment through the trial and sentencing.

The public defender office attempts to provide vertical representation, and in some instances is able to do so. If a person is arrested on a felony and the public defender office is appointed, the case will be assigned to one of two felony public defenders – one representing people with last names A-M and the other representing people with last names N-Z. While they are appointed to represent specific defendants, in reality they cover days in court, with one appearing on Tuesdays and Thursdays and the other appearing on Wednesdays and Fridays, and they alternate Mondays. On their felony court days, they cover: arraignments, pre-trial conferences, entry of agreed guilty pleas, sentencings, and probation revocations. So in essence a client will not necessarily see his own attorney unless the case goes to trial. A third public

defender handles all cases, including felonies, that originate out of the City of Watertown; however, these felony defendants will shift to one of the felony attorneys if the case actually proceeds to County Court. Where a client has previously been or is currently being represented by assigned counsel and a judge is aware of that, the judge will try to appoint the same attorney, but this is more a matter of serendipity than of plan when it actually occurs. The number of conflict cases and the difficulty in identifying them grows daily. Indeed, some conflicts are largely ignored. For example, the spouse of the public defender senior secretary is a Justice, yet the public defender office represents clients before that Justice without notifying the clients of the potential conflict of interest. Likewise, the definition of conflict is taken quite loosely in the Family Courts, where the public defender office might today represent the father of a second child in a child support proceeding, even though they previously represented the mother – a conflict that would normally be avoided by a private attorney. The attorneys involved in the system all recognize the need for vertical representation and desire to achieve it, but insufficient staffing and resources prevent them from doing so.

Resource Parity

***ABA Principle 8:** There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.*

Any consideration of parity must look at not only the District Attorney office, but also the County Attorney office and the Department of Social Services at a minimum. This is because the public defender system is charged with providing counsel to all eligible persons arrested for misdemeanor and felony offenses and probation/parole violations, as well as to all eligible adult respondents in child abuse & neglect cases, family offenses, custody & visitation cases, paternity cases, and child support violations. On the criminal court side, the public defender system is working opposite the District Attorney. On the Family Court side, the public defense attorney may be working opposite private attorneys, or Department of Social Services attorneys, or County Attorneys, or other appointed attorneys, or any combination of these. It is widely and openly recognized throughout the County that the public defender office is not treated equally with the District Attorney office – or any other attorneys within the County – in terms of space and resources. The public defender office has a tiny waiting room with four chairs and no room for any more. There is an open secretarial space where the two full-time secretaries and one part-time investigator all work in a common area; the same area contains what few file cabinets there are for the entire office. There are four relatively small offices, resulting in all of the attorneys having to share offices if they are fully staffed. There is no space at all in which attorneys can meet privately with their clients. The Public Defender office does not have its own copy machine, so Public Defender attorneys must go next door to the County Attorney office. The public defense attorneys have recently received a new fax machine, after theirs was damaged and inoperable for several months. They do not have a conference room or law library, and again must go next door to borrow from the County Attorney. They do not have electronic legal research capabilities in their office – they must borrow services in the County Attorney office, which is troubling given that research histories could provide a view into defense strategies and

County Attorney staff may be opposing public defense counsel in some cases. While not a crucial matter, but one that bears on the self-esteem of the public defenders, they do not have a parking spot at their offices though all other county employees do. The assigned counsel attorneys are paid at the state established hourly rates, but they also represent private paying clients, setting up a conflict between their duties to their public and private clients and their own financial interests. Jefferson County cannot hope to resolve the problems in parity, particularly of resources, without assistance from the State of New York.

Training

***ABA Principle 9:** Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.*

Under past Public Defender administration, there was no training program in the Public Defender office. When the present Chief took office, she established a training program for newly hired attorneys. No new attorney is ever sent directly into court. They will "shadow" another attorney for at least one month in all of the night courts. The Chief Public Defender covers Family Court personally, so she is able to train all new attorneys who work in the Family Courts, generally having them accompany her to court for a few weeks until both she and they are comfortable with them appearing on their own. The County pays for required CLE for public defender attorneys. Although the written policy says that the County will pay for travel, hotel stays, and meals if necessary for attorneys to obtain CLE, in practice however the County will not pay for overnight stays. Given Jefferson County's distance from regional centers where CLE generally occurs, this makes attendance impractical. It is difficult to obtain quality, relevant CLE within the County. Those trainings that are available within the County tend to be prosecution-oriented. Thus the public defender office attorneys just do whatever training they can fit into their schedules – often that is real estate or bankruptcy, which fulfills their state requirements but provides them nothing in the way of training in either criminal defense or family law. Generally they do self-study books and tapes, which precludes their having interaction with other and more experienced criminal defense and family lawyers. There is no requirement that assigned counsel have any ongoing training in the areas of law in which they receive appointments, and those whose private practices include varied areas of law outside of criminal defense and family law have no incentive to choose CLE relating to public defense work. There should be mandated and funded ongoing systematic training for all public defense attorneys in the specific areas of criminal defense and family law in which they accept appointments to represent parties at public expense.

