REPORT OF THE

INDIGENT LEGAL SERVICES COMMISSION

FEBRUARY 2009

BACKGROUND

The United States Supreme Court has long held, pursuant to the U.S. Constitution, that all states must provide legal representation to the following types of parties if they cannot afford to hire their own attorney: (1) criminal defendants,[1] *Scott v. Illinois*, 440 U.S. 367 (1979); *Gideon v. Wainwright*, 372 U.S. 355 (1963); *see also State v. Cook*, 1998 ME 40, 706 A.2d 603; (2) juveniles charged with juvenile crimes, *In re Gault*, 73 U.S. 1 (1967); and (3) people with mental illness who are subject to involuntary commitment proceedings, *Vitek v. Jones*, 445 U.S. 480 (1979). In addition, although the federal Constitution does not mandate counsel at state expense in all termination of parental rights cases, *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981), the Supreme Court has stated that "informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well." *Id.* at 33-34 (citations omitted). Consistent with this jurisprudence, Maine statutes also require the appointment of legal counsel to indigent parents in all child protection proceedings, 22 M.R.S. § 4005(2) (2008), and to indigent juveniles in emancipation proceedings, 15 M.R.S. § 3506-A (2008). Thus, Maine is bound by federal and state

[1] In Maine, indigent defendants have a right to counsel pursuant to the State Constitution when imprisonment is imposed. Me. Const. art. I, § 6-A.

constitutional and statutory requirements to provide court-appointed counsel at state expense in a host of matters that come before the courts.

In the current Maine system, individual judges appoint counsel for indigent litigants on a case-by-case basis. The pool of appointed counsel is made up of private attorneys who have notified the court that they are willing to accept court appointments. Pursuant to an Administrative Order issued by the Supreme Judicial Court, JB-05-5 (as amended in July 2008), the State pays these lawyers at a rate of fifty dollars per hour, but that rate is subject to fee caps, the amount of which varies depending on the type of case. In assessing such fees, the court has discretion either to authorize fees in excess of the cap, or to reduce the amount of fees awarded to counsel, based on the quality of legal services rendered.

Although guidelines promulgated by the Supreme Judicial Court govern payment to attorneys appointed to represent indigent litigants, and although the performance of court-appointed attorneys is reviewed by justices and judges in the various court locations, Maine nevertheless lacks a statewide system for the training and selection of attorneys who provide court-appointed counsel services. Moreover, the Judicial Branch has received no resources to implement either

specific performance standards for court-appointed counsel, or a formal process to evaluate or supervise the work of court-appointed counsel on a statewide basis.[2]

The cost of providing constitutionally required counsel services is not subject to a specific appropriation, but is instead paid from the general Judicial Branch budget. Several months into the 2008 fiscal year (July 1, 2007, to June 30, 2008), the Judicial Branch recognized a substantial and accelerating increase over budget projections in the cost of payments to court-appointed counsel. This growing cost overrun had a serious impact on the Judicial Branch budget as a whole. Because the fundamental laws of our nation and our State mandate the provision of court-appointed counsel to certain indigent litigants, the only option available to the Judicial Branch to meet that obligation has been to transfer funds from areas within its budget intended for other essential judicial functions. This transfer of funds from the general budget of the Judiciary to pay court appointed fees seriously jeopardizes the Judicial Branch's ability to provide timely and efficient services across the entire spectrum of Maine's justice system.

To address this situation, Chief Justice Leigh I. Saufley announced to the Legislature, in her January 2008 State of the Judiciary address, that she would

[2] This system of appointing individual attorneys exists in fifteen of Maine's sixteen counties. In Somerset County, the Supreme Judicial Court contracted with a group of attorneys to provide all of the court-appointed counsel services within the county. The contract contains minimal performance standards, and gives the court the authority to determine which lawyers are authorized to perform contract services.

bring together stakeholders from all three branches of government to form a commission tasked with (1) determining how Maine currently provides constitutionally-required counsel services, and (2) making recommendations to ensure quality legal representation to indigent litigants based on a sustainable funding mechanism. The Indigent Legal Services Commission was thus established by Chief Justice Saufley in May of 2008.[3] The Commission is comprised of representatives from the Judicial Branch, the Executive Branch, and the Legislative Branch, together with representatives from stakeholder organizations and other interested individuals.[4] The commission met on June 13, 2008; July 25, 2008; October 17, 2008; and January 23, 2009.

FINDINGS AND CONCLUSIONS

The Commission began by reviewing the findings and recommendations of previous studies of Maine's indigent legal services system dating back to 1981.[5] The Judicial Branch has already implemented some recommendations from these various studies, such as standardizing the determination of indigency, and hiring

[3] A copy of the Commission Charter and membership list is attached as Appendix 2.

[4] The Commission is comprised of volunteers, and has no budget and no full time staff. Nevertheless, the wealth of diverse experience and expertise possessed by the Commission's membership permitted an informed, albeit informal, assessment of the current state of indigent legal services in Maine.

[5] These studies include: Court-Appointed Attorney Procedures Working Group Memorandum (2003); An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings (2002); Report to the Supreme Judicial Court Regarding Court-Appointed Appellate Counsel (2002); Report of the Indigent Defense Committee (1998); Report of the Maine State Bar Association's Commission to Evaluate Maine's Court Appointment System (1986); Report of the Committee on Court-Appointed Counsel (Wathen Committee) (1982); and The Maine Private Defender Pilot Project (1980-1981).

financial screeners to assist judges with indigency determinations and to pursue reimbursement from the partially indigent. In addition, recommendations to increase the rate of pay for court-appointed counsel have been implemented, although not to the full extent of those recommendations. For example, a Maine State Bar Association Commission recommendation resulted in a rate increase from twenty dollars per hour to forty dollars per hour in 1987, but a 1998 recommendation by the Indigent Defense Committee to further increase the rate to sixty dollars per hour in order to keep pace with inflation resulted in a 1999 increase to only fifty dollars per hour. That rate remains unchanged.

Other recommendations contained in these studies have not been implemented, however. A 1986 recommendation to segregate the court-appointed counsel budget from the rest of the Judicial Branch budget has never been implemented. Other recommendations for the establishment of standards for the selection, training, and performance of court-appointed counsel have also not been implemented due to a lack of resources. Finally, there exists no established institution, separate from the Judicial Branch, to oversee the operation of the indigent legal services system and to advocate for measures needed to ensure the quality and efficiency of that system.

The Commission has also sought to analyze the cause of the recent increase in the cost of indigent legal services,[6] as evidenced in particular by the dramatic rise in the number of court-appointed counsel vouchers filed in the Superior Court. This surge has been caused, in great part, by the amendments to the criminal code and court rules, as well as by an increase in the percentage of parties who qualify as indigent. More particularly, various amendments to the criminal code have resulted in an increase in the number of former misdemeanor crimes that are now charged as felonies based on prior convictions or the presence of aggravating factors and are more likely to require the appointment of an attorney at State expense. Moreover, changes in the Maine Rules of Criminal Procedure have shifted initial proceedings in felony cases and motion hearings in many misdemeanor cases from the District Court to the Superior Court. Finally, fiscal year 2008 saw a nearly twenty percent increase in the proportion of Superior Court litigants who qualify for court-appointed counsel.

[6] See Appendix 3. Since 1999, the average cost per voucher in the Superior Court has remained stable at approximately $490 per voucher. In the District Court, the number and average cost per voucher have remained stable since 2002 at approximately 9600 vouchers per year at an average cost of $250 per voucher.

The Commission agrees with and embraces the American Bar Association's *Ten Principles of a Public Defense Delivery System*[7] as its guide for effective reform. The first and foremost principle states: "The public defense function, including the selection, funding, and payment of defense counsel, is independent." The commentary to this principle correctly points out that "removing oversight from the judiciary ensures judicial independence from undue political pressure and is an important means of furthering the independence of public defense." The ABA recommends that: "to safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems." The Commission fully endorses this basic principle.

Maine's current indigent defense system is directly at odds with the ABA's first principle requiring the independence of the public defense function. Contrary

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[7] The ABA Ten Principles, with commentary, are attached hereto as Appendix 4. They were adopted by the ABA House of Delegates in February of 2002. The Ten Principles are:

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.
2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.
4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
5. Defense counsel's workload is controlled to permit the rendering of quality representation.
6. Defense counsel's ability, training, and experience match the complexity of the case.
7. The same attorney continuously represents the client until completion of the case.
8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
9. Defense counsel is provided with and required to attend continuing legal education.
10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

to the first principle, individual judges in Maine select and determine the appropriate compensation for court-appointed counsel in individual cases, and the Judicial Branch is responsible for allocating overall funding for indigent legal services. When the State brings a criminal charge, seeks to diminish or terminate parental rights, or pursues an involuntary commitment, the State is represented by counsel whose compensation and resources rely on budgets and resources independent from the Judicial Branch. Indigent litigants, on the other hand, must look to the court system, the same court system that has to resolve the dispute for which they are before the court, to fund their representation. This creates a basic inequity in our adversarial system of justice because one side to the case involving fundamental rights is dependent on the court, which must decide the dispute in a disinterested neutral fashion.

Moreover, in times of budget constraint, the appearance of a conflict of interest is created when judges handling these cases make decisions about the payment of counsel vouchers and the allocation of investigative and expert resources to indigent parties against the backdrop of pressures on the Judicial Branch budget. Although judges have been instructed to not consider budget issues when evaluating the need for indigent legal services, the appearance of a conflict can undermine the court's role as a neutral arbiter of the matters before it. Consistent with the ABA Principles, the delivery system for indigent legal services

in Maine should be reformed to eliminate the inequity between the parties, and the appearance of a conflict of interest inherent in the current system.

The Commission has also concluded that the current budget structure—in which cost increases for constitutionally required counsel necessitate substantial reductions in other parts of the Judicial Branch budget, thereby significantly constraining the Judicial Branch's ability to fulfill its mission as a whole—should not continue. Funding constitutionally required indigent legal services is a distinct state obligation that should be met through a direct appropriation, rather than through budget-wide Judicial Branch cost-cutting measures that diminish the Judicial Branch's ability to effectively provide justice to all of Maine's citizens.

Finally, closer adherence to the ABA Principles, together with indigent defense standards in place throughout the nation, would result in improvements in the efficiency of the system and in the quality of the representation provided to Maine's indigent citizens. The Ten Principles set forth additional characteristics of an adequate indigent legal services system that Maine currently lacks. These include mechanisms to ensure that: (1) appointed counsel receive regular training, (2) appointed counsel possess experience to match the complexity of the cases to which they are assigned, (3) caseloads are controlled to ensure that adequate time is available to permit quality representation in each case, and (4) the work of appointed counsel is supervised and systematically reviewed to ensure quality and

efficiency.[8] The Commission believes that closer adherence to these standards would most certainly improve the quality of representation for indigent litigants, and would also yield efficiencies through centralized management and oversight.

