# Court shining light on the need for indigent defense reform

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The Sixth Amendment to the U.S. Constitution guarantees criminal defendants the right to, among other things, a lawyer. This right to counsel was further guaranteed by the U.S. Supreme Court's 1963 decision in *Gideon v. Wainwright* where the Court ruled that the Sixth Amendment requires states to provide attorneys to criminal defendants who are unable to afford their own.

Illinois is one of just seven states with no entity to exercise oversight of the delivery of indigent defense trial-level services, thereby resulting in the administration of this fundamental right being shifted to the counties. More than half of Illinois counties have part-time public defenders, and the resources available to those defenders is dependent on the availability (or lack thereof) of local county resources.

It is against this backdrop that the Illinois Supreme Court, through its Administrative Office of the Illinois Courts, sought and received a grant award in late 2018 from the 6th Amendment Center (Center), a nonprofit organization that operates under the auspices of the Bureau of Justice Assistance - Office of Justice Programs (U.S. Department of Justice). The purpose of the grant was to evaluate the state of indigent defense in Illinois. In so doing, the Sixth Amendment Center closely examined nine counties and issued its report in 2021 called "**The Right to Counsel in Illinois: Evaluation of Adult Criminal Trial-Level Indigent Defense Services**."

The report found that in all nine counties, which varied in population and demographics, public defenders lacked the necessary resources to provide the quality of representation required by the U.S. Constitution. This was largely attributed to excessive caseloads and lack of statewide oversight.

In response, and with renewed urgency given the impending implementation of the SAFE-T Act, the Illinois Supreme Court announced the creation of the Illinois Judicial Conference (IJC) Criminal Indigent Defense Task Force (Task Force) which was tasked with developing recommendations in follow up to the Sixth Amendment Center report.

Specifically, the Task Force was charged with proposing a short-term solution for how counties without a public defender's office can comply with the Pretrial Fairness Act and, in the longer term, recommending a permanent, sustainable, and equitable system to ensure that everyone entitled to a public defender gets one and every public defender has the support needed to provide effective assistance of counsel. The Task Force focused on issues of access, consistency, effectiveness, accountability, and independence across the state.

The Task Force's recommendations were adopted by the IJC and the Supreme Court. These included three key items:

1. Full State funding of trial-level public defense services;
2. Establishing a statewide office of trial-level public defense services within the Illinois Judicial Branch to provide a continuous flow of administrative and operational support to local public defender offices; and
3. Developing and implementing a rigorous strategy and infrastructure within this new office for the recruitment and retention of public defense attorneys.

Then, the Illinois Supreme Court took a rare next step and introduced a bill in the 2024 Spring Legislative Session to implement these improvements. Senate Bill 595 (SB 595) was drafted with the intent of placing Illinois on the path to having the best public defense system in the nation. It would ensure that extensive and long overdue resources continue to flow to public defenders across the state while deliberate, transparent and inclusive discussions took place to create the permanent statewide structure.

However, a lack of consensus among public defenders and others across Illinois led to differing positions about what model is best. As such, the Court requested SB 595 not be called for a vote. But this issue is far from over.

The Supreme Court's demonstrated leadership - engaging with the Sixth Amendment Center, convening the IJC Criminal Indigent Defense Task Force, and drafting legislation to provide permanent statewide support for public defenders – has focused a spotlight on the need for comprehensive indigent defense reform in Illinois.

The campaign to ensure every indigent defendant across our state has access to effective assistance of counsel and every public defender has the resources needed to fulfill the mandates of the 6th Amendment must continue. Whatever the eventual outcome, the Court's commitment to these principles has remained, and will remain, steadfast.

https://www.illinoiscourts.gov/News/1378/Court-shining-light-on-the-need-for-indigent-defense-reform/news-detail/

# NAPD Policy Statement on Independence (May 2020)

## Professional and Political Independence Must be Structurally Assured and Actually Honored for Public Defense Programs to Provide Systematically Meaningful Representation

### Executive Summary

Jurisdictions provide structural and actual independence for public defense programs[1] that thrive and provide meaningful representation to clients according to national standards of practice. These Independent programs add value to communities at a high level. Tragically, in many jurisdictions, the public defense program is not independent, negatively impacting the individual meaningful representation of clients, the integrity of the legal system, and the community. Independence is essential. Independence produces a system of justice that enlarges us as a people who pride ourselves on fairness. The National Association for Public Defense (NAPD) issues an urgent call to advance the independence of all public defense systems.

Professional and political independence is essential for the meaningful representation of clients, the effective functioning of public defense programs, and assuring the legal adversary system works reliably and produces valid results. Independence is ethically and constitutionally required.

A "public defender is not amenable to administrative direction in the same sense as other employees of the State. . . . A public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client."[2]

Without independence for public defense programs, the *National Association for Public Defense Foundational Principles* (2017), the ABA *Ten Principles of a Public Defense Delivery System* (2002), and all other national public defense standards cannot be attained or sustained. Without independence, effective representation for clients is threatened and can be severely undermined.

The law, national standards and professionally accepted norms provide clear guidance for states, counties and cities on how to provide public defense systems independence.

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[1] Public defense counsel who represent accused persons who cannot afford a lawyer in criminal, juvenile offender, dependency, civil commitment, and children in need of supervision and at-risk youth proceedings. Independence of the public defense program is essential to their ability to protect the due process rights of their clients.

[2] *Polk County v. Dodson*, 454 U.S. 312, 321 (1981).

The primary structural method of ensuring independence is the creation of a nonpartisan Governing Board that oversees the delivery of defender services and does not interfere with the individual representation of clients. This Governing Board should not include active prosecutors or judges. It should have appointees who have staggered terms made by multiple appointing authorities. The majority of its members should be practicing attorneys and representatives of organizations concerned with the needs of clients. It should be nonpartisan. For more on the makeup of the Governing Board, see NAPD's *Qualifications of Those Selecting Public Defense Leadership* (2017).[3] The Governing Board should appoint the Chief Defender to a term of years which is renewable with the Chief Defender subject to removal by the Governing Board only for good cause after being afforded due process.[4]

Independence is the cornerstone of public confidence in the system's outcomes. If the individual accused, their family members, or the larger community perceive the defender as anyway constrained by a judge, a prosecutor, or politician, respect for the outcome of individual cases, and for the system as a whole will be undermined. State, county and city governments must honor the independence of public defense systems and must create a Public Defense Governing Board that:

- Oversees the delivery of defender services;
- Does not interfere with the individual representation of clients;
- Does not include active prosecutors or judges;
- Has appointees who have staggered terms made by multiple appointing authorities;
- Has the majority of its members who are practicing attorneys and organizations concerned with the problems of the client community;
- Appoints the Chief Defender to a term of years which is renewable with the Chief Defender subject to removal only for good cause after being afforded due process;
- Is nonpartisan.

Now is the time for each jurisdiction to structurally assure the independence of public defense programs.

## What is independence and why it is necessary

Independence is the ability of a professional to be able to make decisions based on what is right for their clients to whom they are ethically responsible without fear of adverse personal or program consequences.

Professional and political independence of public defender services is required to ensure that clients receive constitutional representation and that the results produced by the criminal legal system are valid and reliable.

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[3] Found at: https://www.publicdefenders.us/files/Qualifications%20for%20Selection%20of%20Public%20Defense%20System%20Leadership_Position%20Paper.pdf.

[4] Some jurisdictions have the term of the chief defender be coterminous with that of the local prosecutor, which may have some advantages such as a recognition of equality of importance of the two roles.

In order to ensure the integrity of the service, a professional providing advice and services must give the assistance based on an independent judgment without control by others. The importance of independence is not unique to public defense. All of us place high value on independent professional assistance in the important matters of our lives.

When we send a loved one to the doctor, we want that loved one to receive testing, a diagnosis and a treatment plan that reflects the best professional judgment of the doctor. Because we want the best for our loved one we do not want an opinion dependent on third party pressure or influence, whether that is from an insurance company or a hospital administrator. The primary loyalty of the doctor that we find essential is to her patient.

Many people who seek to purchase a car turn to independent sources[5] to determine the vehicle's reliability and fair market value in their locality as opposed to only relying on the car dealership which is seeking to sell the vehicle for as much profit as possible and has a profit bias that can influence the truthfulness and completeness of the information it provides.

An audit of a program such as a nonprofit must be independently conducted to be reliable. The Auditor must perform the scrutiny without undue influence and without conflicts to ensure full transparency and authentic accountability.[6] How else would the public have confidence in the results? How else would donors be inspired to believe in a nonprofit's work? The primary loyalty of the audit is to the financial and program facts, not to the funder of the audit's preferred version of information.

Misinformation in matters of life and death is unacceptable. Imagine having a pandemic without communities being informed by public health medical professionals able to communicate their advice independent of political bias or agendas.

As a people, we declared our foundational value of independence on July 4, 1776 in our Declaration of Independence, "in the Name, and by Authority of the good People of these Colonies, [we] solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States." We became a country with independence as our bedrock against the tyranny of the day that undermined our individual liberties. Independence of major actors in a system, especially the criminal legal system, is essential. A prosecutor must have the discretion to decide, independent of political or financial influence, what to charge and how to prosecute cases. An independent judiciary is essential to decision-making that produces valid results. Alexander Hamilton observed that "The complete independence of the courts of justice is particularly essential in a limited Constitution."[7] Being penalized—or even just fearing penalty—for doing what is right, what is ethical, what is responsible, destroys the integrity of the system.