Accountability

***ABA Principle 10:** Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.*

There is no supervision or review of the representation provided by public defense attorneys in Jefferson County. There is no accountability in the public representation system. Despite the best efforts of all attorneys, the structure, funding, and resourcing of the system yields an inability to meet national standards of representation. Because there is no oversight or accountability, everyone within the system is left with the abiding sense that the public defenders are overwhelmed, but they are unable to demonstrate this to anyone with the inclination and power to improve the situation. The taxpayers cannot be assured that their dollars are spent effectively and efficiently and in a manner calculated to ensure that justice is served.

NLADA Recommendations for Jefferson County

NLADA believes it is unfair for the state of New York to saddle its counties with the responsibility of bringing their public defense standards into constitutional compliance. Indeed, to do the job right would require a significant increase in local funding, which would threaten the overall economic health of the counties. It is best for the state to shoulder this burden and allow counties to invest in social services that may decrease the need for public representation services in the first place. However, we understand that it is important to assess the county's defender system against recognized national standards as a measure of the health and effectiveness of the defense services. With that in mind, we offer the following recommendations about what is needed locally.

- Provide additional funding sufficient to implement the recommendations made here.
- Establish an independent board to oversee all public representation services, including the hiring of the chief public defender.
- Consider establishing a separate public defender office for the provision of Family Court representation.
- Provide adequate physical resources to the public defender office, to a level on parity with the resources of the district attorney and county attorney offices, specifically including: individual offices for each staff public defender; a copier for the office; on-line legal research access to each staff public defender at their own computer; open and closed file storage space; and a parking space for each attorney given that all other county employees receive this benefit.
- Evaluate the local hourly rates for assigned counsel to ensure that the statutory rates are sufficient to cover overhead costs and provide a reasonable hourly fee.
- Establish hiring criteria and minimum qualifications for the chief public defender and all public defense system attorneys, specifically including assigned counsel.
- Adopt and fully fund a systematic and comprehensive training program for all public representation system attorneys in the areas of law in which they are appointed, to include both internal training provided directly by the public representation system and

external training that will allow public representation system attorneys to attend statewide and national training.

- Adopt performance standards for all public representation system attorneys.
- Adopt an objective system for the regular supervision, review, and evaluation of all public representation system attorneys, specifically including assigned counsel.
- Move responsibility from the public defender office to the assigned counsel administrator to: determine eligibility for public counsel, determine conflicts, and make assignments to assigned counsel where necessary.
- Require that attorneys be appointed to clients rather than to courts, thus providing vertical representation in all cases.
- Adopt mandatory caseload/workload standards for all public representation system attorneys, specifically including assigned counsel, and establish a county-wide criminal justice system mechanism for the public representation system to cease taking new cases when maximum caseloads/workloads are reached.
- Hire a sufficient number of attorneys, investigators, and social workers in the public defender office to bring workloads within nationally accepted standards, expressly considering the time and distance required to travel to all sessions of Town & Village Courts and the likely growth in populations within the county in light of planned Fort Drum expansions. There should be one investigator and one social worker for every four attorneys required by the system workload, including provision of investigators and social workers to assigned counsel for their appointed cases.
- Ensure that all courts comply with Section 200.26 of the Uniform Rules for Courts Exercising Criminal Jurisdiction to provide prompt appointment of counsel.
- Provide counsel at all initial appearances before a magistrate following arrest, where a detainee is indigent and requests counsel, prior to conducting any proceedings related to probable cause or bond setting.