COMMISSION RECOMMENDATIONS

The Commission recommends that Maine implement an indigent legal services system that is independent from the judiciary, and that provides the training and oversight necessary to ensure quality representation to Maine's citizens. Across the nation, in pursuit of these goals, forty-three states have established independent commission systems to oversee the delivery of indigent legal services.[9] The Commission concludes that such a system, tailored to Maine's circumstances, would address the deficiencies in Maine's current delivery system in the following ways:[10]

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[8] *ABA Ten Principles of a Public Defense Delivery System*, Principles 4, 6, 9 and 10. *See also* National Legal Aid & Defender Association, *Compendium of Standards for Indigent Defense Systems* (2000); *ABA Standards for Criminal Justice: Providing Defense Services* (3rd ed. 1992).

[9] The Spangenberg Group, *State Indigent Defense Commissions* (December 2006) (Prepared for the ABA Standing Committee on Legal Aid and Indigent Defendants). The report is attached as Appendix 5.

[10] To assist in the design of an independent commission system for indigent legal services in Maine, this Commission benefited greatly from the assistance of the Spangenberg Group, the nation's foremost experts on the delivery of indigent legal services around the country. The services of the Spangenberg Group have included presentations at two Commission meetings, technical support in the design of a system for Maine, and the drafting of implementing legislation. These services were funded through a grant from the ABA Standing Committee on Legal Aid and Indigent Defendants to the Maine Indigent Defense Center. The Commission wishes to thank Robert Spangenberg and David Newhouse of the Spangenberg Group; Georgia N. Vagenas, Esq., Chief Counsel, ABA Standing Committee on Legal Aid and Indigent Defendants; and Robert J. Ruffner, Esq., President, Maine Indigent Defense Center.

1. An independent commission to oversee the selection and payment of constitutionally required counsel would eliminate the inherent inequity and the appearance of the conflict of interest present in the current system;

2. An independently funded commission would alleviate the negative impact on the judicial branch budget and the judicial system as a whole caused by the higher-than-expected costs for constitutionally required counsel; and

3. An independent commission could implement uniform, statewide standards for the selection, training, and performance review of appointed counsel, while providing supervision and management to ensure that quality representation is uniformly provided in the most efficient manner possible.

The Commission recommends that an independent commission be established to oversee Maine's indigent defense system. The commission should have its own budget, and should promulgate standards for the selection, training, and performance of appointed and contract counsel. The commission should employ an executive director and be provided with sufficient staff to implement its policy standards, and to oversee the payment of attorneys. In the provision of legal services to indigent litigants, the State should continue to rely on a mixed system

consisting of individually-appointed counsel from the private bar, and contract counsel.

The Commission also believes that the new recommended system can and should operate within the existing resources expended on constitutionally required counsel. Accordingly, the Commission recommends that the financial and personnel resources currently utilized by the Judicial Branch to provide constitutionally required counsel services should be transferred from the Judicial Branch to the newly established independent commission. At the outset, the new system should retain the current rate of fifty dollars per hour for court-appointed counsel, and should continue to follow the case payment guidelines promulgated by the Supreme Judicial Court. The Commission believes that this transfer of resources and payment constraints will allow a transition to the new independent system that can be accomplished with no new or increased resources, an additional benefit in these difficult financial times.

Despite the difficult budget constraints Maine currently faces, the Commission is convinced that a timely reorganization of legal defense services is necessary and should not be delayed. Such services should no longer be allowed to imperil the timeliness and quality of justice provided to all of Maine's citizens by monopolizing the Judicial Branch budget. Judges should no longer decide the remuneration and resources available to only one side of the criminal justice

system. Finally, the attorneys providing indigent legal services should have the training, support, and supervision that are essential to quality and efficient legal representation.

RECOMMENDED LEGISLATION

The Commission recommends establishment of an independent Maine Commission on Indigent Legal Services to oversee the delivery of legal representation to Maine's indigent population.[11] The independent commission should consist of five members appointed by the Governor and confirmed by the Senate. To ensure broad support for the independent commission's work, all three branches of government should participate in the selection of its members. Accordingly, one member should be selected from a list of potential appointees recommended by the President of the Senate, one from a list recommended by the Speaker of the House, and one from a list recommended by the Chief Justice of the Maine Supreme Judicial Court. Independent commission members should have a strong commitment to providing high-quality indigent legal services in the most efficient manner possible. No more than three members should be practicing attorneys.

In these financially sensitive times, the new independent commission should operate with the same resources currently expended by the Judicial Branch to

[11] Proposed legislation to implement the Commission's recommendations is attached as Appendix 1.

provide indigent legal services. The funds and professional resources currently utilized by the Judicial Branch to administer and pay for indigent legal services should be transferred from the Judicial Branch budget to the that of the independent commission, whose centralized oversight and management should allow the new system to operate within these existing resources.

The independent commission should hire an executive director who is an attorney with experience in the provision of indigent legal services. Together with the executive director, the commission should establish standards for the selection, training, and performance of lawyers providing indigent legal services. The Commission should also establish procedures and systems to gather accurate data regarding the system's operation in order to manage caseloads and identify efficiencies. With this data, the independent commission should provide an annual report to the Legislature, the Executive Branch, and the Judicial Branch. Finally, the independent commission should submit biennial budget requests to fund its operations.

The executive director should establish an office and hire staff necessary to implement the standards and policies adopted by the commission. Based on these standards, the executive director will be able to determine who is qualified to represent indigent litigants as appointed or contract counsel. In addition, the executive director will provide training and support to lawyers, monitor their

performance and caseloads, and match attorney qualifications to case complexity. Finally, the executive director will develop a system for the payment of appointed and contract counsel that generates the detailed financial data necessary to identify efficiencies and implement cost savings.

CONCLUSION

The Indigent Legal Services Commission has identified a national consensus that the provision of indigent legal services should be independent from the judiciary and subject to standards for the selection, training, and performance of the lawyers representing indigent clients. Establishment of the Maine Commission on Indigent Legal Services will create a more efficient system for providing indigent legal services, and will bring Maine into line with this national consensus and effectuate the constitutional right of Maine citizens to high-quality indigent legal services.

Respectfully submitted,

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Robert W. Clifford
Associate Justice
Chair, Indigent Legal Services Commission

APPENDIX
1

APPENDIX 1

LR #: 0461
2/6/2009 7:53 AM

Title: **An Act to Establish the Maine Commission on Indigent Legal Services**

Emergency preamble. Whereas, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, under the United States Constitution and the Maine Constitution, an indigent person charged with a crime, facing loss of parental rights, or the risk of institutional commitment is entitled to counsel, and

Whereas, the state of Maine is obligated to ensure that such representation is provided and currently spends in excess of 10 million dollars per year;

Whereas, the demand for such services has increased because the number of child protective hearings requiring counsel has doubled, the number of cases with mandatory jail time has increased, and an increasing number of criminal defendants are indigent and entitled to such services;

Whereas, a central agency to coordinate such services has never been established, despite the increase in services;

Whereas, such representation is currently funded by an appropriation to the Judicial Branch of government;

Whereas, such representation is managed by approximately 60 judges located in 40 court locations throughout the state, who approve vouchers to private attorneys acting as indigent legal counsel and who are located throughout the state;

Whereas, the current method of paying for indigent legal services creates the appearance of a conflict of interest by placing judges in the position of ruling on compensation and reasonable effort and expenses for only one side in criminal, protective custody and involuntary commitment matters;

Whereas, there is at least the appearance of further conflict because judges are authorizing payment of indigent legal fees out of appropriations intended to fund Judicial Branch operations;

Whereas, the current system lacks a central authority to provide coordinated planning, oversight and management in order to ensure the delivery of quality legal representation in the most cost effective manner;

Whereas, it is necessary to provide independent oversight for the delivery of indigent counsel services, improve the quality of representation, insure the independence of counsel, establish uniform policies and procedures for the delivery of such services, and to develop the statistics necessary to evaluate the quality and the cost effectiveness of such services;

Whereas, the current method of funding indigent legal services through the Judicial Branch budget creates the appearance of a conflict of interest and is contrary to accepted practices;

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 4 MRSA c. 37 is enacted to read:

CHAPTER 37
MAINE COMMISSION ON INDIGENT LEGAL SERVICES

§1801. Maine Commission on Indigent Legal Services; established

The Maine Commission on Indigent Legal Services, established by Title 5, section 12004-G, subsection 25-A, is an independent commission whose purpose is to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants and parents in child protective cases, consistent with federal and state constitutional and statutory obligations. The commission shall work to ensure the delivery of indigent legal services by qualified and competent counsel in a manner that is fair and consistent throughout the State, and to ensure adequate funding of a statewide system of indigent legal services that is provided and managed in a fiscally responsible manner, free from undue political interference and conflicts of interest.

§1802. Definitions

As used in this chapter, the following terms have the following meanings.

1. Assigned counsel. "Assigned counsel" means a private attorney designated by the court to provide indigent legal services at public expense.

2. Commission. "Commission" means the Maine Commission on Indigent Legal Services under section 1801.

3. Contract counsel. "Contract counsel" means a private attorney under contract with the commission to provide indigent legal services.

4. Indigent legal services. "Indigent legal services" means legal representation provided to:

A. An indigent defendant in a criminal case in which the United States Constitution or the Constitution of Maine or federal or state law require that the State provide representation;

B. An indigent party in a civil case in which the United States Constitution or the Constitution of Maine or federal or state law require that the State provide representation; and

C. Juvenile defendants.

"Indigent legal services" does not include the services of a guardian ad litem appointed pursuant to Title 22, section 4005, subsection 1.

§1803. Commission structure

1. Members; appointment; chair. The commission consists of 5 members appointed by the Governor and subject to review by the joint standing committee of the Legislature having jurisdiction over judiciary matters and confirmation by the Legislature. The Governor shall designate one member to serve as chair of the commission.

A. One of the members must be appointed from a list of qualified potential appointees provided by the President of the Senate;

B. One of the members must be appointed from a list of qualified potential appointees provided by the Speaker of the House of Representatives; and

B. One of the members must be appointed from a list of qualified potential appointees provided by the Chief Justice of the Supreme Judicial Court.

2. Qualifications. Individuals appointed to the commission must have a strong commitment to high-quality representation for persons who are indigent. No more than 3 members may be attorneys engaged in the active practice of law.

3. Terms. The members of the commission are appointed for terms of 3 years each, except that of those first appointed, the Governor shall designate 2 whose terms are

only one year, 2 whose terms are only 2 years, and one whose term is 3 years. A member may not serve more than 3 consecutive 3-year terms plus any initial term of less than 3 years.

A member of the commission appointed to fill a vacancy occurring otherwise than by expiration of term is appointed only for the unexpired term of the member succeeded.

4. Quorum. Three members of the commission constitute a quorum. A vacancy in the commission does not impair the power of the remaining members to exercise all the powers of the commission.