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[5] See, *e.g.*, Consumers Reports, Edmunds.Com, Kelly Blue Book. Each has information that seldom is communicated by a dealer eager for a sale at whatever profit is possible.

[6] See, *e.g.*, how an auditing firm views their responsibility. "Independence is integrity, professional skepticism, intellectual honesty, and objectivity—freedom from conflicts of interest. The people of Deloitte must remain unbiased and free from conflicts of interest with our clients, in fact and appearance. https://www2.deloitte.com/us/en/pages/about-deloitte/articles/about-ethics-independence.html

[7] Alexander Hamilton, *The Federalist No. 78*, 28 (May 28, 1788).

Some states, counties, cities do not provide the public defense program with structural, actual, enforceable ways to ensure independence to guarantee that staff only represent the interests of the accused. Independence is undermined or nonexistent when the Chief Defender serves at the whim of their funding source, when the appointing authority can suspend and remove the Chief Defender from her position without cause or process. Without commonsense mechanisms to provide independence, a Chief Defender would rightly fear that she will lose her job, or be otherwise disciplined, if she runs afoul of the Funding Authority or the Appointing Authority. Without real independence, the Chief Defender might understandably be motivated to tend to the preferences of the funding or appointing authority rather than to the needs of the clients. When the Defender in that situation stands up for the clients, she risks losing her job.

Our criminal legal system is founded on the value that just outcomes for citizens whose liberty is at risk is best achieved through an adversarial system[8] that ensures a fair process for all. To accomplish this justice, courts, prosecutors and defenders must be able to perform their separate functions independently.

State, county, city Appointing Authorities who appoint Chief Defenders do not select the prosecuting attorney. Therefore, prosecutors are not primarily dependent on the Appointing Authority for their continued employment. The Chief Defender must be no different. At-will employment is by definition antithetical to independence. You can be let go anytime for any reason, including providing vigorous representation against the government, seeking a justice public policy contrary to the wishes of your employer, communicating the inadequacy of your budget, or arguing a judge or prosecutor has acted illegally or unethically. If every day, your job is subject to the total discretion of an employer who is not bound by the same legal, professional and ethical responsibilities, your ability to act independently to advance your clients' interests is fatally undermined.

The lynchpin of public confidence in the system's outcomes is independence. When judges, prosecutors, and defenders all vigorously and independently serve their functions, the system is stable, steady, strong. No one actor, judge, prosecutor, or defender, can take advantage of another. Everyone can be secure in choosing to do what their professional ethics and interests require.

Threats to independent professional decision-making by the Chief Defender and the defender staff can come from judges, prosecutors, legislators, and law enforcement. But, "[p]robably the greatest risk to independence of the defense function is the pressure defenders receive from their funding sources."[9]

How will the number of requests for funds for investigation, expert services, additional expenses be interpreted by those who control the funding for the program? How will the kind and degree of advocacy influence the Appointing

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[8] See *United States v. Cronic*, 466 U.S. 648, 655-656 (1984) "The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. '[T]ruth," Lord Eldon said, 'is best discovered by powerful statements on both sides of the question.' This dictum describes the unique strength of our system of criminal justice. The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.' *Herrin v. New York,* 422 U. S. 853, 422 U. S. 862 (1975). It is that 'very premise' that underlies and gives meaning to the Sixth Amendment."

[9] The Constitution Project, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (2009), p. 80.

Authority's future decisions about whether a chief defender should keep her position? What happens when the Funding Authority and its legal counsel are exasperated by the nature of an attorney's representation on behalf of a particular client? Will there be pressure for attorneys to meet clients and promptly plead them, not to aggravate the judge and prosecutor, not to file motions, not to interview witnesses or seek appointment of experts? What happens if the chief defender needs to file a writ against a judge or challenge jail conditions? Will less vigorous representation be more attractive for continued employment?

**Legal ethics, the law and our constitution, and national standards are clear: the exercise of independent professional judgment on behalf of our clients is mandated**

Client loyalty is the preeminent ethical value.[10] The Chief Defender and staff must subordinate all other loyalties to the best interests of every client. All decisions, including those about what resources are reasonable and necessary to properly prepare a client's case, must be unaffected by political influence.

In the public defense context, independence requires that line attorneys have the ability to provide well-researched, reflective advice to clients upon specific knowledge of the relevant facts and law of the client's case and to make decisions based only on loyalty to the client. Attorneys engaged in direct client representation and other staff should not be subject to any influence to act inconsistently with these values by an office chief who is catering to other interests or any other outside pressures.

The criminal legal adversary system only functions if the accused have representation by attorneys who provide undivided loyalty. "Should there develop an unavoidable conflict between the duties, responsibility or allegiance of an institutional public defender as a county manager or department of county government, and the role of said Public Defender in representing an indigent client, the duty to properly represent the client supersedes all other loyalties."[11]

The representation of clients must be independently provided to comply with constitutional requirements. No experts in the field of public defense dispute this preeminent principle. Constitutional law and national standards and practice reflect this obligation. The structure of a public defense program must ensure independence. There must be an independent method of selecting the chief defender, providing funding, overseeing defender work, ensuring adequate training, and reporting compliance with national standards of practice. The relevant authorities are clear and consistent on this subject.

Independence is especially critical for public defenders because the essence of the work is to represent individuals against the very government that employs and funds defenders. Caselaw recognizes the need for independence in this unusual relationship. A public defender's "principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance

[10] American Bar Association Rules of Professional Conduct, 1.7, Comment 1 states: "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."
[11] The State Bar of California, *Guidelines on Indigent Defense Services Delivery Systems* (2006), p. 7.

of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation."[12]

In our criminal legal system, "a defense lawyer characteristically opposed the designated representatives of the State. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'.... [A] defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, *see Moore v. United Sates,* 432 F.2d 730 (CA3 1970), a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client.... [T]he constitutional obligation of the State [is] to respect the professional independence of the public defenders whom it engages.... Implicit in the concept of a 'guiding hand' is the assumption that counsel will be free of state control."[13]

In his concurring opinion in *Polk*, Chief Justice Berger emphasized that "in providing counsel for an accused, the governmental participation is very limited. Under *Gideon v. Wainwright,* 372 U. S. 335 (1963), and *Argersinger v. Hamlin,* 407 U. S. 25 (1972), the government undertakes only to provide a professionally qualified advocate wholly independent of the government. It is the independence from governmental control as to how the assigned task is to be performed that is crucial." *Id.* at 327.

A state, county or city government "violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."[14]

The preeminent professional standards also recognize the need for independence. The *National Association for Public Defense Foundational Principles* (2017), "Principle 2: Public Defense Must Be Independent of Judicial and Political Control" requires:

- "The fair administration of justice requires that representation by lawyers be free from real or perceived inappropriate influence.
- Representation should be without political influence and subject to judicial supervision only in the same manner and to the same extent as are prosecutors and attorneys in private practice.
- The selection and payment of lawyers should be independent of the judiciary.
- The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged by administrators of defender, assigned-counsel or contract-for-service programs. Except in jurisdictions in which public defenders are locally elected, the policy-making function, choice of the chief public defender, and oversight of defense programs should be vested in a commission or board of trustees selected by diverse authorities, including but not limited to, officials from executive and

[12] *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).
[13] *Polk County v. Dodson*, 454 U.S. 312, 318-19, 321, 322 (1981).
[14] *Strickland v. Washington*, 466 U.S. 668, 686 (1984) "*See, e.g., Geders v. United States,* 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); *Herring v. New York,* 422 U.S. 853 (1975) (bar on summation at bench trial); *Brooks v. Tennessee,* 406 U.S. 605, 406 U.S. 612-613 (1972) (requirement that defendant be first defense witness); *Ferguson v. Georgia,* 365 U.S. 570, 365 U.S. 593-596 (1961) (bar on direct examination of defendant)."

legislative branches of government, heads of bar associations and law school deans.
- All persons chosen for a board or commission should be committed to high quality public defense and members should include one or more persons who previously were represented by a public defense lawyer.
- Commissions or boards should not include active public defense practitioners, judicial office holders, and active law enforcement officials of any kind such as prosecutors, police, sheriffs, or their staffs.
- All systems for defense representation should include both full-time public defenders and private public defense lawyers serving as assigned counsel or pursuant to contracts. "

The American Bar Association's *Ten Principles of a Public Defense Delivery System* (2002) "constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney."

Principle 1 of the ABA *Ten Principles* charges governments to have independent public defenses systems with nonpartisan oversight boards. "The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems."

*Justice Denied: America's continuing neglect of our constitutional right to counsel*, Report of the National Right to Counsel Committee (2009) counseled states to "establish a statewide independent non-partisan agency headed by a board or commission responsible for all components of indigent defense services."[15] The Report said this recommendation "embodies the fundamental cornerstones for establishing a successful program of public defense."[16]

In short, independence is the primary principle needed for a public defense system to render meaningful representation for all clients. This is recognized in national standards by both the American Bar Association, the largest voluntary association of attorneys and legal professionals in the world whose membership includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students, and by the National Association for Public Defense, the largest association of public defense programs and public defenders. Independence is essential for there to be meaningful assistance to clients across the system.