Appendix A

Mary Broderick served as team leader for the NLADA evaluations of the Cook County (IL) Public Defender and the San Bernardino County (CA) Public Defender and developed a Projected Indigent Defense System Budget for San Diego (CA). She was also a team member for the NLADA evaluations of the Public Defender Service of the District of Columbia, Montana indigent defense system and the Riverside County (CA) Public Defender. As executive director of California Attorneys for Criminal Justice (CACJ), the largest statewide association of criminal defense lawyers and allied professionals, Broderick was responsible for policy development; supervision of the legislative, professional education and publications programs; public education and media relations; liaison with other organizations; technical assistance; and administration. She led the CACJ legislative effort that preserved unanimous jury verdicts in California. Broderick was also director of NLADA's Defender Division, where she conceived and edited NLADA's *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* and its *Standards for the Administration of Assigned Counsel Systems* and supervised development of NLADA's *Performance Guidelines for Criminal Defense Representation; Indigent Defense Caseloads and Common Sense: An Update; The Lay of the Land: Statewide Defender Programs; FINAL REPORT: Indigent Defense and the FY 91 BJA Formula Grant Program; and the National Directory of Death Penalty Mitigation Specialists*. She designed and launched NLADA's *Life in the Balance* death penalty defense training, and NLADA's *Defender Management Training*, and supervised its *Appellate Defender Training*. She also led NLADA's effort in Congress to preserve *habeas corpus*.

David Carroll is the director of research for the National Legal Aid & Defender Association (NLADA). Carroll has conducted assessments of the right to counsel in Montana, Idaho, New York, the District of Columbia, Clark County (Las Vegas) Nevada, Santa Clara County (San Jose) California, and Venango County Pennsylvania. Carroll has consulted with numerous public defender organizations and state Supreme Courts, and he co-authored a report for the U.S. Department of Justice on the Implementation and Impact of Indigent Defense Standards.

In 2004, NLADA released *In Defense of Public Access to Justice*, a comprehensive report detailing the impact Louisiana's systemic deficiencies had on one judicial district – Avoyelles Parish. A legislative Task Force on Indigent Defense subsequently retained Carroll to advise them on different models for delivering indigent defense services. The Louisiana State Bar retained NLADA to document issues in post-Katrina New Orleans and to create a road map for a legislative fix to the state's systemic deficiencies. The report, primarily authored by Carroll and released in September 2006, was the starting point for a legislative advisory group put together by the Chair of the House Criminal Justice Committee that eventually led to the passage of the Louisiana Public Defender Act of 2007.

For five and a half years, Carroll worked as a senior research associate & business manager for the Spangenberg Group (TSG). TSG is a national and international research and consulting firm specializing in criminal justice reform. Since 1985, TSG has been the research arm of the American Bar Association on indigent defense issues. Carroll directed numerous projects on behalf of TSG, including: a jail-planning study for Pierce County (Tacoma) Washington; a study of indigent defense cost recovery efforts in Jefferson and Fayette Counties (Louisville and Lexington), Kentucky; a statewide assessment of West Virginia's Public Defender Services; and principal analysis on a statewide public defender, court, and prosecutor

case-weighting study in Tennessee. He provided analysis and re-design of the New York Legal Aid Society's Criminal Defense Division and Criminal Appeals Bureau's case management information systems. Carroll also was chosen to provide on-site technical assistance to statewide Task Forces in Illinois, Nevada, Alabama, and Vermont under the auspices of the American Bar Association and the U.S. Department of Justice, Bureau of Justice Assistance.

William J. (Bill) Leahy grew up in Boston, graduated from the University of Notre Dame in 1968 and Harvard Law School in 1974. Between college and law school, he taught elementary school students at P.S. 20 in Hunts Point, the Bronx. His legal career has been dedicated to the representation of indigent persons, first as a trial and appellate defender with the Massachusetts Defenders Committee for 10 years, then as the first leader of the Public Defender Division of the Committee for Public Counsel Services (CPCS) from 1984 to 1991, and since 1991 in his current position as CPCS chief counsel.

Leahy was a member from 1991 to 2005 of the Massachusetts Supreme Judicial Court Standing Advisory Committee on the Rules of Criminal Procedure and was a member of the Boston Bar Association Executive Council from 2003 to 2006. He has been an adviser to the American Law Institute's Model Penal Code sentencing project since 2001. He has served on the Boston Bar Association/Crime and Justice Foundation Task Force on Justice, the Superior Court Criminal Justice Study Committee, the Criminal History Systems Board, and the executive board of the Massachusetts Association of Criminal Defense Lawyers. He is an active member of the National Legal Aid & Defender Association and is currently a member of the executive committee of the American Council of Chief Defenders. In April 2007, Leahy was appointed to serve on Gov. Deval Patrick's Anti-Crime Council.