5. Compensation. Each member of the commission is eligible to be compensated as provided in Title 5, chapter 379.

§1804. Commission responsibilities

1. Executive director. The commission shall hire an executive director. The executive director must be an attorney licensed in this State with experience in the provision of indigent legal services.

2. Standards. The commission shall develop standards governing the delivery of indigent legal services, including:

A. Standards governing eligibility for indigent legal services;

B. Standards prescribing minimum experience, training and other qualifications for contract counsel and assigned counsel;

C. Standards for assigned counsel and contract counsel case loads;

D. Standards for the evaluation of assigned counsel and contract counsel;

E. Standards for independent, competent and efficient representation of clients whose cases present conflicts of interest;

F. Standards for the reimbursement of expenses incurred by assigned counsel and contract counsel; and

G. Other standards considered necessary and appropriate to ensure the delivery of adequate indigent legal services.

3. Duties. The commission shall:

A. Develop and maintain a system that utilizes appointed private attorneys, contracts with individual attorneys or groups of attorneys, and any other program necessary to provide high-quality and efficient indigent legal services;

B. Develop and maintain an assigned counsel voucher review and payment authorization system;

C. Establish processes and procedures consistent with commission standards to ensure that office and contract personnel use information technology and case load management systems so that detailed expenditure and case load data is accurately collected, recorded and reported;

D. Develop criminal defense, child protective and involuntary commitment representation training and evaluation programs for attorneys throughout the state to ensure an adequate pool of qualified attorneys;

E. Establish minimum qualifications to ensure that attorneys are qualified and capable of providing adequate representation in the case types to which they are assigned;

F. Establish rates of compensation for assigned counsel;

G. Establish a method for accurately tracking and monitoring case loads of assigned counsel and contract counsel;

H. Submit to the Legislature, the Chief Justice of the Supreme Judicial Court and the Governor an annual report on the operation, needs and costs of the indigent legal services system; and

I. Approve and submit a biennial budget request to the Department of Administrative and Financial Services, Office of the Budget, including supplemental budget requests as necessary.

4. Powers. The commission may:

A. Establish and maintain a principal office and other offices within the State as it considers necessary;

B. Meet and conduct business at any place within the State;

C. Use voluntary and uncompensated services of private individuals and organizations as may from time to time be offered and needed;

D. Adopt rules to carry out this chapter. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A; and

E. Appear in court and before other administrative bodies represented by its own attorneys.

§1805. Executive director

The executive director of the commission hired pursuant to section 1804, subsection 1, shall:

1. Compliance with standards. Ensure that the provision of indigent legal services complies with all constitutional, statutory and ethical standards;

2. Development of standards. Assist the commission in developing standards for the delivery of adequate indigent legal services;

3. Delivery and supervision. Administer and coordinate delivery of indigent legal services and supervise compliance with commission standards;

4. Most effective method of delivery. Recommend to the commission the most effective method of the delivery of indigent legal services in furtherance of the commission's purposes;

5. Training. Provide for regular training programs for counsel providing indigent legal services;

6. Personnel. Subject to policies and procedures established by the commission, hire professional, technical and support personnel, including attorneys, considered reasonably necessary for the efficient delivery of indigent defense services;

7. Submissions to commission. Prepare and submit to the commission:

A. A proposed biennial budget for the provision of indigent legal services, including supplemental budget requests as necessary;

B. An annual report containing pertinent data on the operation, needs and costs of the indigent legal services system; and

C. Any other information as the commission may require;

8. Develop and implement. Coordinate the development and implementation of rules, policies, procedures, regulations and standards adopted by the commission to carry out the provisions of this chapter and comply with all applicable laws and standards;

9**. Records.** Maintain proper records of all financial transactions related to the operation of the commission;

11. Other funds. Apply for and accept on behalf of the commission funds that may become available from any source, including government, nonprofit or private grants, gifts or bequests;

12. Meetings of commission. Attend all commission meetings, except those meetings or portions of the meetings that address the question of appointment or removal of the executive director; and

14. Other assigned duties. Perform other duties as the commission may assign.

Sec. 2. 5 MRSA §12004-G, sub-§25-A is enacted to read:

25-A. Legal services.

Legal Services	Maine Commission on Indigent Legal Services	Legislative Per Diem and Expenses	4 MRSA §1801

Sec. 3. Transfer of personnel and funds. Funds necessary to staff the commission and carry out this Act must be transferred from the Judicial Department's General Fund Personal Services and All Other accounts to the Maine Commission on Indigent Legal Services. Positions necessary to carry out the provisions of this Act must be transferred from the Judicial Department to the Maine Commission on Indigent Legal Services.

Sec. 4. Transition. The Maine Commission on Indigent Legal Services and the Judicial Department shall develop a process to provide for the transition from the existing voucher payment system to the payment system developed by the commission.

Emergency clause. In view of the emergency cited in the preamble, this Act takes effect when approved.

SUMMARY

This bill establishes the Maine Commission on Indigent Legal Services, an independent and permanent statutory entity, to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants and parents in child protective cases, consistent with federal and state constitutional and statutory obligations. The commission will not oversee the provision of guardian ad litem services.

The commission consists of 5 members appointed by the Governor and confirmed by the Senate. Two must be appointed from suggestions made by the President of the

Senate and the Speaker of the House of Representatives and one must be appointed from suggestions made by the Chief Justice of the Supreme Judicial Court. The Governor shall select the chair. After the initial staggered terms, members serve for 3-year terms. Individuals appointed to the commission must have a strong commitment to high-quality representation of person who is indigent. Compensation is limited to the legislative per diem and expenses.

The commission will develop standards for the delivery of indigent legal services and will establish maintain a system that utilizes appointed private attorneys, contracts with individual attorneys or groups of attorneys, and any other program necessary to provide high-quality and efficient indigent legal services. The commission shall appoint an executive director to carry out the day to day activities of the commission. All attorneys providing indigent legal services will be paid through the commission.

This bill also authorizes a one-time transfer of all necessary funds from the Judicial Branch to the Maine Indigent Legal Services Commission in order to create the Commission at no additional cost to the General Fund.

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APPENDIX
2

APPENDIX 2

JUDICIAL BRANCH
INDIGENT LEGAL SERVICES COMMISSION

Type:	**Commission, Tri-Branch**
Established:	**May 5, 2008**
Chair:	**Senior Associate Justice Robert W. Clifford**
Report date:	**November 14, 2008**
Reports to:	**Supreme Judicial Court**
Completion Date:	**June 30, 2009**

I. Commission Established

The Judicial Branch Indigent Legal Services Commission is hereby established, in cooperation with the Executive and Legislative Branches, (1) to study how Maine currently provides legal representation to indigent citizens as required by the United States Constitution and the Constitution and laws of Maine, and (2) to identify ways to improve the availability of and support for constitutionally required legal services.

II. Goal

An indigent legal services system that makes quality legal representation available to Maine's indigent population from lawyers who receive adequate compensation, training, and support services based on a sustainable and responsible funding mechanism.

III. Duties:

The Commission will:

A. Review all aspects of the current court appointed counsel system within the Judicial Branch, including, but not limited to, (1) current methods for appointing lawyers to represent clients or act as guardians ad litem, (2) the compensation paid to court appointed attorneys, and (3) the mechanism currently in place to fund indigent legal services;

B. Investigate and consider alternative methods of organizing and funding indigent legal services, giving consideration to both the experience of other states and to Maine's unique characteristics and legal culture;

C. Consider the adequacy of current training and support services for court appointed counsel;

D. Report its findings and recommend actions needed to improve the current system, including initiatives by stakeholders, reform of administrative procedures, and statutory changes.

IV. Authority:

The Commission may seek input, suggestions, and recommendations from individuals and groups within and outside the Judicial Branch. The Commission may invite consultants to its meetings as needed.

The Commission Chair may establish subgroups to study designated issues and report recommendations for consideration by the Commission as a whole.

There is no funding authorized for the work of the Commission.

V. Membership:

The membership in the Commission shall consist of members from the Executive, Legislative, and Judicial Branches of Maine State Government, as well as representatives of interested stakeholder organizations, individual attorneys, and others with valuable knowledge and experience to contribute. The specific names shall be listed in a separate membership roster, and membership may be changed or expanded as ordered by the Chief Justice.

VI. Meetings:

The Commission shall meet as often as is necessary to fulfill its responsibilities. The Chair shall schedule the meetings of the Commission.

VII. Reporting:

The Commission shall report its findings and recommendations to the Supreme Judicial Court on or before November 14, 2008.

VIII. Commission Duration:

Unless the Chief Justice extends this charter, the Commission will cease to exist on June 30, 2009.

Dated: May 12, 2008

Approved by:

/s

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APPENDIX
3

MAINE Judicial Branch

ILS-1 - Trend

EXPENDITURES FOR INDIGENT LEGAL SERVICES, Court-Appointed Attorneys: TREND, FY'99 - FY'08

FY'99-FY'08

NOTE: These figures include only attorney costs, NOT expert witnesses, psych exams, and other related costs.