**Resolution to the lack of independence: create an independent Governing Board**

[15] *Justice Denied: America's continuing neglect of our constitutional right to counsel*, Report of the National Right to Counsel Committee (2009), p. 185. "Recommendation 2—States should establish a statewide, independent, non-partisan agency headed by a Board or Commission responsible for all components of indigent defense services. The members of the Board or Commission of the agency should be appointed by leaders of the executive, judicial, and legislative branches of government, as well as by officials of bar associations, and Board or Commission members should bear no obligations to the persons, department of government, or bar associations responsible for their appointments. All members of the Board or Commission should be committed to the delivery of quality indigent defense services, and a majority of the members should have had prior experience in providing indigent defense representation."

[16] *Id.*

There is a readily available solution to the foundational problem with the structure of state and county and city public defense programs that do not have institutional independence. State legislatures or county governing boards can legislate or delegate the appointing and supervision authority to an independent Governing Board. The Governing Board should have members appointed according to national standards and have the authority to employ a chief defender for a term of years who can only be removed for good cause with process.[17]

**There must be a Governing Board which serves as a firewall for independent representation of clients**

The *National Association for Public Defense Foundational Principles* (2017), Principle 2 which mandates independence requires that "the policy-making function, choice of the chief public defender, and oversight of defense programs should be vested in a commission or board of trustees selected by diverse authorities, including but not limited to, officials from executive and legislative branches of government, heads of bar associations and law school deans."

The ABA *Ten Principles of a Public Defense Delivery System's* Principle 1 which mandates independence is supported by a footnote which refers to the National Study Commission on Defense Services' (NSC) *Guidelines for Legal Defense Systems in the United States* (1976). The NSC *Guidelines* were created in consultation with the United States Department of Justice (DOJ) under a DOJ Law Enforcement Assistance Administration (LEAA) grant. [18] These NSC *Guidelines* state that "a special Defender Commission should be established for every defender system, whether public or private," and that the primary consideration of appointing authorities should be "ensuring the independence of the Defender Director."[19]

"The importance of establishing an independent indigent defense system cannot be overstated. Experience demonstrates that defense counsel will not fully discharge their duties as zealous advocates for their clients when their compensation, resources, and continued employment depend upon catering to the predilections of politicians or judges. Even when political or judicial oversight of the defense function does not actually impact the performance of counsel, clients and the general public may still have doubts about the loyalties of those providing defense services."[20]

The Governing Board, similar to a literal firewall in a physical building or a technological firewall in an information technology system, protects the Chief

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[17] When, for instance, a public defense agency is housed in a particular branch of government, a Memorandum of Agreement can assist in the important practicalities of the legal relationship. For example, there is a Memorandum of Agreement between the Kentucky Department of Public Advocacy and the Kentucky Justice and Public Safety Cabinet that addresses the responsibility of the Cabinet to honor the independence of the state public defense program. Its provisions include sections on the constitutionally required independence of counsel, how independence will be assured, the administrative relationship, potential lawsuits, budget and public policy work. A copy of the MOA is available on National Association for Public Defense's MyGideon.

[18] Governing board ensures independence and selects chief defender. NSC Guideline 2.11 states that the "primary function of the Defender Commission should be to select the State Defender Director."

[19] NSC Guideline 2.10.

[20] *Justice Denied: America's continuing neglect of our constitutional right to counsel*, Report of the National Right to Counsel Committee (2009), p. 158, found at: https://archive.constitutionproject.org/wp-content/uploads/2012/10/139.pdf

Defender and public defense program from influences that would undermine the proper functioning of the delivery of services.

### Chief Defender and staff must be selected on the merits by the Governing Board

Ensuring justice in our adversarial system in a way that has the confidence of the public requires this independent delivery of public defender services. To accomplish this independence and confidence the Governing Board of a state, county, city, nonprofit pubic defense program must appoint the Chief Defender who must be hired on the merits. That is the longstanding national standard.[21]

The American Bar Association Standards for Criminal Justice *Providing Defense Services* state: "Selection of the chief defender and staff should be made on the basis of merit....The chief defender should be appointed for a fixed term of years and be subject to renewal. Neither the chief defender nor staff should be removed except upon a showing of good cause. Selection of the chief defender and staff by judges should be prohibited."[22]

The ABA Commentary adds: "Selection of the chief defender and staff should not be based on political considerations or on any other factors unrelated to the ability of persons to discharge their employment obligations. Hiring and promotion should be based on merit and the defender program should encourage opportunities for career service."[23]

Nationally, virtually all defender state commissions appoint the chief defender. Kentucky and West Virginia are the current exceptions.[24]

### States, counties, cities have implemented governing boards that advance independence

There are state, county and city structures that promote political and professional independence of the chief defender and the defender program by implementing an independent Governing Board that appoints the chief defender to a term which is renewable and allow removal only for good cause with process.

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[21] National Study Commission on Defense Services' (NSC) ***Guidelines for Legal Defense Systems in the United States* (1976)** *Guideline 2.10 (The Defender Commission)* states that "a special Defender Commission should be established for every defender system, whether public or private," and that the primary consideration of appointing authorities should be "ensuring the independence of the Defender Director." NSC Guideline 2.11 states that the "primary function of the Defender Commission should be to select the State Defender Director." The *Guidelines* were created in consultation with the United States Department of Justice (DOJ) under a DOJ Law Enforcement Assistance Administration (LEAA) grant.

[22] The American Bar Association Standards for Criminal Justice *Providing Defense Services* (3d ed. 1992), Standard 5-4.1, Chief defender and staff.

[23] Commentary to the American Bar Association Standards for Criminal Justice *Providing Defense Services* (3d ed. 1992), Standard 5-4.1, Chief defender and staff.

[24] See WV Code 29-21-5; KRS 31.015(6)(a).

About half of the states have a statewide Governing Board. Most all state Governing Boards appoint the public defender to a term of years which is renewable and subject to removal only for good cause. [25]

### Structure of Independent Governing Board

Governing boards must be structured to authentically advance independence.[26] The Governing Board:

- Should not include active prosecutors or judges[27]
- Have as primary function to support and protect the independence of the defense services program[28]
- Have the power to establish general policy for the operation of defender programs
- Be precluded from interfering in the conduct of particular cases
- Have a majority be members of the bar admitted to practice in the jurisdiction
- Should appoint a chief defender who serves a term of years that is renewable and not be removable except for cause with process.

Any provision that a chief defender shall serve at the total discretion of the Appointing Authority is on its face problematic because a primary role of a chief defender is to be an adversary against the government when it is seeking to take the liberty or life of a client. The institutional legal and ethical conflict is ever-present under this system.

State, county, city governments have established Governing Boards or contracted with nonprofits which have Governing Boards that advance independent public defender representation and have functioned over the years in many ways that have allowed the independent delivery of services. Numerous Governing Boards have some but not all of the necessary features that national standards identify as essential. The more of the national features, the more independence emerges.

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[25] See, *e.g.*,. Missouri, Mo. Rev. St. § 600.015, § 600.019. See Sixth Amendment Center at: http://sixthamendment.org/know-your-state/

[26] The ABA Criminal Justice Standards, ***Providing Defense Services,*** **Standard 5-1.3 Professional independence** (3d ed. 1992), **states: "**(b) An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board. Provisions for size and manner of selection of boards of trustees should assure their independence. "

[27] The Commentary **to ABA Criminal Justice Standards, *Providing Defense Services* Standard 5- 1.3 states:** "Members of governing boards should not include prosecutors and judges. This restriction is necessary in order to remove any implication that defenders are subject to the control of those who appear as their adversaries or before whom they must appear in the representation of defendants, except for the general disciplinary supervision which judges maintain over all members of the bar."

[28] Footnotes to ABA *Ten Principles of a Public Defense Delivery System* (2002) *Principle 1* refer to National Study Commission on Defense Services' (NSC) ***Guidelines for Legal Defense Systems in the United States* (1976)**. The *Guidelines* were created in consultation with the United States Department of Justice (DOJ) under a DOJ Law Enforcement Assistance Administration (LEAA) grant. NSC *Guideline 2.10 (The Defender Commission)* states that "a special Defender Commission should be established for every defender system, whether public or private," and that the primary consideration of appointing authorities should be "ensuring the independence of the Defender Director." NSC Guideline 2.11 states that the "primary function of the Defender Commission should be to select the State Defender Director."

Examples of state Governing Boards that have strong characteristics of independence include North Carolina Office of Indigent Defense Services Commission[29] and Kentucky Public Advocacy Commission[30] which have members appointed from diverse authorities. The Massachusetts Committee for Public Counsel Services has an important range of powers of authority.[31] The Michigan

[29] See § 7A-498.4. Establishment of Commission on Indigent Defense Services. "(b) The members of the Commission shall be appointed as follows: (1) The Chief Justice of the North Carolina Supreme Court shall appoint one member, who shall be an active or former member of the North Carolina judiciary. (2) The Governor shall appoint one member, who shall be a nonattorney. (3) The General Assembly shall appoint one member, who shall be an attorney, upon the recommendation of the President Pro Tempore of the Senate. (4) The General Assembly shall appoint one member, who shall be an attorney, upon the recommendation of the Speaker of the House of Representatives. (5) The North Carolina Public Defenders Association shall appoint member, who shall be an attorney. (6) The North Carolina State Bar shall appoint one member, who shall be an attorney. (7) The North Carolina Bar Association shall appoint one member, who shall be an attorney. (8) The North Carolina Academy of Trial Lawyers shall appoint one member, who shall be an attorney. (9) The North Carolina Association of Black Lawyers shall appoint one member, who shall be an attorney. (10) The North Carolina Association of Women Lawyers shall appoint one member, who shall be an attorney. (11) The Commission shall appoint three members, who shall reside in different judicial districts from one another. One appointee shall be a nonattorney, and one appointee may be an active member of the North Carolina judiciary. One appointee shall be Native American. The initial three members satisfying this subdivision shall be appointed as provided in subsection (k) of this section.... (d) Persons appointed to the Commission shall have significant experience in the defense of criminal or other cases subject to this Article or shall have demonstrated a strong commitment to quality representation in indigent defense matters. No active prosecutors or law enforcement officials, or active employees of such persons, may be appointed to or serve on the Commission. No active judicial officials, or active employees of such persons, may be appointed to or serve on the Commission, except as provided in subsection (b) of this section...."