In September 2005, he received the *Award for Legal Excellence* from the New England Bar Association, and the *Outstanding Professional Achievement Award* in June 2005, from the Boston Inn of Court. In June, 2004, he received the *Clarence Earl Gideon Award* from the Massachusetts Association of Criminal Defense Lawyers, and in October 2004, he received the Juvenile Bar Association's *Judge Leo Lydon Award*. Leahy was lead counsel in the landmark right-to-counsel case of *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228 (2004).

Phyllis Mann is the director of the National Defender Leadership Institute, within the National Legal Aid & Defender Association. Prior to joining NLADA, she was a consultant in criminal defense, providing expert testimony in both state and federal courts in capital defense, research and writing in systemic areas of criminal defense, and serving as the curriculum coordinator for NLADA's *Life in the Balance* capital defense training. Before returning to her home state of Texas, where she resides, Mann practiced exclusively criminal defense – trial and appeal, state and federal – in Louisiana. At various times in her career she served as a public defender for Rapides Parish, as an appellate public defender for the Louisiana Appellate Project, as a court appointed capital defender certified by the Louisiana Indigent Defender Assistance Board, and as a court appointed CJA attorney for the Western and Middle Districts of Louisiana. In 2005, she secured the unanimous opinion from the Louisiana Supreme Court in *State v. Citizen & Tonguis*, establishing the authority for trial court judges to halt capital prosecutions in Louisiana where there is no funding for the defense of the accused. Following Hurricane Katrina, she established and led an *ad hoc* group of criminal defense attorneys in their *pro bono* efforts to interview, counsel and document the approximately 8,500 prisoners and detainees evacuated from south-

eastern Louisiana jails and to represent them where appropriate in *habeas corpus* and bond proceedings. She received the 2006 *Arthur von Briesen Award* from NLADA for her contributions as a private attorney to indigent defense in Louisiana. Phyllis is a past president of the Louisiana Association of Criminal Defense Lawyers and was the recipient of LACDL's 2005 *Justice Albert Tate Jr. Award* for lifetime achievement in criminal defense.

Jon Mosher is research associate for the Research & Evaluations division of the National Legal Aid & Defender Association. He assists in the direction of NLADA's numerous standards-based assessments of indigent defense systems, including: an evaluation of trial-level public defender services in the state of Michigan; a study of public defense in Orleans Parish (New Orleans) Louisiana; an evaluation of public defense in Hamilton County, Ohio (Cincinnati); a statewide study of the right to counsel in Idaho's trial-level adult criminal and juvenile delinquency systems; and an evaluation of the Idaho State Appellate Defender's Office. He joined NLADA in 2003 as resource coordinator with Defender Legal Services, serving as primary staff liaison to the American Council of Chief Defenders. He is a graduate of George Washington University.

Gerard A. Smyth is the former chief public defender for the state of Connecticut and served as co-chair of the American Council of Chief Defenders (ACCD) from 2004-06. He had a 30-year career as a public defender in Connecticut, including misdemeanor representation, felony trials and supervision of the Capital Defense & Trial Services Unit of the CT Division of Public Defender Services. He served as chief public defender from 1994 until 2006. He is also the founder of the CT Innocence Project and has served on numerous criminal justice advisory boards and commissions. He currently is affiliated with the Institute for the Study of Crime & Justice at Central Connecticut State University and is an adjunct professor in the Department of Criminology & Criminal Justice. He has served as a consultant to the National Legal Aid & Defender Association and has been involved in indigent defense evaluations in several jurisdictions throughout the United States.

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

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

Appendix B

"Ten Principles of a Public Defense Delivery System"

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1. ***The public defense function, including the selection, funding, and payment of defense counsel,¹⁰ 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.¹¹ To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.¹² Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.¹³ 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.¹⁴*

2. ***Where the caseload is sufficiently high,¹⁵ the public defense delivery system consists of both a defender office¹⁶ and the active participation of the private bar.*** *The private bar participation*

¹⁰ "Counsel" as used herein includes a defender office, a criminal defense attorney in a defender office, a contract attorney or an attorney in private practice accepting appointments. "Defense" as used herein relates to both the juvenile and adult public defense systems.