ADULT CRIMINAL & JUVENILE OFFENSES (includes "Lawyer of the Day")	FY'99	FY'00	FY'01	FY'02	FY'03	FY'04	FY'05	FY'06	FY'07	FY'08	% change 1 yr. '07-'08
SUPERIOR COURT: expenditures	$1,892,674	$2,036,328	$2,131,982	$2,516,220	$2,907,249	$3,086,462	$2,909,544	$3,480,002	$3,728,155	$4,457,238	19.6%
SUPERIOR COURT: # vouchers	4,005	4,456	4,126	4,580	5,556	6,119	5,916	6,589	7,602	9,031	18.8%
Avg Cost per Super Ct vouch:	$473	$457	$517	$549	$523	$504	$492	$528	$490	$494	0.6%
LAW COURT: expenditures	$39,210	$51,441	$35,010	$50,834	$39,809	$42,532	$52,456	$44,022	$59,078		
LAW COURT: # vouchers	75	99	58	74	58	63	77	61	71	CR detail N/A	
Avg Cost per Law Ct vouch:	$523	$520	$604	$687	$686	$675	$681	$722	$832		
DISTRICT COURT Expenditures:	$1,592,893	$1,744,991	$2,142,646	$2,314,435	$2,505,356	$2,352,169	$2,437,730	$2,381,694	**$2,373,701**	**$2,526,152**	6.4%
DISTRICT COURT # vouchers:	7,859	8,816	9,160	9,664	10,329	9,812	9,770	9,314	**9,348**	**9,677**	3.5%
Avg Cost per Dist Ct vouch:	$203	$198	$234	$239	$243	$240	$250	$256	$254	$261	2.8%
Contracts with coalitions of attorneys in Somerset County (and Franklin County in FY'06 only), for representation in all crminal cases in the District & Superior Courts in those counties:											
CONTRACTED COUNSEL: (a.)	$174,000	$174,000	$194,000	$201,800	$201,800	$218,646	$201,840	$262,040	**$223,706**	**$225,000**	0.6%
SUBTOT. ALL CR & JV:	**$3,698,777**	**$4,006,760**	**$4,503,638**	**$5,083,289**	**$5,654,213**	**$5,699,809**	**$5,601,570**	**$6,167,757**	**$6,384,640**	**$7,208,390**	12.9%
CHILD PROTECTIVE:	*(see next page for Detail by Child, Parent or Other representation)*										
DISTRICT COURT Expenditures:	$2,862,397	$3,667,536	$4,282,998	$4,647,351	$5,161,370	$5,471,555	$5,421,921	$5,058,990	5,043,455	5,160,705	2.3%
DISTRICT COURT # vouchers:	6,847	9,510	10,319	10,223	10,793	11,561	11,136	10,586	10,202	10,415	2.1%
LAW COURT Expenditures:	$20,979	$51,530	$33,125	$26,368	$19,950	$25,752	$25,007	$30,796	$27,342		
LAW COURT # vouchers:	31	74	51	33	28	34	30	39	31	Detail	
TOTAL CP $	$2,883,376	$3,719,066	$4,316,122	$4,673,719	$5,181,320	$5,497,307	$5,446,928	$5,089,786	$5,070,797	Not avail	
Avg Cost per CP voucher	$419	$388	$416	$456	$479	$474	$488	$479	$496		
MENTAL HEALTH											
DISTRICT COURT Expenditures:	$50,402	$62,448	$58,233	$62,059	$60,875	$59,008	$72,837	$82,380	$110,227	$110,709	0.4%
DISTRICT COURT # vouchers:	460	589	511	568	593	574	594	584	703	694	-1.3%
Avg Cost per Dist Ct vouch:	$110	$106	$114	$109	$103	$103	$123	$141	$157	$160	1.7%
TOTAL EXPENDITURES:											
District Court	$4,505,692	$5,474,975	$6,483,877	$7,023,844	$7,727,601	$7,882,732	$7,932,489	$7,523,063	$7,527,383	$7,797,566	3.6%
Superior Court	$1,892,674	$2,036,328	$2,131,982	$2,516,220	$2,907,249	$3,086,462	$2,909,544	$3,480,002	$3,728,155	$4,457,238	19.6%
Law Court	$60,189	$102,972	$68,134	$77,202	$59,758	$68,284	$77,463	$74,817	$86,420	$66,338	-23.2%
Contract Counsel	$174,000	$174,000	$194,000	$201,800	$201,800	$218,646	$201,840	$262,040	$223,706	$225,000	0.6%
TOTAL	$6,632,555	$7,788,274	$8,877,993	$9,819,066	$10,896,408	$11,256,124	$11,121,335	$11,339,923	$11,565,664	$12,546,142	8.5%

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APPENDIX
4

TEN PRINCIPLES

Of a Public Defense Delivery System

February 2002

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2001-2002

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TEN PRINCIPLES

Of a Public Defense Delivery System

February 2002

Approved by American Bar Association House of Delegates, February 2002. The American Bar Association recommends that jurisdictions use these Principles to assess promptly the needs of public defense delivery systems and clearly communicate those needs to policy makers.

INTRODUCTION

The *ABA Ten Principles of a Public Defense Delivery System* were sponsored by the ABA Standing Committee on Legal and Indigent Defendants and approved by the ABA House of Delegates in February 2002. The Principles were created as a practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems. The Principles 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. The more extensive ABA policy statement dealing with indigent defense services is contained within the ABA Standards for Criminal Justice, *Providing Defense Services* (3d ed. 1992), which can be viewed on-line (black letter only) and purchased (black letter with commentary) by accessing the ABA Criminal Justice Section homepage at http://www.abanet.org/crimjust/home.html.

ACKNOWLEDGMENTS

The Standing Committee on Legal Aid and Indigent Defendants is grateful to everyone assisting in the development of the *ABA Ten Principles of a Public Defense Delivery System*. Foremost, the Standing Committee acknowledges former member James R. Neuhard, Director of the Michigan State Appellate Defender Office, who was the first to recognize the need for clear and concise guidance on how to design an effective system for providing public defense services. In 2000, Mr. Neuhard and Scott Wallace, Director of Defender Legal Services for the National Legal Aid and Defender Association, jointly produced a paper entitled "The Ten Commandments of Public Defense Delivery Systems," which was later included in the Introduction to Volume I of the U.S. Department of Justice's Compendium of Standards for Indigent Defense Systems. The *ABA Ten Principles of a Public Defense Delivery System* are based on this work of Mr. Neuhard and Mr. Wallace.

Special thanks go to the members of the Standing Committee and its Indigent Defense Advisory Group who reviewed drafts and provided comment. Further, the Standing Committee is grateful to the ABA entities that provided invaluable support for these Principles by co-sponsoring them in the House of Delegates, including: Criminal Justice Section, Government and Public Sector Lawyers Division, Steering Committee on the Unmet Legal Needs of Children, Commission on Racial and Ethnic Diversity in the Profession, Standing Committee on Pro Bono and Public Services. We would also like to thank the ABA Commission on Homelessness and Poverty and the ABA Juvenile Justice Center for their support.

L. Jonathan Ross
Chair, Standing Committee on
Legal Aid and Indigent Defendants

ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

Black Letter

1 The public defense function, including the selection, funding, and payment of defense counsel, is independent.

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

3 Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

4 Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

5 Defense counsel's workload is controlled to permit the rendering of quality representation.

6 Defense counsel's ability, training, and experience match the complexity of the case.

7 The same attorney continuously represents the client until completion of the case.

8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

9 Defense counsel is provided with and required to attend continuing legal education.

10 Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

With Commentary

1 **The public defense function, including the selection, funding, and payment of defense counsel,[1] is independent.** The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.[2] To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.[3] Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.[4] The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.[5]

2 **Where the caseload is sufficiently high,[6] the public defense delivery system consists of both a defender office[7] and the active participation of the private bar.** The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services.[8] The appointment process should never be *ad hoc*,[9] but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.[10] Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.[11]

3 **Clients are screened for eligibility,[12] and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.** Counsel should be furnished upon arrest, detention, or request,[13] and usually within 24 hours thereafter.[14]

4 **Defense counsel is provided sufficient time and a confidential space within which to meet with the client.** Counsel should interview the client as soon as practicable before the preliminary examination or the trial date.[15] Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client.[16] To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.[17]

5 **Defense counsel's workload is controlled to permit the rendering of quality representation.** Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.[18] National caseload standards should in no event be exceeded,[19] but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.[20]

6 Defense counsel's ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.[21]

7 The same attorney continuously represents the client until completion of the case. Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing.[22] The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.[23] Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.[24] Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases,[25] and separately fund expert, investigative, and other litigation support services.[26] No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system.[27] This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

9 Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.[28]

10 Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel,or contract defenders should be supervised and periodically evaluated for competence and efficiency.[29]

NOTES

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

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

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

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

[5] ABA, *supra* note 2, Standard 5-4.1

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

[7] NAC, *supra* note 2, Standard 13.5; ABA, *supra* note 2, Standard 5-1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2. "Defender office" means a full-time public defender office and includes a private nonprofit organization operating in the same manner as a full-time public defender office under a contract with a jurisdiction.

[8] ABA, *supra* note 2, Standard 5-1.2(a) and (b); NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

[9] NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

[10] ABA, *supra* note 2, Standard 5-2.1 and commentary; Assigned Counsel, *supra* note 2, Standard 3.3.1 and commentary n.5 (duties of Assigned Counsel Administrator such as supervision of attorney work cannot ethically be performed by a non-attorney, citing ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct).

[11] NSC, *supra* note 2, Guideline 2.4; Model Act, *supra* note 2, § 10; ABA, *supra* note 2, Standard 5-1.2(c); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (provision of indigent defense services is obligation of state).

[12] For screening approaches, see NSC, *supra* note 2, Guideline 1.6 and ABA, *supra* note 2, Standard 5-7.3.

[13] NAC, *supra* note 2, Standard 13.3; ABA, *supra* note 2, Standard 5-6.1; Model Act, *supra* note 2, § 3; NSC, *supra* note 2, Guidelines 1.2-1.4; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(A).

[14] NSC, *supra* note 2, Guideline 1.3.

[15] American Bar Association Standards for Criminal Justice, *Defense Function* (3rd ed. 1993) [hereinafter "ABA Defense Function"], Standard 4-3.2; *Performance Guidelines for Criminal Defense Representation* (NLADA 1995) [hereinafter "Performance Guidelines"], Guidelines 2.1-4.1; ABA Counsel for Private Parties, *supra* note 2, Standard 4.2.

[16] NSC, *supra* note 2, Guideline 5.10; ABA Defense Function, *supra* note 15, Standards 4-3.1, 4-3.2; Performance Guidelines, *supra* note 15, Guideline 2.2.

[17] ABA Defense Function, *supra* note 15, Standard 4-3.1.

[18] NSC, *supra* note 2, Guideline 5.1, 5.3; ABA, *supra* note 2, Standards 5-5.3; ABA Defense Function, *supra* note 15, Standard 4-1.3(e); NAC, *supra* note 2, Standard 13.12; Contracting, *supra* note 2, Guidelines III-6, III-12; Assigned Counsel, *supra* note 2, Standards 4.1, 4.1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2(B)(iv).

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

[20] ABA, *supra* note 2, Standard 5-5.3; NSC, *supra* note 2, Guideline 5.1; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980) [hereinafter "Appellate"], Standard 1-F.

[21] Performance Guidelines, *supra* note 15, Guidelines 1.2, 1.3(a); Death Penalty, *supra* note 19, Guideline 5.1.

[22] NSC, *supra* note 2, Guidelines 5.11, 5.12; ABA, *supra* note 2, Standard 5-6.2; NAC, *supra* note 2, Standard 13.1; Assigned Counsel, *supra* note 2, Standard 2.6; Contracting, *supra* note 2, Guidelines III-12, III-23; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(B)(i).

[23] NSC, *supra* note 2, Guideline 3.4; ABA, *supra* note 2, Standards 5-4.1, 5-4.3; Contracting, *supra* note 2, Guideline III-10; Assigned Counsel, *supra* note 2, Standard 4.7.1; Appellate, *supra* note 20 (*Performance*); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(B)(iv). *See* NSC, *supra* note 2, Guideline 4.1 (includes numerical staffing ratios, e.g.: there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). *Cf.* NAC, *supra* note 2, Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

[24] ABA, *supra* note 2, Standard 5-2.4; Assigned Counsel, *supra* note 2, Standard 4.7.3.

[25] NSC, *supra* note 2, Guideline 2.6; ABA, *supra* note 2, Standards 5-3.1, 5-3.2, 5-3.3; Contracting, *supra* note 2, Guidelines III-6, III-12, and *passim*.

[26] ABA, *supra* note 2, Standard 5-3.3(b)(x); Contracting, *supra* note 2, Guidelines III-8, III-9.