[30] See KRS 31.015 Public Advocacy Commission -- Appointment -- Members -- Terms -Compensation -- Duties.

"(1) (a) The Public Advocacy Commission shall consist of the following members, none of whom shall be a prosecutor, law enforcement official, or judge, who shall serve terms of four (4) years, except the initial terms shall be established as hereafter provided: 1. Two (2) members appointed by the Governor; 2. One (1) member appointed by the Governor. This member shall be a child advocate or a person with substantial experience in the representation of children; 3. Two (2) members appointed by the Kentucky Supreme Court; 4. Three (3) members, who are licensed to practice law in Kentucky and have substantial experience in the representation of persons accused of crime, appointed by the Governor from a list of three (3) persons submitted to him or her for each individual vacancy by the board of governors of the Kentucky Bar Association; 5. The dean, ex officio, of each of the law schools in Kentucky or his or her designee; and 6. One (1) member appointed by the Governor from a list of three (3) persons submitted to him or her by the joint advisory boards of the Protection and Advocacy Division of the Department of Public Advocacy."

[31] See, e.g., Mass. Gen. Laws ch. 211D, Section 9, "The committee shall establish standards for the public defender division and the private counsel division which shall include but not be limited to:

(a) vertical or continuous representation at the pre-trial and trial stages by the attorney either assigned or appointed, whenever possible;

(b) required participation by each attorney in an approved course of training in the fundamentals of criminal trial practice, unless the attorney has a level of ability which makes such participation unnecessary;

(c) specified caseload limitation levels;

(d) investigative services;

(e) a method for the provision of social services or social service referrals;

(f) availability of expert witnesses to participating counsel;

(g) clerical assistance, interview facilities, and the availability of a law library and model forms to participating counsel; and

(h) adequate supervision provided by experienced attorneys who shall be available to less experienced attorneys.

(i) qualifications for vendors for the services provided in clauses (d), (e) and (f) and a range of rates payable for said services, taking into consideration the rates, qualifications and history of performance; provided, however, that such ranges may be exceeded with approval of the court. Payment of such costs

Indigent Defense Commission has important oversight powers over local systems.[32] State systems such as Colorado, Missouri, Minnesota, and Kentucky have Governing Boards that provide structures that have staff who are employees of the program and who are trained and supervised by the program.

### Recommendation is for federal system to move to independent structure

There was an extensive study of the federal public defense system which unanimously recommended that "Congress create an independent defender commission within the judicial branch, but outside the jurisdiction of the Judicial Conference and AO."[33] The Report identified the particular authority of the commission including appointing its director.[34] The Report emphasized, "The needed course of action is clear: Congress should create an autonomous entity, not subject to judicial oversight and approval."[35]

### Appointing Authorities have limits on discharging Chief Defenders

Limits as to how, when, and under what circumstances a Chief Public Defender may be terminated are sometimes outlined by applicable state statutes or local ordinances. Some statutes or ordinances give a Chief Public Defender a property right in his or her position, and that Chief cannot be terminated unless given due process. Normally the Appointing Authority would have to demonstrate some level of "good cause" to remove the Chief. However, in some states there either have been, or still are, no laws which convey to the Chief Public Defender any property right in his or her position. See, for example, *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904-05 (9th Cir. 1993) (holding that a public defender did *not* have a property right in his job where city and state law provided that the public defender serves at the will of the Board of Supervisors).

However, when jurisdictions fail to bestow a property interest in the position, Chiefs still have the ability to speak to critical issues impacting clients. All Chief Public

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and fees shall be in accordance with the provisions of section twenty-seven A to G, inclusive, of chapter two hundred and sixty-one."

[32] See, *e.g.*, Mich. Comp. Laws 780.989, Section 9 MIDC; authority and duties; establishment of minimum standards, rules, and procedures; manual. "(1) The MIDC has the following authority and duties: (a) Developing and overseeing the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are consistently delivered to all indigent adults in this state consistent with the safeguards of the United States constitution, the state constitution of 1963, and this act…."

[33] *2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act* (Revised April 2018), p. 243.

[34] "This independent defender commission proposed by our committee above would have powers to: 1. Establish general policies and rules as necessary to carry out the purposes of the CJA; 2. Appoint and fix the salaries and duties of a director and senior staff; 3. Select and appoint federal defenders and determine the length of term; 4. Issue instruction to, monitor the performance of, and ensure payment of defense counsel; 5. Determine, submit, and support annual appropriations requests to Congress; 6. Enter into and perform contracts; 7. Procure as necessary temporary and intermittent services; 8. Compile, collect and analyze data to measure and ensure high quality defense representation throughout the nation; 9. Rely upon other federal agencies to make their services, equipment, personnel, facilities and information available to the greatest practicable extent to the commission in execution of its functions;1112 and 10. Perform such other functions as required to carry out the purposes of and meet responsibilities under the CJA." *2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act* (Revised April 2018), p. 244.

[35] *2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act* (Revised April 2018), p. X.

Defenders do have a First Amendment right of free speech. Public Defenders who speak out on matters of public concern may file a civil rights suit alleging a violation of their First Amendment right if they are terminated or otherwise suffer an adverse action as a result of that speech. But a Public Defender's public statement will only be protected by the First Amendment when, (1) in making it, the Public Defender spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have 'an adequate justification for treating the Public Defender differently from any other member of the general public as a result of the statement he made. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)).

A Public Defender's First Amendment claims can be defeated if he is unable to prove that he spoke *as a citizen,* because it was actually *part of his job duties to speak out* about concerns. "A public employee does not "speak as a citizen" when he makes a statement pursuant to his "official duties." *Garcetti*, 547 U.S. at 421. "Restricting speech that owes its existence to a public employee's professional responsibilities," the Court reasoned, "does not infringe any liberties the employee might have enjoyed as a private citizen." *Id.* Put another way, the First Amendment does not shield the consequences of "expressions employees make pursuant to their professional duties." *Id.* at 426. Illustrating this principle is *Flora v. County of Luzerne*, 776 F.3d 169, 180-181 (3rd Dist. 2015), where the Court held that a Chief Public Defender, who filed a lack of adequate funding suit and who publicly reported 3000 adjudications had not been expunged as ordered, had adequately alleged that his ordinary job duties did not include taking these actions. Therefore, his First Amendment suit was not dismissed. *Flora v. County of Luzerne*, 776 F.3d 169, 180-181 (3rd Dist. 2015).

Chief Public Defenders may also file suits if they are discharged for political reasons. Such a political discharge would violate their First Amendment freedom of association rights. The Supreme Court held in *Branti v. Finkel,* 445 U.S. 507, 519 (1980), that "it is manifest that the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government. The primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State."

It was further held in *Yurchak v. County of Carbon*, 84 Fed. Appx. 218, 220 (3rd Dist. 2002), that the office of public defender had an independent nature and that the defendants failed to show that political affiliation was an appropriate requirement - even for the position of Chief Public Defender. See also *Yurchak v. County of Carbon*, 2007 U.S. App. LEXIS 10880, *3. Therefore, absent a showing that political affiliation is an appropriate requirement, Chief Public Defenders cannot be terminated for political reasons either.

## Conclusion

Many public defense systems suffer from persistent excessive workloads, understaffing, and practices that do not ensure constitutional representation to all clients.

A public defense system that lacks independence and is under resourced will result in the diminution of the adversary process to the detriment of clients because the

regular manner of processing cases is done by persons who are blind to the "ordinary injustice"[36] that becomes routine.

In order to have meaningful defense representation, the defense must put the prosecution's case through the "crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656-57 (1984). For the criminal legal system to "advance the public interest in truth and fairness," a defense lawyer must serve "the undivided interests of his client."[37]

State, county and city governments must honor the independence of public defense systems and must create a Public Defense Governing Board that:

- Oversees the delivery of defender services;
- Does not interfere with the individual representation of clients;
- Does not include active prosecutors or judges;
- Has appointees who have staggered terms made by multiple appointing authorities;
- Has the majority of its members who are practicing attorneys and organizations concerned with the problems of the client community;
- Appoints the Chief Defender to a term of years which is renewable with the Chief Defender subject to removal only for good cause after being afforded due process;
- Is nonpartisan.

Bar leaders, judges, and prosecutors who are desirous of a constitutional legal system have legal and ethical responsibilities to support public defense independence and creation of nonpartisan Governing Boards constructed to ensure the independence of the public defense program and the independent representation of individual clients.