¹¹ National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973) [hereinafter "NAC"], Standards 13.8, 13.9; National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) [hereinafter "NSC"], Guidelines 2.8, 2.18, 5.13; American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992) [hereinafter "ABA"], Standards 5-1.3, 5-1.6, 5-4.1; *Standards for the Administration of Assigned Counsel Systems* (NLADA 1989) [hereinafter "Assigned Counsel"], Standard 2.2; *NLADA Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984) [hereinafter "Contracting"], Guidelines II-1, 2; National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970) [hereinafter "Model Act"], § 10(d); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979) [hereinafter "ABA Counsel for Private Parties"], Standard 2.1 (D).

¹² NSC, *supra* note 12, Guidelines 2.10-2.13; ABA, *supra* note 12, Standard 5-1.3(b); Assigned Counsel, *supra* note 12, Standards 3.2.1, 2; Contracting, *supra* note 12, Guidelines II-1, II-3, IV-2; Institute for Judicial Administration/ American Bar Association, *Juvenile Justice Standards Relating to Monitoring* (1979) [hereinafter "ABA Monitoring"], Standard 3.2.

¹³ Judicial independence is "the most essential character of a free society" (American Bar Association Standing Committee on Judicial Independence, 1997).

¹⁴ ABA, *supra* note 12, Standard 5-4.1

¹⁵ "Sufficiently high" is described in detail in NAC Standard 13.5 and ABA Standard 5-1.2. The phrase can generally be understood to mean that there are enough assigned cases to support a full-time public defender (taking into account distances, caseload diversity, etc.), and the remaining number of cases is enough to support meaningful involvement of the private bar.

¹⁶ NAC, *supra* note 12, Standard 13.5; ABA, Standard 5-1.2; ABA Counsel for Private Parties, *supra* note 12, Standard 2.2. "Defender office" means a full-time public defender office and includes a private nonprofit organization operating in the same manner as a full-time public defender office under a contract with a jurisdiction.

may include part time defenders, a controlled assigned counsel plan, or contracts for services.¹⁷ The appointment process should never be ad hoc,¹⁸ but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.¹⁹ Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.²⁰

3. **Clients are screened for eligibility,²¹ and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention or request,²² and usually within 24 hours thereafter.²³**
4. **Defense counsel is provided sufficient time and a confidential space with which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date.²⁴ Counsel should have confidential access to the client for the full exchange of legal, procedural and factual information between counsel and client.²⁵ To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses and other places where defendants must confer with counsel.²⁶**
5. **Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations,**

¹⁷ ABA, *supra note 12*, Standard 5-1.2(a) and (b); NSC, *supra note 12*, Guideline 2.3; ABA, *supra note 12*, Standard 5-2.1.

¹⁸ NSC, *supra note 12*, Guideline 2.3; ABA, *supra note 12*, Standard 5-2.1.

¹⁹ ABA, *supra note 12*, Standard 5-2.1 and commentary; Assigned Counsel, *supra note 12*, Standard 3.3.1 and commentary n.5 (duties of Assigned Counsel Administrator such as supervision of attorney work cannot ethically be performed by a non-attorney, citing ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct).

²⁰ NSC, *supra note 12*, Guideline 2.4; Model Act, *supra note 12*, § 10; ABA, *supra note 12*, Standard 5-1.2(c); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (provision of indigent defense services is obligation of state).

²¹ For screening approaches, see NSC, *supra note 12*, Guideline 1.6 and ABA, *supra note 12*, Standard 5-7.3.

²² NAC, *supra note 12*, Standard 13.3; ABA, *supra note 12*, Standard 5-6.1; Model Act, *supra note 12*, § 3; NSC, *supra note 12*, Guidelines 1.2-1.4; ABA Counsel for Private Parties, *supra note 12*, Standard 2.4 (A).

²³ NSC, *supra note 12*, Guideline 1.3.

²⁴ American Bar Association Standards for Criminal Justice, *Defense Function* (3rd ed. 1993) [hereinafter "ABA Defense Function"], Standard 4-3.2; *Performance Guidelines for Criminal Defense Representation* (NLADA 1995) [hereinafter "Performance Guidelines"], Guidelines 2.1-4.1; ABA Counsel for Private Parties, *supra note 12*, Standard 4.2.

²⁵ NSC, *supra note 12*, Guideline 5.10; ABA Defense Function, *supra note 12*, Standards 4-2.3, 4-3.1, 4-3.2; Performance Guidelines, *supra note 113*, Guideline 2.2.