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

[28] NAC, *supra* note 2, Standards 13.15, 13.16; NSC, *supra* note 2, Guidelines 2.4(4), 5.6-5.8; ABA, *supra* note 2, Standards 5-1.5; Model Act, *supra* note 2, § 10(e); Contracting, *supra* note 2, Guideline III-17; Assigned Counsel, *supra* note 2, Standards 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA *Defender Training and Development Standards* (1997); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(A).

[29] NSC, *supra* note 2, Guidelines 5.4, 5.5; Contracting, *supra* note 2, Guidelines III-16; Assigned Counsel, *supra* note 2, Standard 4.4; ABA Counsel for Private Parties, *supra* note 2, Standards 2.1 (A), 2.2; ABA Monitoring, *supra* note 3, Standards 3.2, 3.3. Examples of performance standards applicable in conducting these reviews include NLADA Performance Guidelines, ABA Defense Function, and NLADA/ABA Death Penalty.

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Defending Liberty
Pursuing Justice

APPENDIX
5

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STATE INDIGENT DEFENSE COMMISSIONS

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Legal Aid and Indigent Defendants

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EXECUTIVE SUMMARY

Most indigent defense experts agree that independence and meaningful statewide oversight of indigent defense services enhances the quality of services rendered within that state's system. However, ensuring independence and creating meaningful statewide oversight takes time, a good deal of effort and careful planning. This report is designed to assist members of the bar, state legislators, criminal justice system planners, and others who are interested in effectuating positive change in the indigent defense systems in their own states.

The most important role of a successful state oversight body or commission is to insulate the defense function by providing a measure of independence to the indigent defense system from political and judicial influence. Without such independence, the likelihood of successfully improving indigent defense services is greatly diminished. The *ABA's Ten Principles of a Public Defense Delivery System*[1] set a benchmark against which the quality of an indigent defense system can be measured, and the first of these principles calls for independence in the public defense function and in the oversight of the system. Throughout this report, we discuss the importance of, and ways to achieve, independence.

Forty-two states have created some form of a statewide public defender agency or commission that can provide oversight for indigent defense services. Next to providing independence for a state's indigent defense system, one of the most critical roles of a state commission is to act as an oversight body by monitoring costs and caseloads, or going further to ensure the quality of indigent defense services by developing indigent defense standards, such as performance standards and caseload limits, and overseeing compliance with those standards. In many states, oversight is provided exclusively through a state commission or oversight board. However, the level of the commission's authority, and thus effectiveness of such oversight, is frequently linked to the level of funding provided by the state. The greater the state funding, the greater the influence a commission is normally able to have over the quality of indigent defense services being provided among the localities. Because of the importance of funding, this report separately discusses states with full state funding and those with partial state funding.

Currently, 28 states have fully state-funded indigent defense systems.[2] Most of these states have some sort of state commission, although some have a state public defender program but no commission. Most states that fully fund their indigent defense systems - with a few exceptions - have higher quality indigent defense programs; however, the level of funding and oversight provided are additional factors. In some states that provide partial funding of indigent defense, a state appellate commission or agency has authority over appellate cases only. In other partially-funded states, a statewide commission has been created that has partial authority over indigent defense. The partial-authority commission is often handicapped by an inability to exert authority over, or to provide a meaningful financial incentive to, localities that create and fund their own indigent defense systems. In this report, we discuss the limitations of commissions that control supplemental state funding to counties, with some specific examples. In addition, we provide examples of systemic litigation that have helped to move some states toward increased indigent defense funding and positive reform.

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[1] Attached to this report as Appendix B.

[2] Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. (In some of these states, local governments contribute office space and/or a small portion of additional funding.)

This report also discusses the various issues to consider in creating a state commission or state oversight model. The critical features of a successful commission, including independence, effective oversight and adequate funding are cited throughout this report. We touch upon effective leadership qualities as well as the need for accurate and reliable indigent defense data in fulfilling a commission's oversight role. Other features of a commission are also discussed, such as the location of the agency within the state government and the actual structure of the commission, including size, length of membership, and responsibilities. Many examples are provided from various states. Finally, the report discusses characteristics and roles of a successful study commission or task force, which often precedes the creation of a statewide commission or agency but may also be created with the goal of improving or revising a current system.

Developing meaningful statewide oversight takes time, but it is our hope that this report will serve to assist those who are up to the challenge.

INTRODUCTION

In 1963 in *Gideon v. Wainwright*,[3] the U.S. Supreme Court held that, in felony cases, an indigent criminal defendant's Sixth Amendment right to appointed counsel is a fundamental right necessary to ensure a fair trial and the fundamental human rights of life and liberty. *Gideon* further held that the right to appointed counsel applies in the state courts under the due process clause of the Fourteenth Amendment, thus placing an obligation on state or local governments to furnish indigent defendants with counsel in criminal trials. The right was also applied to direct criminal appeals in *Douglas v. California*, 372 U.S. 353 (1963). Four years later, the right to counsel was extended to juveniles in delinquency proceedings resulting in confinement. *In re Gault*, 387 U.S. 1 (1967). In 1972, the right to counsel was still further extended to apply to *any* criminal defendant who is sentenced to incarceration, including petty offenses and misdemeanors. *Argersinger v. Hamlin,* 407 U.S. 25 (1972).

The Supreme Court's expansion of the right to counsel includes numerous types of cases and proceedings,[4] however these four opinions form the core group that necessitated major changes among states to ensure that these rights are carried out. A number of states, moreover, have expanded the list, extending the right to counsel to cases not recognized by the U.S Supreme Court.

Since the Gideon decision, states have adopted varying approaches to fulfill the Court's mandate to provide counsel at government expense to indigent persons in criminal (and various other) proceedings. However, the Court has never ruled that a state's central government must establish and fund the right to counsel; the duty to provide counsel may be discharged either by a state's central government, local governments, or some combination of both. In fact, in a majority of states, the responsibility for indigent defense services is now entirely a state responsibility: both funding and oversight are at the state level. In other states, indigent defense services remain primarily a county responsibility. In still other states, indigent defense is a shared responsibility between the state's central government and local governments.

Over time, the clear trend across the country has been towards full state funding or increasing the state's share of funding. As of July 2006, 28 states provide full funding for indigent defense expenditures through state funds. Three other states provide more than 50 percent of the expenditures through state funds. Seventeen states provide at least 50 percent of the expenditures through county funds. Finally, only two states (Pennsylvania and Utah) fund their indigent defense systems entirely through county funds. (See Table 2 below.)

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[3] 372 U.S. 335, 344-45 (1963).

[4] The U.S. Supreme Court's right to counsel jurisprudence includes the following cases and proceedings: *Powell v. Alabama,* 287 U.S. 45 (1932) (capital cases); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (felony trials); *Miranda v. Arizona*, 384 U.S. 436 (1967) (custodial interrogation); *In re Gault*, 387 U.S. 1 (1967) (juvenile delinquency proceedings); *U.S. v. Wade*, 388 U.S. 218 (1967) (lineups); *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearings); *Alabama v. Shelton,* 535 U.S. 654 (2002) (suspended or probated sentence may not be imposed unless counsel was provided for underlying offense). The Supreme Court has also recognized "a narrow category of civil cases in which the State must provide access to its judicial processes without regard to a party's ability to pay court fees." *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (indigent parent has a right to transcripts in appeal of termination of parental rights case).

There is also a clear trend among states to develop some sort of statewide oversight. In many states, both those with a statewide public defender program and those without, oversight is provided exclusively through a state commission or oversight board. Normally, these bodies are charged with setting policy for indigent defense services and advocating for state resources. But in other states, the oversight is provided by the chief public defender, and there is no commission. Still, in several states, the commission provides some statewide oversight but lacks full authority over indigent defense services; for example, some states have commissions that oversee appellate cases only. (See Appendix A, *Statewide Indigent Defense Systems: 2005*, for detailed information on the state systems and oversight bodies.)

The consensus among indigent defense experts is that state oversight is a desirable structure. Currently, 42 states have some sort of statewide body providing oversight for some or all indigent defense services, whether that body is some type of commission or a public defender agency. Seven states have no commission or body providing such oversight. Two states (Tennessee and Florida) are unique in that their indigent defense system is headed by elected public defenders in each of the state's judicial districts.[5] Due to the independent nature of elected officials, there is no statewide oversight body governing these public defenders; but in both states, the public defenders belong to a membership organization.

The goal of an indigent defense system must be to provide not just efficient, but quality indigent defense services. The *ABA's Ten Principles of a Public Defense Delivery System* (attached as Appendix B) provide a benchmark for measuring the quality of such a system and the services it provides. The first of these ten principles addresses the most important criteria necessary for quality indigent defense services, independence and oversight.

STATE AUTHORITY AND FUNDING

Indigent Defense Systems of the 50 States

The following table provides an overview of the different indigent defense systems that exist across the country by state and the year in which the system was created. Forty-two states have some sort of statewide agency or commission for indigent defense services: column (A) shows 11 states with a state public defender program and a state commission; column (B) shows nine states with a state public defender program without a commission; column (C) shows five states with a state commission and a state director; column (D) shows ten states with a state commission with partial authority; and column (E) shows seven states with a state appellate commission or agency. As shown in column (F), seven states have no state commission or agency; except for Maine, these states have county-funded and county-controlled indigent defense systems.

[5] While Tennessee has publicly-elected district public defenders, there is a state post-conviction death penalty commission.

TABLE 1

INDIGENT DEFENSE SYSTEMS OF THE 50 STATES[6]

(A) State PD with Comm'm		*(B)* State PD without Comm'n		*(C)* State Comm'n, State Director		*(D)* State Comm'n Partial Authority		*(E)* State Appellate Comm'n or Agency	*(F)* No State Comm'n	
State	*Year Est.*	*State*	*Year Est.*	*State*	*Year Est.*	*State*	*Year Est.*	*State*	*State*	*Prior Study Comm.*
CO	1969	RI	1942	MA	1983	NV	1971	CA	AL	Yes
MD	1971	DE	1953	NC	2000	KS	1981	IL	AZ	Yes
HI	1972	NJ	1967	OR	2001	OH	1984	ID	ME	Yes
KY[7]	1972	VT	1972	VA	2004	IN	1989	MI	NY	Yes
NH[8]	1972	NM	1973	ND	2005	OK	1991	MS[9]	PA	Yes
CT	1974	WY	1977			SC	1993	TN[10]	SD	
WI	1977	AK	1980			LA	1994	WA	UT	
MO	1982	IA	1981			NE	1995			
MN	1986	WV	1989			TX	2001			
AR	1997					GA	2003			
MT	2005									

As displayed in the first three columns of Table 1, the overwhelming majority of the full statewide bodies have been in existence for 20 or more years. In column (A), nine of the 11 states have had a public defender with a commission for 20 years or more. In column (B), eight of the nine states have had a state public defender program for 25 years or more. While creating a full state commission and/or statewide body for indigent defense generally takes time, the past six years have seen marked change. Since 2000, seven states have moved towards creating a new statewide indigent defense commission: Montana has created a statewide public defender program with a commission; North Carolina, Oregon, Virginia and North Dakota have created

[6] Florida, which has elected public defenders in each judicial district or circuit is not shown here; the elected public defenders belong to a membership organization but lack state oversight.
[7] The Kentucky Department of Public Advocacy was created in 1972, while the Public Advocacy Commission was created in 1982 (see KRS 31.010 and 31.015).
[8] The New Hampshire Public Defender is a private, nonprofit corporation that was created in 1972 and is under the general supervision of the New Hampshire Judicial Council (see NH RSA 604-B:5). In addition, an all-volunteer Board of Directors oversees the program's operations.
[9] Mississippi created a full commission in 1998, but the legislation was later repealed; it is the only state commission legislation to have been completely repealed. Currently, Mississippi has three agencies that provide representation in appeals and capital cases at the trial and post-conviction stages.
[10] Tennessee has a post-conviction defender office and oversight commission. Locally-elected public defenders operate at the trial level in each judicial district without a state oversight body, similar to Florida.

new state commissions with state directors; and Texas and Georgia have created new state commissions with partial authority.