[36] See Amy Bach, *Ordinary Injustice: How America Holds Court* (2009).
[37] *Polk County* at 318–19 (1981) (quoting *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979)).

AMERICANBARASSOCIATION

# Ten Principles of a Public Defense Delivery System

AMERICANBARASSOCIATION

Standing Committee on Legal Aid and Indigent Defense

AUGUST 2023

AMERICANBARASSOCIATION

# Ten Principles of a Public Defense Delivery System

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Standing Committee on Legal Aid and Indigent Defense

AUGUST 2023

The ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM were prepared by the ABA Standing Committee on Legal Aid and Indigent Defense.

The ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, black letter and commentary, were adopted by the American Bar Association House of Delegates, August 2023. The American Bar Association recommends that each jurisdiction swiftly assess its compliance with the ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM.

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**on Legal Aid and Indigent Defense**
**2022-2023**

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**AMERICAN BAR ASSOCIATION**

**STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENSE**

**SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE**

**RESOLUTION**

RESOLVED, That the American Bar Association adopts the revised Ten Principles of a Public Defense Delivery System, dated August 2023, including black letter and commentary; and

FURTHER RESOLVED, That the American Bar Association recommends that each jurisdiction swiftly assess its compliance with the Ten Principles of a Public Defense Delivery System, dated August 2023, and implement any necessary legal and policy changes where deficiencies may exist.

## INTRODUCTION

The Revised ABA Ten Principles of a Public Defense Delivery System were sponsored by the American Bar Association Standing Committee on Legal Aid and Indigent Defense (SCLAID) and approved by the ABA House of Delegates at the ABA's Annual Meeting in August 2023. The Revised Principles update the original Ten Principles, adopted by the ABA in February 2002, for modern public defense systems while retaining the original commitment to high-quality, well-funded, and independent indigent defense. As with the original Principles, the Revised Principles describe the fundamental criteria for jurisdictions to use when assessing their public defense systems. The ABA has adopted more detailed policy on the provision of indigent defense services elsewhere, such as the ABA Standards for Criminal Justice, Providing Defense Services (3d ed. 1992).[1]

## ACKNOWLEDGMENTS

The Standing Committee on Legal Aid and Indigent Defense thanks everyone who contributed to the development of the Revised Principles. First and foremost, SCLAID acknowledges former SCLAID member and ABA Criminal Justice Section Chair Norm Lefstein. Mr. Lefstein, a law professor, law school dean, and public defender, was passionate about improving the quality of public defense, and instrumental in getting the Revised Principles off the ground. Mr. Lefstein died in 2019, but the tireless devotion to equal justice reflected in the Revised Principles bears his unmistakable imprint.

The Standing Committee also thanks the members of the Revised Ten Principles Committee, a group of public defenders, academics, and indigent defense experts recruited by SCLAID who volunteered countless hours researching, drafting, and reaching a consensus on these principles: Barbara Bergman, Bob Boruchowitz, Brendon Woods, Lauren Sudeall, Stephen Hanlon, Dawn Deaner, Carlos Martinez, and Malia Brink. Further, SCLAID is grateful to the ABA Criminal Justice Section and

[1] https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_toc/

Section of Civil Rights and Social Justice, whose members provided critically important input during the drafting process. Finally, SCLAID thanks the National Legal Aid and Defender Association, the National Association of Criminal Defense Lawyers, the Sixth Amendment Center, and the National Association for Public Defense, who also helped ensure the final version of the Revised Principles met the needs of indigent defense counsel and their clients.

Hon. Bryant Y. Yang
Chair, Standing Committee on Legal Aid and Indigent Defense

**ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM**

## PRINCIPLE 1: Independence

Public Defense Providers[1] and their lawyers should be independent of political influence and subject to judicial authority and review only in the same manner and to the same extent as retained counsel and the prosecuting agency and its lawyers.[2] To safeguard independence and promote effective[3] and competent[4] representation, a nonpartisan board or commission should oversee the Public Defense Provider.[5] The selection of the head of the Public Defense Provider, as well as lawyers and staff, should be based on relevant qualifications and should prioritize diversity and inclusion to ensure that public defense staff are as diverse as the communities they serve.[6] Public Defender Providers should have recruitment and retention plans in place to ensure diverse staff at all levels of the organization.[7] Neither the chief defender nor staff should be removed absent a showing of good cause.[8]

## PRINCIPLE 2: Funding, Structure, and Oversight

For state criminal charges, the responsibility to provide public defense representation rests with the state;[9] accordingly, there should be adequate state funding and oversight of Public Defense Providers. Where the caseloads allow, public defense should be a mixed system: primarily dedicated public defense offices,[10] augmented by additional Public Defense Providers[11] to handle overflow and conflict of interest cases.[12] The compensation for lawyers working for Public Defense Providers should be appropriate for and comparable to other publicly funded lawyers. Full-time public defender salaries and benefits should be no less than the salaries and benefits for full-time prosecutors.[13] Other provider attorneys should be paid a reasonable fee that reflects the cost of overhead and other office expenses, as well as payment for work.[14] Investigators, social workers, experts, and other staff and service providers necessary to public defense should also be funded and compensated in a manner consistent with this Principle.[15] There should

be at least parity of resources between public defense counsel and prosecution.[16]

## PRINCIPLE 3: Control of Workloads

The workloads of Public Defense Providers should be regularly monitored and controlled to ensure effective and competent representation.[17] Workloads should never be so large as to interfere with the rendering of quality representation or to lead to the breach of ethical obligations.[18] Workload standards should ensure compliance with recognized practice and ethical standards and should be derived from a reliable data-based methodology. Jurisdiction-specific workload standards may be employed when developed appropriately,[19] but national workload standards should never be exceeded.[20] If workloads become excessive, Public Defense Providers are obligated to take steps necessary to address excessive workload, which can include notifying the court or other appointing authority that the Provider is unavailable to accept additional appointments, and if necessary, seeking to withdraw from current cases.[21]

## PRINCIPLE 4: Data Collection and Transparency

To ensure proper funding and compliance with these Principles, states should, in a manner consistent with protecting client confidentiality, collect reliable data on public defense, regularly review such data, and implement necessary improvements.[22] Public Defense Providers should collect reliable data on caseloads and workloads,[23] as well as data on major case events,[24] use of investigators, experts, social workers and other support services, case outcomes, and all monetary expenditures.[25] Public Defense Providers should also collect demographic data on lawyers and other employees.[26] Providers should also seek to collect demographic data from their clients to ensure they are meeting the needs of a diverse clientele.[27] Aggregated data should be shared with other relevant entities and made publicly available in accordance with best practices.[28]

## PRINCIPLE 5: Eligibility and Fees for Public Defense

Public defense should be provided at no cost to any person who is financially unable to obtain adequate representation without substantial

burden or undue hardship.[29] Persons[30] should be screened for eligibility in a manner that ensures information provided remains confidential.[31] The process of applying for public defense services should not be complicated or burdensome, and persons in custody or receiving public assistance should be deemed eligible for public defense services absent contrary evidence.[32] Jurisdictions should not charge an application fee for public defense services, nor should persons who qualify for public defense services be required to contribute to or reimburse defense services.[33]

## PRINCIPLE 6: Early and Confidential Access to Counsel

Counsel should be appointed immediately after arrest, detention, or upon request. Prior to a client's first court appearance, counsel should confer with the client and prepare to address pretrial release and, if possible, probable cause.[34] Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information.[35] Waiver of the right to counsel and waiver of the person's right to court appearance should never be coerced or encouraged.[36] Before a person may waive counsel, they must be provided a meaningful opportunity to confer with a defense lawyer who can explain the dangers and disadvantages of proceeding without counsel and, if relevant, the implications of pleading guilty, including the direct and collateral consequences of a conviction.[37]

## PRINCIPLE 7: Experience, Training and Supervision

A Public Defense Provider's plan for the assignment of lawyers should ensure that the experience, training, and supervision of the lawyer matches the complexity of the case.[38] Public Defense Providers should regularly supervise and systematically evaluate their lawyers to ensure the delivery of effective and competent representation free from discrimination or bias. In conducting evaluations, national, state, and local standards, including ethical obligations, should be considered. Lawyers and staff should be required to attend continuing education programs or other training to enhance their knowledge and skills. Public Defense Providers should provide training at no cost to attorneys, as well as to other staff.[39]

Public Defense Providers should ensure that attorneys and other staff have the necessary training, skills, knowledge, and awareness to effectively represent clients affected by poverty, racism, and other forms of discrimination in a culturally competent manner.[40] Public defense counsel should be specifically trained in raising legal challenges based on racial and other forms of discrimination.[41] Public defense counsel and other staff should also be trained to recognize biases within a diverse workplace.[42]

## PRINCIPLE 8: Vertical Representation

To develop and maintain a relationship of trust, the same defense lawyer should continuously represent the client from assignment[43] through disposition and sentencing in the trial court, which is known as "vertical" representation. Representation by the defense lawyer may be supplemented by specialty counsel, such as counsel with special expertise in forensic evidence, immigration, or mental health issues, as appropriate to the case.[44] The defense lawyer assigned to a direct appeal should represent the client throughout the direct appeal.