²⁶ ABA Defense Function, *supra note 12*, Standard 4-3.1.

and counsel is obligated to decline appointments above such levels.²⁷ National caseload standards should in no event be exceeded,²⁸ but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.²⁹

6. ***Defense counsel's ability, training, and experience match the complexity of the case.*** Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.³⁰
7. ***The same attorney continuously represents the client until completion of the case.*** Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing.³¹ The attorney assigned for the direct appeal should represent the client throughout the direct appeal.
8. ***There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.*** There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.³² Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.³³ Contracts with private attorneys for public defense services

²⁷ NSC, *supra* note 12, Guideline 5.1, 5.3; ABA, *supra* note 12, Standards 5-5.3; ABA Defense Function, *supra* note 15, Standard 4-1.3(e); NAC, *supra* note 12, Standard 13.12; Contracting, *supra* note 12, Guidelines III-6, III-12; Assigned Counsel, *supra* note 12, Standards 4.1,4.1.2; ABA Counsel for Private Parties, *supra* note 12, Standard 2.2 (B) (iv).

²⁸ Numerical caseload limits are specified in NAC Standard 13.12 (maximum cases per year: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals), and other national standards state that caseloads should "reflect" (NSC Guideline 5.1) or "under no circumstances exceed" (Contracting Guideline III-6) these numerical limits. The workload demands of capital cases are unique: the duty to investigate, prepare and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea. *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998). See also *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (NLADA, 1988; ABA, 1989) [hereinafter "Death Penalty"].

²⁹ ABA, *supra* note 12, Standard 5-5.3; NSC, *supra* note 12, Guideline 5.1; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980), Standard 1-F.

³⁰ Performance Guidelines, *supra* note 15, Guidelines 1.2, 1.3(a); Death Penalty, *supra* note 117, Guideline 5.1.

³¹ NSC, *supra* note 12, Guidelines 5.11, 5.12; ABA, *supra* note 12, Standard 5-6.2; NAC, *supra* note 12, Standard 13.1; Assigned Counsel, *supra* note 12, Standard 2.6; Contracting, *supra* note 12, Guidelines III-12, III-23; ABA Counsel for Private Parties, *supra* note 12, Standard 2.4 (B) (i).

³² NSC, *supra* note 12, Guideline 3.4; ABA, *supra* note 12, Standards 5-4.1, 5-4.3; Contracting, *supra* note 12, Guideline III-10; Assigned Counsel, *supra* note 12, Standard 4.7.1; Appellate, *supra* note 120, ABA Counsel for Private Parties, *supra* note 12, Standard 2.1 (B) (iv). See NSC, Guideline 4.1 (includes numerical staffing ratios, e.g., there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). Cf. NAC, Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

³³ ABA, *supra* note 12, Standard 5-2.4; Assigned Counsel, *supra* note 12, Standard 4.7.3.

should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases,³⁴ and separately fund expert, investigative and other litigation support services.³⁵ No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system.³⁶ This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

- 9. Defense counsel is provided with and required to attend continuing legal education.** *Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.³⁷*

- 10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.** *The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.³⁸*

³⁴ NSC, *supra note 12*, Guideline 2.6; ABA, *supra note 12*, Standards 5-3.1, 5-3.2, 5-3.3; Contracting, *supra note 12*, Guidelines III-6, III-12, and *passim*.

³⁵ ABA, *supra note 12*, Standard 5-3.3(b)(x); Contracting, *supra note 12*, Guidelines III-8, III-9.

³⁶ ABA Defense Function, *supra note 15*, Standard 4-1.2(d).

³⁷ NAC, *supra note 12*, Standards 13.15, 13.16; NSC, *supra note 12*, Guidelines 2.4(4), 5.6-5.8; ABA, *supra note 12*, Standards 5-1.5; Model Act, § 10(e); Contracting, *supra note 12*, Guideline III-17; Assigned Counsel, *supra note 12*, Standards 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA *Defender Training and Development Standards* (1997); ABA Counsel for Private Parties, *supra note 12*, Standard 2.1 (A).

³⁸ NSC, *supra note 12*, Guidelines 5.4, 5.5; Contracting, *supra note 12*, Guidelines III-16; Assigned Counsel, *supra note 12*, Standard 4.4; ABA Counsel for Private Parties, *supra note 12*, Standards 2.1 (A), 2.2; ABA Monitoring, *supra note 3*, Standards 3.2, 3.3. Examples of performance standards applicable in conducting these reviews include NLADA Performance Guidelines, ABA Defense Function, and NLADA/ABA Death Penalty.