Scope of Authority and Amount of State Funding

Next to providing independence for a state's indigent defense system, one of the most critical roles of a state commission is to act as an oversight body by monitoring the quality of indigent defense programs and the services provided. The extent of a commission's oversight role can vary. A commission may monitor costs and caseloads, but a more active commission may also develop a number of indigent defense standards and oversee compliance with those standards. For example, a commission may develop and oversee compliance with attorney performance standards, experience and training requirements, caseloads limits, and compensation levels. However, the authority and effectiveness of a commission in this oversight role can vary widely depending on the level of funding provided.

The relationship between state funding and an indigent defense oversight body's level of authority is inextricable and directly proportionate in most cases. The greater the amount of funding provided by the state and therefore overseen by the oversight body, the greater the influence a commission has over quality and type of local indigent defense delivery system(s) used. Typically, the more responsibility localities have for funding indigent defense services, the less authority a state commission has over local programs.

Table 2 below provides an overview of states within several state and county funding categories.

TABLE 2

Indigent Defense Funding of the 50 States

Full State Funding[11]		More Than 50% State Funding	Full County Funding	More Than 50% County Funding
Alaska	New Hampshire	Alabama	Pennsylvania	Arizona
Arkansas	New Jersey	Kansas	Utah	California
Colorado	New Mexico	Oklahoma		Georgia
Connecticut	North Carolina			Idaho
Delaware	North Dakota			Illinois
Florida	Oregon			Indiana
Hawaii	Rhode Island			Louisiana
Iowa	Tennessee			Michigan
Kentucky	Vermont			Mississippi
Maine	Virginia			Nebraska
Maryland	West Virginia			Nevada
Massachusetts	Wisconsin			New York
Minnesota	Wyoming			Ohio
Missouri				South Carolina
Montana				South Dakota
				Texas
				Washington

As Table 2 shows, 28 states have fully state-funded indigent defense systems; another three states have more than 50 percent state funding. Only two states have indigent defense systems that are fully funded by the counties, but another seventeen states are more than 50 percent county-funded.

In 2005, Montana became the most recent state to move to a fully state-funded indigent defense system with a statewide oversight commission.[12] Although North Dakota was previously fully state-funded, in 2005 North Dakota also created a new statewide indigent defense commission with an executive director to oversee its system.[13]

Full State Funding

In our judgment, states that provide full funding for their indigent defense systems, with a few exceptions,[14] have better quality indigent defense services than those states that rely primarily on county funds. Regardless of the system type (statewide public defender or a

[11] In some of these states, local governments contribute office space and/or a small portion of additional funding.
[12] Montana Public Defender Act, S.B. 0146 (Mont. 2005).
[13] S.B. 2027 (N.D. 2005).
[14] Arizona, California, Georgia and Washington.

mixture of delivery systems), fully state-funded systems tend to have greater uniformity of quality in indigent defense representation statewide. Increased quality is not strictly a function of state funding; it is also a result of centralized oversight, whether from a commission or a state public defender. We do not mean to suggest, however, that the funding of all statewide systems is adequate since many of the state systems do not receive sufficient financial support, and in some instances, funding is woefully inadequate. Furthermore, in a few states with full funding and statewide commissions, while the commission may have authority over indigent defense in theory or by statute, in practice the ability of the commission to effectuate change is limited by a number of factors, including inadequate funding, structure or composition of the commission itself.

Statewide Commissions, State Public Defender or State Director

Seventeen states have fully state-funded indigent defense systems that are overseen at least to some extent by commissions. As column (A) of Table 1 shows, 11 of these states have established statewide public defender systems: Arkansas, Colorado,[15] Connecticut, Hawaii, Kentucky, Maryland, Minnesota, Missouri, Montana, New Hampshire, and Wisconsin. As column (C) shows, five of these states have a state commission with a state director that establishes indigent defense systems (public defender or other) for the entire state by county or region: Massachusetts, North Carolina, North Dakota, Oregon, and Virginia. As noted previously, the commissions have varying levels of responsibility, ranging from selection of the public defender in Colorado, to active policy and standards development and oversight in Massachusetts.

Statewide Public Defenders Without Commissions

As column (B) of Table 1 displays, nine states have fully state-funded public defender systems without an oversight commission: Alaska, Delaware, Iowa, New Jersey, New Mexico, Rhode Island, Vermont, West Virginia, and Wyoming. In these states, the chief public defender is appointed by the governor[16] and is in charge of oversight and administration of the system statewide. In such systems, the state public defender is not fully protected from the risk of political influence, and the entire indigent defense system loses a measure of independence which, as discussed later, is the primary concern and goal in creating a state commission.

As earlier mentioned, Florida and Tennessee have fully-funded indigent defense systems[17] served by elected public defenders in each judicial district or circuit. Tennessee also has a separate state agency that handles capital post-conviction cases. The elected public defenders in these states belong to a membership organization but are not overseen by a commission.

[15] In Colorado, two agencies, a public defender and an alternate defense counsel, each have separate oversight commissions whose primary duty is to appoint the heads of the agencies.
[16] In New Jersey, Rhode Island, Vermont and West Virginia, the governor's appointment is subject to confirmation by the state senate.
[17] In Tennessee, a few local governments also provide a measure of funding.

Partial State Funding

In some states that provide partial indigent defense funding, legislatures have agreed to create either: (a) a state appellate commission or agency; or (b) a statewide commission that provides less than a full measure of oversight and policy development for indigent defense.

State Appellate Commission or Agency

As shown in column (E) of Table 1, there are seven states with partial state funding that, although they have no statewide public defender or commission for indigent defense at the trial level, have either a state appellate or state post-conviction commission or agency: California, Illinois, Idaho, Michigan, Mississippi, Tennessee and Washington. In these seven states, indigent appeals are funded directly by the state. Five of the states have established a statewide appellate agency with a separate body that has some degree of authority over the agency (e.g., appoints a director, prepares the agency's budget or develops standards): California, Illinois, Michigan, Tennessee (capital post-conviction only) and Washington. Two of the states have a state appellate agency without an oversight body: Idaho and Mississippi. In California, a state agency provides representation in direct capital appeals, while a board of directors oversees the state capital post-conviction agency. In Mississippi, three state agencies provide representation in capital trials, appeals and capital post-conviction cases, but they are without an oversight body.

State Commission, Partial Authority

As column (D) of Table 1 displays, state commissions with partial authority exist in ten states: Georgia, Indiana, Kansas, Louisiana, Nebraska, Nevada, Ohio, Oklahoma, South Carolina and Texas. In each of these states, counties retain important responsibilities for indigent defense services to varying extents. In some of these states, the state commission oversees a portion of the state's indigent defense services based on geographic areas or in particular types of cases. In most partially-funded states, the state commission's authority (or a portion of it) derives from a relatively small percentage of state money that the commission distributes to counties based on their compliance with standards and goals developed by the commission.

In four of the states that have established commissions with partial authority (Georgia, Kansas, Oklahoma and Nevada), the commission's authority is over a particular geographic area or case types. In Georgia, where state funding is provided for felony and juvenile delinquency cases, the commission has authority over indigent defense in those counties that have chosen to opt in to the statewide system. In addition, counties and municipalities may contract with the commission to provide representation in misdemeanor cases. Approximately two-thirds of the local governments have contracted with the Georgia Public Defender Standards Council. In Kansas, the scope of the statewide commission's authority occurs according to case type. The Kansas Board of Indigents' Defense Services is responsible for all felony and appeal cases. The counties retain responsibility for misdemeanor and juvenile cases, but they may contract with the commission to provide indigent defense services in those case types. In Oklahoma, state funding and state authority exist through the Oklahoma Indigent Defense System for indigent criminal and juvenile delinquency cases in all but the two largest counties who opted out of the state

system. Similarly, in Nevada, seven of the state's 16 counties have chosen to participate in the state public defender system, while the other nine counties, including the two largest counties, operate and fund their own systems and are therefore subject to no state oversight. While these partial commissions were created to provide a measure of indigent defense oversight along with partial state funding, the distribution of state funds to the localities and indigent defense providers does not directly depend on their performance (although Georgia is working towards this). In this respect, the commission's ability to control the quality of indigent defense services is quite limited.

Similarly, in South Carolina, the commission does not have the authority to withhold state funding based on poor performance or lack of adherence to indigent defense standards. Although the commission was created to oversee all indigent defense case types statewide, its authority is curtailed both by the fact that the state only funds a portion of indigent defense and by its inability to control the disbursement of the limited state funds. South Carolina's statewide commission, which merged with a prior state appellate commission, provides state funding for appeals and partial state funding to counties based not on performance, but on per-capita costs. Although there is currently no incentive for the counties to improve their indigent defense services, the current South Carolina commission is hoping to change this.

The Promise to Control Supplemental Funding

In the remaining five states with partial state funding and commissions with partial authority over indigent defense (Indiana, Louisiana, Nebraska, Ohio and Texas), all or part of the commission's authority flows – or was originally intended to flow – from supplemental state funding that is tied to county compliance with state standards. County compliance is voluntary in each of these states except Texas, where compliance with state standards is mandatory. These states have primarily county-funded indigent defense systems (less then 50% state funding), but created state commissions with some authority to control the disbursement of state funds based on the county's indigent defense performance or compliance with state standards (sometimes called the "carrot-and-stick" approach) in order to encourage counties to improve their indigent defense systems. However, often such a commission does not wish to sanction local programs by withholding the supplemental funds. That is, a commission may overlook a county's non-compliance because it realizes that removing supplemental state funding from a struggling county program for failing to make improvements will only lessen indigent defense services in the county.[18]

Although these commissions were created to have meaningful oversight, unless they are able and willing to exert their authority to control the disbursement of significant state monies based on the performance of a locality's indigent defense system, such commissions may ultimately have a minimal effect. The efficacy of such a commission in a partially-funded state is dependent upon a number of factors, including: (1) whether the commission is actually able and willing to control the monies disbursed to counties based on performance or compliance with indigent defense standards; (2) the amount of state funds available for disbursement; (3) whether the available state funds will cover a significant portion of the counties' indigent defense expenditures so that compliance with standards and systemic improvements are fiscally viable

[18] Consider the example of the former Georgia commission, discussed below.

options for the counties; (4) the ability of the commission and its staff to review the performance of the counties' indigent defense services programs; and (5) the quality and reliability of the indigent defense data.