## PRINCIPLE 9: Essential Components of Effective Representation

Public Defense Providers should adopt a client-centered approach to representation based around understanding a client's needs and working with them to achieve their goals.[45] Public Defense Providers should have the assistance of investigators, social workers, mitigation specialists, experts, and other specialized professionals necessary to meet public defense needs.[46] Such services should be provided and controlled by Public Defense Providers.[47] Additional contingency funding should be made available to support access to these services as needed.[48] Public Defense Providers should address civil and non-legal issues that are relevant to their clients' cases.[49] Public Defense Providers can offer direct assistance with such issues or establish collaborations with, or provide referrals to civil legal services organizations, social services providers, and other lawyers and non-lawyer professionals.[50]

## PRINCIPLE 10: Public Defense as Legal System Partners

Public Defense Providers should be included as equal participants in the legal system. Public Defense Providers are in a unique position to identify and challenge unlawful or harmful conditions adversely impacting their clients. Legislative or organizational changes or other legal system reforms should not be considered without soliciting input from representatives of the defense function and evaluating the impact of such changes on Public Defense Providers and their clients. To the extent any changes result in an increase in defender workload or responsibilities, adequate funding should be provided to Public Defense Providers to accommodate such changes.

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[1] The term "Public Defense Providers" refers to public defender agencies and to programs that furnish assigned lawyers and contract lawyers who provide defense services at public expense. The term "Public Defense Providers" is also used in the *ABA Eight Guidelines of Public Defense Related to Excessive Workloads* (2009).

[2] Independence should extend to the selection, funding, and payment of Public Defense Providers and lawyers. "The selection of lawyers for specific cases should not be made by the judiciary or elected officials but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs." *ABA Standards for Criminal Justice: Providing Defense Services*, Standard 5-1.3(a) (3rd edition, 1992). *See also* Nat'l Ass'n for Public Defense, *Statement on the Importance of Judicial Independence*, July 1, 2016, https://www.publicdefenders.us/positionpapersstatements. Establishing independence from political and judicial influence is also critically important to effective public defense at the federal level. *See* Ad Hoc Committee to Review the Criminal Justice Act, *2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act* (2017); Nat'l Ass'n of Criminal Defense Lawyers, *Federal Indigent Defense 2015: The Independence Imperative* (2015), https://www.nacdl.org/Document/FederalIndigentDefense2015IndependenceImperative.

[3] The Sixth Amendment right to counsel requires "reasonably effective assistance of counsel pursuant to prevailing professional norms of practice." *See* Strickland v. Washington, 466 U.S. 668, 688 (1984). In *Strickland*, the U.S. Supreme Court noted that the ABA Criminal Justice Standards on Defense Function are guides to determining what is reasonably effective. A quarter of a century later, the Court described these standards as "valuable measures of the prevailing professional norms of effective representation." Padilla v. Kentucky, 559 U.S. 356 (2010). The Court has also held that criminal cases must be subject to "meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 658-59 (1984).

[4] Under the ethical rules, lawyers are required to provide clients "competent" representation. *ABA Model Rules of Professional Conduct*, Rule 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). These rules have been adopted by every state throughout the country.

[5] The board's mission should be to advocate for and provide high-quality, well-funded public defense that ensures effective assistance of counsel for all eligible defendants. The selection process for members of the board or commission should ensure the independence of the Public Defense Provider. Appointments of members should be divided among the different branches of government and may also include appointments from interested organizations such as bar organizations, law schools, and organizations representing the client community. No members should be judges, prosecutors, law enforcement officials or current Public Defense Providers. Members should serve staggered terms to ensure continuity. *See* National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976); National Legal Aid and Defender Association, *Standards for the Administration of Assigned Counsel Systems*, Standard 3.2.1 (1989). The structure of board oversight may be adjusted based upon the organization of Public Defense Providers. It may consist of a single board or multiple separate boards requiring separate governing bodies. *See ABA Standards for Criminal Justice: Providing Defense Services*, Standard 5-1.3(b) (3rd edition, 1992) ("An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned counsel and contract-for-service components for defender systems should be governed by such a component. Board of Trustees should not include prosecutors or judges. The primary function of Boards of Trustees is to support and protect the independence of the defense services program.").

[6] In Florida and Tennessee, and in some cities in the United States, public defenders are popularly elected. *See* Ronald F. Wright, *Public Defender Elections and Popular Control over Criminal Justice*, 75 Mo. L. Rev. 803, 814 (2010). The ABA has not endorsed popular election of chief public defenders.

[7] 16AM113 (encouraging "all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys").

[8] *See ABA Standards for Criminal Justice: Providing Defense Services*, Standard 5-4.1 (3rd edition, 1992) ("The chief defender should be appointed for a fixed term of years and be subject to renewal. Neither the chief defender nor staff should be removed except upon a showing of good cause. Selection of the chief defender and staff by judges should be prohibited.")

[9] *See* Gideon v. Wainwright, 372 U.S. 353 (1963) (right to counsel in felony cases);

Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel in misdemeanor cases); In re Gault, 387 U.S. 1 (1967) (right to counsel in juvenile delinquency cases); Alabama v. Shelton, 535 U.S. 654 (2002) (right to counsel attaches to any case in which there is a potential for active jail or prison time, including suspended sentences). For federal criminal charges, the responsibility for adequate funding and oversight rests with the federal government. Local governments should also provide funding and resources as needed or constitutionally required.

[10] Full-time public defenders, working in a fully staffed office, develop valuable expertise in handling criminal cases and working with persons charged with crimes. *See, e.g., ABA Criminal Justice Standards: Providing Defense Services,* Standard 5-1.2 ("When adequately funded and staffed, defender organizations employing full-time personnel are capable of providing excellent defense services. By devoting all of their efforts to legal representation, defender programs ordinarily are able to develop unusual expertise in handling various kinds of criminal cases. Moreover, defender offices frequently are in the best position to supply counsel soon after an accused is arrested. By virtue of their experience, full-time defenders also are able to work for changes in laws and procedures aimed at benefiting defendants and the criminal justice system.")

[11] These additional Public Defense Providers may be a second public defender office for handling conflict cases and/or assigned counsel operating pursuant to a defense service contract. The appointment process for assigned counsel should be according to a coordinated plan directed by a lawyer-administrator familiar with private lawyers, investigators and other vital defense services in the jurisdiction. *See, e.g., ABA Criminal Justice Standards: Providing Defense Services,* Standard 5-1.2 ("The participation should be through a coordinated assigned counsel system and may also include contracts for services.").

[12] Absent substantial private practitioners to augment the representation of full-time public defenders, public defenders are likely to become overwhelmed with cases. *See id.,* at Commentary to Standard 5-1.2 ("In some cities, where a mixed system has been absent and public defenders have been required to handle all of the cases, . . .[c]aseloads have increased faster than the size of staffs and necessary revenues, making quality legal representation exceedingly difficult."). In rural areas, it may be appropriate to consider regional Public Defense Providers. Adherence to all of the Principles is critically important to an effective public defense system irrespective of whether a jurisdiction relies on public defender offices or solely on a system of appointed counsel.

[13] Public defense counsel should also receive raises and promotions commensurate with prosecutors and other publicly funded lawyers in order to encourage retention of experienced counsel.

[14] *ABA Criminal Justice Standards: Providing Defense Services,* Standard 5-2.4. The fee rate should be subject to regular increases to ensure the ongoing availability of quality

counsel and reviewed regularly. Contract selection should be based on factors such as counsel training and experience in public defense representation and should not merely be awarded to the lowest bidder. Counsel should not be paid on a flat fee basis, as such payment structures reward counsel for doing as little work as possible. *See* Wilbur v. Mt. Vernon, No. C11-1100RSL, U.S.D.C. D. Wash., at 15 (Dec. 4, 2013) (district court finding that a flat fee contract "left the defenders compensated at such a paltry level that even a brief meeting at the outset of the representation would likely make the venture unprofitable.").

[15] The importance of these providers is discussed in more detail in Principle 9.

[16] In determining appropriate funding and resources, jurisdictions should consider that while prosecutors can often draw upon separately funded resources for investigations such as police departments and state crime labs, Public Defense Providers normally must pay for investigative and other ancillary services. In many jurisdictions, defender offices face a significant funding gap with prosecutors despite this distinction. Bryan Furst, *A Fair Fight: Achieving Indigent Defense Resource Parity* 9 (Brennan Center for Justice, Sept. 9, 2019), https://www.brennancenter.org/our-work/research-reports/fair-fight (discussing the lack of investigators and other support staff in public defender offices as compared prosecutorial investigatory resources).

[17] Excessive caseloads impinge upon a lawyer's ability to provide competent and effective representation to all clients. *See ABA Eight Guidelines of Public Defense Related to Excessive Workloads*, Commentary to Guideline 1 ("[A]n excessive number of cases create[s] a concurrent conflict of interest, as a lawyer is forced to choose among the interests of various clients, depriving at least some, if not all clients, of competent and diligent defense services.") (citations omitted). Those who provide public defense services, no less than those who represent persons with financial means, are duty bound not to accept a representation when doing so would impinge upon their ability to provide competent and effective representation. *See* ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-441, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation* (2006). The National Association for Public Defense has concluded that public defenders "can no longer operate in a system without meaningful workload standards" and has "encourage[d] public defense providers in every jurisdiction to develop, adopt, and institutionalize meaningful, evidence-based workload standards in their jurisdictions." Nat'l Ass'n for Public Defense, *Statement on the Necessity of Meaningful Workload Standards for Public Defense Delivery Systems*¸ Mar. 19, 2015, https://www.publicdefenders.us/positionpapersstatements.