The Indiana Public Defender Commission, which is perhaps the most authoritative commission in a partially-funded state, has the authority to withhold state funds from counties that have volunteered to comply with commission standards and has threatened to do so on several occasions. By exerting its authority through the control of state funds, the commission is able to create a meaningful incentive for the counties to improve their indigent defense systems. Counties have in fact increased their local indigent defense expenditures as a result of the commission's threat to withhold state funds. However, Indiana's commission is not without its difficulties. For example, although the commission has been able to monitor caseloads for compliance with commission standards, the commission must rely on the self-reporting data of the counties, and monitoring compliance with qualitative standards has proven difficult. Still, in addition to its authoritative commission, Indiana, along with Ohio, also provides one of the greatest percentages of state funding among the states with partial-authority commissions providing supplemental state funding. In 2005, Indiana provided approximately 41% of the statewide indigent defense expenditures.[19]

In Louisiana, one of the tasks of the Louisiana Indigent Defense Assistance Board (LIDAB) is to oversee the distribution of state funds to local judicial districts that have agreed to be subject to the indigent defense standards created by the commission. Among these localities, or parishes, the state funds are distributed according to felony caseload, felony trials, and the amount of the local indigent defense funds already available. However, to date, LIDAB has been unable to effectively monitor compliance with its qualitative standards. In 2005, the state provided approximately $10 million - just under 29% - of the statewide indigent defense expenditures, in comparison with nearly $25 million - just over 70% - from the localities.[20] The funding from the localities comes entirely from monies received from local traffic tickets. In addition, not all of the state expenditures are distributed to the localities; for example, some funds are used for state appellate and capital post-conviction projects. In 2003, just under $3 million of the approximately $7.7 million was reportedly used for distribution among the local parishes. Assuming the 2001 level of funding from the parishes in 2003, then just over 9% of Louisiana's statewide expenditures were actually state funds that the parishes received. Given the limited amount of available state funds and the lack of qualitative oversight, LIDAB's authority and overall effectiveness in improving Louisiana's indigent defense system is significantly impeded.

In Nebraska, the Nebraska Commission on Public Advocacy provides indigent defense services and resources to the counties through capital, appellate, and felony resource centers. Originally, state contributions of up to 25% of the counties' indigent defense costs were contemplated at the request of the counties on the condition of compliance with indigent defense standards. However, although legislation was passed that provided the commission with the authority to control this supplemental funding, in the wake of a budget crisis, the funding was

[19] This percentage includes funding for the Indiana Public Defender Council, which is a statewide back-up center, and also for the Indiana Public Defender, which provides representation in post-conviction cases and some appeals.
[20] In 2006, the state contribution increased to $20 million.

never fully appropriated. Today, Nebraska's commission and its standards yield little authority. In FY 2004, the state provided less than 4% funding for indigent defense.

The Ohio Public Defender Commission is charged with providing state funds to the counties on a monthly basis to reimburse them for a portion of their costs for appointed counsel. The commission also promulgates standards, and is charged with overseeing compliance with these standards in its distribution of state funds to the counties. (By statute, these standards include minimum - not maximum - caseload standards.) The Ohio commission has the authority to control the distribution of state funds and to reimburse the counties for up to 50% of their expenditures. However, unlike the Indiana commission, the commission does not exert its authority to withhold funding. In 2002, Ohio contributed approximately 45% of the statewide indigent defense expenditures, but by 2005, this funding had dropped to approximately 32% (and is now believed to be below 30%).

In Texas, the Task Force on Indigent Defense develops policies and standards for indigent defense services and distributes a small amount of state funds on a population-based formula to complying counties. The task force also provides a limited number of discretionary grants based on competitive bids from counties seeking funding for various programs (e.g., a new defender office or video teleconferencing system). Unlike the other states that provide (or were meant to provide) supplemental funding to counties that voluntarily comply with state standards, Texas passed a state law, the Fair Defense Act (Senate Bill 7), that mandates county compliance with minimal standards, including standards that cover indigency determinations, timely appointment of counsel and minimal standards for counsel. Thus, county compliance with standards is both mandatory and a prerequisite to receiving state funds. However, in FY 2005, Texas contributed only 11% of the costs of indigent defense statewide. Since the implementation of Senate Bill 7 and mandatory standards, Texas has seen a significant increase in indigent defense expenditures from the counties.

The Challenges of Supplemental Funding, and Lessons Learned in Georgia

The control of supplemental state funding was originally seen as a promising approach to encourage indigent defense reform. Over time, however, the approach has failed to encourage the level of statewide improvement anticipated in most states that have adopted it. As state funding remains inadequate, so are the incentives for compliance with state standards. Further, the monitoring of compliance is difficult without a statewide system. Accurate and meaningful data is needed to oversee compliance with caseload standards and to support the counties' funding requests. Monitoring and validating indigent defense data is a large and time-consuming task that requires sufficient staff. Even if a commission has the ability and staff to monitor data, the data is often self-reported by the counties; without a uniform statewide data system and case-counting method, the consistency and reliability of such data is questionable. Monitoring compliance with qualitative standards is even more difficult. In order to provide meaningful oversight, a commission needs a paid full-time director and staff. Too often, the commissions do not have adequate staff to monitor the local programs and to assist the commission members - who frequently have full-time jobs - in their oversight duties.

A lack of resources and wide variations in the quality of representation continue to exist in each of the states with partial funding and partial-authority commissions. With some exceptions in Indiana and Texas, overall, relatively little statewide improvement can be attributed to the supplemental funding model. Still, the existence of even a partial commission is usually preferable to none at all.

The former partial-authority commission in Georgia, which provided supplemental funding to counties under the carrot-and-stick approach, provides an example of a state in which such a model clearly failed (as acknowledged by the state legislature). Until January 1, 2005, indigent defense services in Georgia were established and primarily funded by each of the state's 159 counties. Among the counties, three different delivery systems existed. Most counties employed the panel system in which the courts appointed attorneys from a list. In some counties, all practicing attorneys were required to be on the panels (certain exceptions applied, for example, attorneys working as prosecutors were exempted). Other counties employed a contract system, and still fewer counties employed a public defender system.

The Georgia legislature created a state agency within the judicial branch, the Georgia Indigent Defense Counsel (GIDC), to administer taxpayer funds to support local indigent defense programs and recommend to the Georgia Supreme Court guidelines for the operation of the programs. The court then created guidelines that the county programs were required to follow in order to receive the state supplemental funds from GIDC. While the GIDC guidelines were quite extensive, covering many topics including timing of entry of counsel, determination of eligibility, appointment of counsel, requirements for the existence of performance standards, and recommended caseload limits (following national standards), the supplemental funds covered less than 12% of all indigent defense costs statewide.

Not only was the carrot provided by GIDC not sufficiently tantalizing to the counties, but the stick it wielded was not sufficiently intimidating to foster improvements. Although GIDC had the authority to withhold supplemental funds from counties that made inadequate attempts at compliance with standards, it was reluctant to do so, both for fear of backlash from state legislators and for fear of further depriving funds to a county whose indigent defense system was already starved of resources. Thus, counties that failed to comply with some of the standards nonetheless continued to receive state funds, and there was no real incentive for counties to take steps to come into compliance.

Acting on recommendations of the Chief Justice's Commission on Indigent Defense,[21] the Georgia legislature abandoned the method for superior court cases (felonies and juvenile delinquencies) and implemented a state-funded public defender system with centralized oversight as of January 1, 2005 (as described above under State Commissions, Partial Authority).

Obstacles to State Assumption of Indigent Defense

[21] Serious deficiencies with the system were documented in a 2002 report prepared by The Spangenberg Group. See *Status of Indigent Defense in Georgia: A Study for the Chief Justice's Commission on Indigent Defense, Part I* (December 12, 2002), available at http://www.georgiacourts.org/aoc/press/idc/idc.html.

As seen in Georgia, even when a partially state-funded system is not working, state assumption of all indigent defense services is not always feasible. There are a variety of reasons for this. One major reason is funding. Some state governments are willing to contribute to indigent defense funding in an effort to encourage improvements among the locally-operated and locally-funded indigent defense programs but are not willing, or able, to assume full fiscal responsibility.

A second major reason why full state funding and oversight are not undertaken is the strength of local, home rule. Local judges, in particular, are sometimes reluctant to cede oversight of assigned counsel programs to a centralized state agency. Such judges assert that they are in the best position to assess which lawyers are capable of undertaking court-appointed cases. In addition, in some states where indigent defendants are largely represented by private court-appointed attorneys, a fear exists that a shift to full state funding will result in the creation of a statewide public defender system at the expense of the private bar.

Compromise and the Link to Funding

In a number of states without full state funding of indigent defense, persons seeking creation of an indigent defense commission are faced with a dilemma. Do they compromise and accept a structure that is less than what they hope for or walk away from the negotiating table, hoping that in a subsequent legislative session, a system that contains all of the desired components is created? For most advocates, to walk away from even minimal reform is difficult, and they frequently accept a lesser program in the hope that it will ultimately lead to more significant reform in the future.

Typically, the area in which the greatest concessions must be made is adequate funding. In states such as Indiana, Louisiana, Mississippi, Nebraska, Ohio and South Carolina, advocates for change welcomed creation of systems that they knew were not adequately funded. In all six states, the indigent defense systems are likely still suffering from funding and caseload problems. (In Mississippi, the new state system was repealed after one year. It is the only state commission in the country to be repealed.) Still, most state governments have a much broader power to raise revenue to fund indigent defense than most county governments. Again, funding is inextricably linked to the ability of a commission or oversight body to institute positive reform. Without adequate funding, it is extremely difficult to effectively induce local county programs to implement minimum standards of performance.

Is Full Funding the Answer?

On the other hand, full state funding is no panacea. Consider the examples of Virginia and North Dakota. Virginia has a fully state-funded system but the system suffers for several reasons: (a) state statutes and legislative appropriations cap assigned counsel compensation at extraordinarily low levels; (b) the legislature has been reluctant to expand the Public Defender program; and (c) the legislature has under-funded those public defender offices that were created. An effort is now under way to make improvements through the creation of a new Virginia Indigent Defense Commission vested with authority over assigned counsel and public defenders. However, so far the state legislature has agreed to appropriate enough funds to only slightly raise

the extremely low assigned counsel fee caps.[22] In addition, although the legislature has agreed to appropriate $1.9 million for 32 new public defender positions for the FY 2007-08 biennium, at the same time, it will appropriate $4.9 million for 134 new prosecutor positions.