[18] *See ABA Eight Guidelines of Public Defense Related to Excessive Workloads*; Formal Ethics Opinion 06-441.

[19] The ABA's Standing Committee on Legal Aid and Indigent Defense (ABA SCLAID)

partnered with national data analysis firms to complete workload studies for seven jurisdictions. *See, e.g.,* Moss Adams and ABA SCLAID, The New Mexico Project (2022). These workload studies are available through the ABA SCLAID website, www.indigentdefense.org.

[20] Notably, in 2023, new National Public Defense Workload Standards (NPDWS) were published by The RAND CORPORATION, ABA SCLAID, The National Center for State Courts, and Stephen F. Hanlon. The NPDWS are grounded in a rigorous study of 17 prior jurisdiction-specific workload studies conducted between 2005 and 2022 and use the Model Rules and ABA Criminal Justice Section standards as the reference for reasonably effective assistance of counsel. The NPDWS then used the Delphi Method to obtain a reliable professional consensus of criminal defense experts, both public and private, from across the nation. These new national standards are intended to replace the 1973 NAC Standards. *See* National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, *Chapter 13, The Defense* (1973). The NPDWS reflect the changes in defense practice that have occurred in the fifty years since the creation of the NAC Standards, including the significant role of digital evidence from body-worn cameras to smart phone data and forensics in modern defense practice, as well as the expanded role of defense attorneys.

[21] *See* Formal Opinion 06-441; *ABA Eight Guidelines of Public Defense Related to Excessive Workloads* (August 2009). Failure to take steps to reduce an excessive caseload can result in bar discipline. *See, e.g.,* In re: Karl William Hinkebein, No. SC96089 (Mo. Sup. Ct. Sept. 12, 2017) (suspending the public defender's license indefinitely but staying that suspension and placing him on probation for one year). Courts should not order public defenders to take a case, if doing so would result in an excessive caseload. *See* State ex rel. Missouri Public Defender Commission v. Waters, 370 S.W.3d 592 (Mo. 2012) (holding that a trial judge exceeded his authority in appointing a public defender after the public defender office had declared unavailability due to an excessive caseload); *c.f.* Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228 (Sup. J. Ct. Mass. 2004) (rejecting a judge's appointment of public defenders despite an assertion by the Public Defense Provider that the public defenders had reached caseload limits).

[22] Data collection is essential to proper oversight at every level. A state's duty to fully fund the public defense function, as outlined in Principle 2, includes a duty to fully fund data collection. Florida has adopted a statute mandating the collection of extensive data throughout the criminal justice system. *See* Florida Statutes, Title 47, § 900.05 – Criminal Justice Data Collection. The Texas Indigent Defense Commission collects data on public defense from each county and publishes the data on a portal. *See* Indigent Defense Data for Texas, TIDC (visited Mar. 21, 2023).

[23] Such data should include the number and types of cases assigned to each Public Defense Provider. As noted in Principle 3, caseloads and workloads much be regularly monitored and controlled to ensure ability to comply with ethical and practice standards.

[24] Such data should include eligibility determinations and decisions, initial appearance outcomes including pretrial detention and conditions of release, motions filed, use of services such as translators, investigators, social workers, and experts, and case outcomes. Effective data collection may require the hiring of specific staff to focus on the collection, verification and presentation of data. The ABA has endorsed similar data collection responsibilities for prosecutors. 2021A504. An effective way to collect such data is through regular timekeeping.

[25] Case data is most often collected using timekeeping and/or standardized case opening and closing forms. The ABA has recognized the Los Angeles Independent Juvenile Defender Program, which requires attorneys to complete case intake and resolution forms, for its effective case data collection system. ABA SCLAID, *Exemplary Defense: A Study of Three Groundbreaking Projects in Public Defense* 44-45, Oct. 2018.

[26] The ABA has endorsed collecting demographic data on all judges and government lawyers to promote and track progress toward improving diversity in the legal profession and increasing trust in the justice system. 2021A605.

[27] 2021A504 (urging prosecutor offices to similarly collect and publish outcomes by demographic data); *see, e.g.*, Ramsey County Attorney's Office Public Data Portal (visited Mar. 21, 2023)(showing case outcomes by race and gender). Such data should be collected from clients voluntarily and in accordance with best practices. These best practices are evolving; accordingly, data collection and reporting practices should be regularly reviewed and updated. See, e.g., *A Vision for Equitable Data: Recommendations from the White House Equitable Data Working Group* (Apr. 2022). Absent such data, Public Defense Providers cannot identify, assess, and seek to address disparate impact. See, e.g., *Guidelines for data collection on race and ethnicity*, Utah Dept. of Health and Human Services, Office of Health Equity (Oct. 2022).

[28] *See id.* Sensitive data should be made public in an aggregated format that protects the privacy of individuals. *See* 2021A605 (discussing best practices of aggregating data for privacy). Individual client data should be carefully guarded. *See, e.g., ABA Model Rules of Professional Conduct*, Rule 1.6 (providing that a lawyer many not, generally, "reveal information relating to the representation of a client unless the client gives informed consent" and that a lawyer "shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client").

[29] *ABA Criminal Justice Standards: Providing Defense Services*, §5-7.1 ("Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship."); Eligibility consideration should consider the prevailing fee for the charge(s) faced by the person in the jurisdiction. *See* Brennan Center for Justice, *Eligible for Justice: Guidelines for Appointing Defense Counsel, at 13* (2008) ("In determining whether someone can afford counsel, jurisdictions should take into account the actual cost of obtaining counsel."),

https://www.brennancenter.org/publication/eligible-justice-guidelines-appointing-defense-counsel. Jurisdictions should also consider how the type and nature of the charged offense would affect the cost of an effective defense.

[30] Persons refers to any person arrested or detained or seeking the assistance of indigent defense counsel.

[31] *ABA Criminal Justice Standards: Providing Defense Services*, §5-7.3 ("Determination of eligibility should be made by defenders, contractors for services, assigned counsel, a neutral screening agency or by the court."); *ABA Model Rules of Professional Conduct*, Rule 1.6. Eligibility screening should not be conducted by the presiding judge. *See also* Brennan Center for Justice, *Eligible for Justice: Guidelines for Appointing Defense Counsel, at 11* (2008). Eligibility information should be disclosed only to the extent required by applicable Rules of Professional Conduct or other law.

[32] A person should never be discouraged from or punished for applying for public defense services. *See* National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel*, at 85-87 (2009) (observing how defendants can be pressured to waive counsel rather seek public defense because "a defendant who wants . . . counsel must wait several days for counsel to be appointed and possibly several more days for appointed counsel . . . to make contact.").

[33] Public defense user fees should be eliminated. *See ABA Ten Guidelines on Court Fines and Fees*, Commentary to Guideline 1 (2018) (recommending the elimination of user fees "because the justice system serves the entire public and should be entirely and sufficiently funded by general government revenue.").

[34] Pleas of guilty to criminal charges at first appearance or arraignment are disfavored. *See ABA Criminal Justice Standards: Defense Function*, Standard 4-6.1(b), (2015) ("In every criminal matter, defense counsel . . . should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed . . .. Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest.")

[35] To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where clients confer with defense counsel. *See, e.g.,* Williams v. Birkett, 697 F. Supp. 2d 716 (U.S. Dist. Ct., E.D. Mich. 2010) ("To ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions between counsel and accused.")

[36] *See ABA Criminal Justice Standards: Defense Function*, Standard 5-8.2(a) (2017) ("The accused's failure to request counsel or an announced intention to plead guilty should not

of itself be construed to constitute a waiver of counsel in court. An accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed before a judge and a thorough inquiry into the accused's comprehension of the offer and capacity to make the choice intelligently and understandingly has been made. No waiver of counsel should occur unless the accused understands the right and knowingly and intelligently relinquishes it. No waiver should be found to have been made where it appears that the accused is unable to make an intelligent and understanding choice because of mental condition, age, education, experience, the nature or complexity of the case, or other factors. A waiver of counsel should not be accepted unless it is in writing and of record.")

[37] *See ABA Ten Guidelines on Court Fines and* Fees, Guideline 8 ("Waiver of counsel must not be permitted unless the waiver is knowing, voluntary, and intelligent. In addition, the individual first has been offered a meaningful opportunity to confer with counsel capable of explaining the implications of pleading guilty, including collateral consequences."). *See also* Faretta v. California, 422 U.S. 806 (1975) ("Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'") (citations omitted); Padilla v. Kentucky, 559 U.S. 356 (2010) (holding that counsel must advise their client on the potential immigration consequences of a criminal conviction).

[38] If the defense lawyer lacks the requisite experience or training for the case, the lawyer cannot provide effective and competent representation and is obligated to refuse appointment. *See ABA Model Rules of Professional Conduct,* Commentary to Rule 1.1 ("In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question."); *ABA Eight Guidelines of Public Defense Related to Excessive Workloads.*

[39] As with other aspects of an effective Public Defense System, and as described in Principle 2, Public Defense Providers should be adequately funded to provide such training.

[40] The ABA has endorsed similar requirements for attorneys providing civil legal aid services, Standards for the Provision of Civil Legal Aid 4.4, as well as for law students. 2022M300 ("A law school shall provide education to law students on bias, cross-cultural competency and racism[.]").

[41] For instance, all counsel should be trained to effectively raise objections under Batson v. Kentucky, 476 U.S. 79 (1986).

[42] *See, e.g.,* 2020A116G (urging that all legal and medical professionals "receive periodic training regarding implicit biases."); The ABA's Diversity, Equity and Inclusion Center has a number of resources and trainings available.

[43] In some jurisdictions, to facilitate prompt initial appearance, a specially trained duty lawyer or bail lawyer may represent an individual from arrest through initial appearance. Before or at initial appearance, defense counsel should be assigned. Procedures should be in place to ensure continuous representation and proper transition from initial appearance counsel to defense counsel.

[44] For instance, some public defense offices have established distinct units of attorneys with specialized skills to advise non-U.S. citizen clients on immigration matters relevant to their cases. *See* Carlos J. Martinez, George C. Palaidis & Sarah Wood Borak, *You Are the Last Lawyer They Will Ever See Before Exile: Padilla v. Kentucky and One Indigent Defender Office's Account of Creating a Systematic Approach to Providing Immigration Advice in Times of Tight Budgets and High Caseloads*, 39 Fordham Urb. L.J. 121 (2012).

[45] *See* James M. Anderson, Maya Buenaventura & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 Harv. L. Rev. 819 (Jan. 2019) (assessing the benefits of a client-centered defense model in reducing the length of sentences).

[46] *See* Nat'l Ass'n for Public Defense, *Policy Statement on Public Defense Staffing*, May 2020, https://www.publicdefenders.us/positionpapersstatements.

[47] Under no circumstances should defense counsel be required to bear the cost of experts and other professionals. *See Wash. R. Professional Conduct* 1.8 ("A lawyer shall not . . . make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm . . . to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law firm personnel.").

[48] In Florida, for example, state funds, sometimes referred to as "due process funds for the defense," are available for various defense services, such as investigators, experts, and other specialized public defense needs in addition to contingency funding. The funds also cover prosecution services. *See Florida Statutes* § 29.006, § 29.015, and § 29.018 (2018).

[49] In Padilla v. Kentucky, 559 U.S. 356 (2010), the U.S. Supreme Court held that, in order to provide effective assistance of counsel, an attorney must provide advice on the potential immigration consequences of a client's criminal charge. Following Padilla, several courts have held that advice on other potential civil consequences of a criminal case is also required. *See, e.g.*, Bauder v. Department of Corrections, 619 F.3d 1272, 1275

(11th Cir. 2010) (holding that the requirement of advice on non-criminal consequences extended beyond immigration to include civil commitment). Understanding a client's non-criminal legal issues, may be critical to understanding relevant arguments regarding sentencing, including the appropriateness of diversion or other programs available through the criminal case.

[50] *See* 2012AM107C (urging defender organizations and criminal defense lawyers to create "linkages and collaborations with civil practitioners, civil legal services organizations, social service program providers and other non-lawyer professionals who can serve, or assist in serving, clients in criminal cases with civil legal and non-legal problems related to their criminal cases, including the hiring of such professionals as experts, or where infrastructure allows, as staff.") https://www.americanbar.org/groups/legal_aid_indigent_defendants/indigent_defense_systems_improvement/standards-and-policies/policies-and-guidelines/. For over 40 years, scholars have recognized the importance of having social workers in defender offices. *See, e.g.,* Charles Silberman, *Criminal Violence, Criminal Justice* (New York: Random House, 1978).

## REPORT

Background of the ABA's Public Defense Standards

After the U.S. Supreme Court's decision in *Gideon v. Wainwright*, 371 U.S. 335 (1963), guaranteeing the Sixth Amendment right to appointed counsel for persons charged with a felony, the American Bar Association quickly recognized the need for national standards for public defense services. In 1967, the ABA promulgated the *Standards for Criminal Justice, Providing Defense Service*, now in its third edition. Other entities soon followed suit. In 1973, President Nixon's National Advisory Commission on Criminal Justice Standards and Goals published *The Report of the Task Force on the Courts*, which included a chapter on defense standards. From 1974 to 1976, the National Legal Aid and Defender Association (NLADA) convened a 35-member National Study Commission on Defense Services, with support from the Law Enforcement Assistance Administration, which produced a report outlining several recommendations for the provision of indigent defense services. The ABA meanwhile continued to adopt additional standards governing the provision of defense services, such as the *ABA Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* in 1985 and the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* in 1989. All these policies were passed with the aim of ensuring high-quality, effective, and independent criminal defense counsel for persons who cannot afford an attorney.

As policies became more numerous and detailed, the ABA saw the need to adopt a succinct policy that laid out the fundamental criteria for an effective public defense delivery system. Thus, the ABA House of Delegates adopted the original *Ten Principles of a Public Defense Delivery System* (the "Principles"), dated February 2002, "[T]o provide experts and non-experts alike with a quick and easy way to assess a public defense delivery system and communicate its needs to policy makers."[1] The Principles recognized the need for stronger standards in a variety of areas, including public defense independence, high caseloads, and unduly low salaries and reimbursement rates. The Principles have since been recognized as important national public defense standards by national media and public defense advocacy groups. Courts, legislatures, and state

and local public defense agencies have looked to the Principles in developing decisions, laws, and policies. In 2010, Attorney General Eric Holder called the Principles "the building blocks of a well-functioning public defender system."[2]

The Need for Revised Principles

In the 21 years since the Principles were adopted, significant changes in the delivery of public defense services have occurred, such as the emergence of voluminous digital discovery. Moreover, new information and, critically, more data, have allowed public defense experts to better understand how to provide high-quality indigent defense representation effectively and efficiently. In 2018, the Standing Committee on Legal Aid and Indigent Defense (SCLAID) formed the Ten Principles Revision Committee, comprised of a diverse group of public defense leaders, academics, and experts. The Working Group set out to update the Principles based on their own experiences and the collective knowledge on public defense best practices that had been developed since 2002, while also ensuring that the Principles' core focus remained intact.

These new developments in public defense have been reflected in SCLAID's own work. SCLAID's *Eight Guidelines of Public Defense Related to Excessive Workloads* became ABA policy in 2009[3]. Then, between 2014 and 2022, SCLAID released comprehensive studies of public defender workloads in seven states: Missouri, Louisiana, Rhode Island, Colorado, Indiana, New Mexico, and Oregon. This work culminated in 2023 with the release of the *National Public Defense Workload Standards*, a meta-study published in conjunction with the RAND Corporation, the National Center for State Courts, and nationally recognized indigent defense expert Stephen F Hanlon. Studies such as these, which rely on hard data and the Delphi method[4] to analyze public defender workloads, were simply not available when the original Principles were adopted in 2002.[5] The Working Group also considered developments in public defense standards related to cultural competency, technology, and ancillary services.

In 2023, the Working Group solicited commentary on a draft of the revised Principles from four leading public defense advocacy groups:

NLADA, the National Association of Criminal Defense Lawyers, the National Association for Public Defense, and the Sixth Amendment Center. Their input helped ensure that these revised Principles truly reflect the core best practices for public defense delivery in the modern age.

Key Revisions in the New Principles

All the Principles have been revised to provide more detail and clarity to policymakers. Some of the 2002 Principles were consolidated to make room for additional principles, but all topics addressed in the 2002 Principles are directly addressed in this revision. The following changes are particularly notable:

- A new principle (Principle 4) was added to reflect the importance of data collection and transparency to ensure public defense systems are receiving adequate resources and are following these Principles.

- The principle on training and supervision (Principle 7) reflects a deeper understanding of the need for systematic evaluation of defense lawyers, as well as the need for specialized training and cultural competency.

- A new principle (Principle 9) was added to reflect the importance of non-lawyer professionals, such as investigators, social workers, and experts, to the public defense function.

- The principle on public defense workloads (Principle 3) has been substantially revised to reflect the new information gleaned from the *National Public Defense Workload Standards* study and SCLAID's several state-based studies. Language has also been added on the duties of defenders who face unmanageable workloads.

- A new principle (Principle 10) was added to reinforce the important place public defense providers have in the legal system,

especially in relation to any law or policy changes that are likely to affect their clients.

Use of the Principles

As with the 2002 version of the Principles, these revised Principles are meant to provide policymakers and other stakeholders with easy-to-follow guidelines for assessing their jurisdiction's compliance with the core best practices for a public defense delivery system. They are not meant to serve as a comprehensive guide for public defense practices in every situation. However, each Principle is accompanied by extensive commentary to explain or illustrate the Principle, and to identify issues that might arise in its application. All jurisdictions should strive to bring their public defense systems into compliance with these Principles.

Conclusion

The *Ten Principles of a Public Defense Delivery System* provide policymakers, public defense administrators, and other important stakeholders a critically important roadmap for providing effective indigent defense as required by the Sixth Amendment. In revising the Principles, the ABA ensures that this roadmap reflects the realities and best practices of public defense as of 2023, while maintaining its commitment to independent, well-managed, and well-resourced indigent defense systems.

Respectfully submitted,

Hon. Bryant Yang, Chair
Standing Committee on Legal Aid and Indigent Defense

August 2023

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[1] 02M107.
[2] https://www.justice.gov/opa/speech/attorney-general-eric-holder-addresses-department-justice-national-symposium-indigent
[3] 09M119.

[4] The Delphi method is a process for arriving at a group consensus by surveying a panel of experts. Experts respond to questionnaires, the results are aggregated and shared with the group, and the process continues until a consensus is reached.
[5] 02M107.