In North Dakota, although the state was fully funding indigent defense and a state commission had existed since 1981, the system was seriously under-funded and lacked independence, uniformity and effective oversight. Prior to 2005, North Dakota's system relied primarily on private attorneys working under contract with judges. Attorneys agreed to accept flat fee contracts requiring them to handle an unlimited number of cases in a given county or judicial district. The contracts created problems of independence and case overload, among others, and had a deleterious effect on quality. Although the North Dakota Legal Counsel for Indigents Commission had provided guidelines and technical assistance to the counties on indigent defense, and reviewed costs and caseloads, it had no real authority. For example, contractors across the state were not uniformly paid the $75 hourly rate that the Commission recommended.

However, in 2003, the State Bar of North Dakota's Indigent Defense Task Force was created in response to a House Resolution to study indigent defense in the state. In large part as a result of the work of the Task Force,[23] new legislation was enacted in 2005 that created an authoritative oversight commission and removed from the judiciary responsibility for the indigent defense system.[24] Among other responsibilities, the new seven-member commission, with its appointed state director, reviews caseloads, creates statewide standards, and has the authority to create public defender offices. With the creation of this new system, the North Dakota legislature more than doubled the state funding.

Can Litigation Play a Role in State Action?

A number of state high courts have recognized their inherent or statutory authority to order changes in the state's indigent defense system when the current system fails to adhere to the state's statutory or constitutional requirements. Some of these courts have issued orders that have resulted in systemic changes (e.g., see cases noted below). While the filing of a systemic lawsuit should always be a last resort, even if unsuccessful, it will often raise awareness of the legislature and public regarding the deficiencies of a state's indigent defense system. Such litigation can also play a role in the creation of a study commission. Sometimes, the threat of a lawsuit can also be a motivating factor in seeking statewide reform and increased funding.

Systemic litigation recently played a highly significant role in indigent defense reform in Montana and Massachusetts. In June 2005, the Montana Legislature enacted the Montana Public Defender Act which completely shifted the responsibility for indigent defense funding and oversight from the counties to the state.[25] Momentum to pass the legislation came from a lawsuit

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[22] For example, the statutory cap for misdemeanor cases is $125, however through legislative appropriations, the cap was effectively at $112. Now, the effective cap is $118.
[23] Including a study performed for the Task Force on behalf of the ABA Bar Information Program, *Review of Indigent Defense Services in North Dakota*, The Spangenberg Group (January 30, 2004).
[24] S.B. 2027 (N.D. 2005).
[25] S.B. 0146 (Mont. 2005).

filed by the ACLU alleging that the state's indigent defense system was denying indigent defendants their right to effective assistance of counsel.[26] The ACLU agreed to put the litigation on hold once the state indicated its intent to resolve the situation through legislation rather than a court order. The act created an 11-member statewide public defender commission with oversight authority and a statewide chief public defender. Prior to the act, the counties operated their own indigent defense systems with no oversight; funding, which did not cover misdemeanor cases, was provided by the state to the counties through a limited reimbursement program, and the counties were responsible for any shortfalls. Funding is now provided directly by the state and covers misdemeanor cases.

In Massachusetts, although there was a statewide indigent defense commission prior to recent litigation, that commission's recommendations regarding assigned counsel rates are subject to legislative appropriations and have been under-funded for years. In 2004, two systemic lawsuits were filed challenging the assigned counsel rates appropriated by the legislature.[27] Largely in response to this litigation, as well as a serious lack of available lawyers, the legislature appointed a commission to study the rates. In 2005, the legislative commission issued a report recommending significant increases in assigned counsel rates as well as additional public defenders through two pilot programs but the legislature initially failed to follow any of the commission's recommendations.

Despite the legislative commission's recommendations, the next fiscal year budget passed without additional appropriations for increased compensation rates and no bills were passed implementing the recommendations. Amid another shortage of court-appointed counsel, a status conference was held in the statewide systemic lawsuit to determine whether a lift of the stay in the proceedings was appropriate. Before a decision was made in this litigation, the legislature passed a supplemental bill that adopted a number of the commission's recommendations and increased hourly compensation rates for court-appointed counsel, significantly expanded the statewide public defender program, strengthened indigency verification procedures and established two new commissions, a permanent commission to study decriminalization and a temporary commission to examine alternative revenue sources to fund indigent defense.[28]

In 1991, the Oklahoma Legislature created a statewide indigent defense commission in the year following an Oklahoma Supreme Court decision in a systemic suit that challenged the statutory fee caps for court-appointed counsel.[29] Prior to the creation of the commission and the state system, the counties were responsible for funding and selecting their indigent defense system. The court found that the fee cap resulted in inadequate compensation and constituted an unconstitutional taking under the state constitution.[30] The court also held that the compensation

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[26] *White v. Martz*, Montana First Judicial District Court, Lewis and Clark County, CDV-2002-133.
[27] *Nathaniel Lavallee, et al. vs. The Justices of the Springfield District Court*, 442 Mass. 228 (2004) (holding "that the petitioners' constitutional right to the assistance of counsel is not being honored." Petitioners were limited to criminal defendants in Hampden County, Massachusetts only). *Arianna S., et al. v. Commonwealth of Massachusetts, et al.*, SJ-2004-0282 (filed June 28, 2004 by Holland & Knight with prior study by The Spangenberg Group) (statewide systemic lawsuit involving indigent criminal, juvenile delinquency and child welfare cases).
[28] See Chapter 54 of the Acts of 2005 (MA 2005).
[29] *State v. Lynch*, 796 P.2d 1150 (Okla. 1990).
[30] Okla. Const. art. 2, § 7 (due process clause).

standard needed to be uniform statewide in order to comply with a state constitutional provision against enacting "a proscribed special law."[31]

While the court recognized that "[p]roviding for adequate funding for indigent representation is a matter for legislative action," until the legislature addressed the problem, the court found that it had a duty to act. The court noted that the duty of the courts is to ensure the administration of justice, and that Oklahoma's highest court has the inherent and constitutional power of general superintendence and administrative authority over all lower courts in the state and over the practice of law.[32] Further, the court held that it was necessary to establish a level of uniformity in the rates:

> We must also adopt guidelines for the trial courts to follow in setting fees [for indigent defense representation] in order to avoid the unequal, erratic, unconstitutional taking of private property which might occur if fees are set by a different formula in each of the state's seventy-seven counties.

The Oklahoma court established such guidelines (tying the hourly rate to that of the prosecutors and public defenders) and ordered them immediately effective in capital cases. However, in non-capital cases, the court gave the legislature two years to address the problem before the guidelines became effective. The following year, in response to the court's ruling, the Oklahoma legislature created the Oklahoma Indigent Defense System Board that established a statewide indigent defense system.

In 1993, prior to the creation of Louisiana's indigent defense commission, the Louisiana Supreme Court recognized its general supervisory jurisdiction over all lower courts and its inherent powers to do what is necessary for the proper administration of justice, but deferred the exercise of such power to give the Legislature an opportunity to first address the issue of indigent defense funding.[33] Prior to the case in 1990, the Louisiana Supreme Court Judicial Council had created a committee to study the state's indigent defense system. The Spangenberg Group assisted the committee in its study, and in 1992 delivered a report with recommendations to the committee. The committee and full judicial council then issued recommendations to address the inadequacies of Louisiana's indigent defense system.

Following the study and recommendations, a systemic challenge was initiated by a New Orleans staff public defender filing a pre-trial motion in the trial court seeking a declaration of ineffectiveness with regard to his representation of Leonard Peart due to an overwhelming caseload. Granting the motion, the trial court found that the statutes establishing the state's indigent defense system and the New Orleans indigent defense system violated the state's constitution. The trial court ordered a reduction in caseloads, and ordered the legislature to

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[31] Okla. Const. Art. 5, § 46 ("The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing: …Regulating the practice or jurisdiction of, or change the rules of evidence in judicial proceedings or injury before the courts… or providing or changing the methods for the collection of debts, or the enforcement of judgments or prescribing the effect of judicial sales of real estate; …")
[32] Okla. Const. art. 7, §§ 4, 6.
[33] *State v. Peart*, 631 So.2d 780 (La. 1993).

provide funds for additional public defender staff and resources. The Louisiana Supreme Court reversed the trial court's rulings, finding that the statute statutes were constitutional, that the state legislature is not required to fund the indigent defense system that it creates, and that the remedies ordered were not appropriate at that time.

However, the Louisiana Supreme Court also considered the issue of a pre-trial ineffectiveness claim and found that, with sufficient information before trial, a court could rule on such a prospective claim as "[i]t matters not that the ineffective assistance rendered may or may not affect the outcome of the trial to the defendant's detriment."[34] Although a trial judge must make particularized findings regarding each defendant's case, the Louisiana Supreme Court stated that in order to review the record and judgment before it, it needed to make some systemic findings about the state of indigent defense in the jurisdiction. Citing amici briefs and The Spangenberg Group's report on the systemic deficiencies in Louisiana's indigent defense system, the Louisiana Supreme Court found that indigent defendants in the New Orleans court were being denied their state constitutional right to effective assistance of counsel due to their attorneys' excessive caseloads and inadequate resources.

Recognizing but not employing its inherent judicial power, the court held that if the legislature failed to act to reform indigent defense, the court may intervene to ensure that such reform takes place. Rather than directly order legislative funding in the first instance, the Louisiana Supreme Court directed the trial judge to consider Peart's motion, and others that may arise, by holding individual hearings and to apply a rebuttable presumption of ineffective assistance of counsel unless significant improvements were made to the jurisdiction's indigent defense system. The court also held that, in the absence of another available remedy, the trial court must halt any prosecution until an indigent defendant can be provided with effective assistance of counsel.[35]

Following the litigation, the Louisiana Supreme Court created a statewide commission by court rule with a three-year sunset provision, and the legislature ultimately created the current Louisiana Indigent Defense Assistance Board.

CREATING A STATEWIDE AGENCY OR COMMISSION

As mentioned, 42 states plus the District of Columbia have a statewide chief public defender or a statewide body or commission responsible for developing policy and providing oversight for indigent defense services, ranging from fully integrated state public defender programs to organizations that develop standards and provide some oversight, but not control, over local programs.[36] Below we discuss a number of factors to consider in the creation of a new statewide commission.

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[34] *Id*. at 787, citing *Luckey v. Harris*. *supra*, *cert denied*, 495 U.S. 957 (1990); Rodger Citron, Note, *(Un)Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 Yale L.J. 481, 493-94 ("the right to counsel is more than just the right to an outcome").
[35] *Id*. at 791-2.
[36] This includes state bodies that oversee limited case types, such as appeals or capital cases.

Where to House the Agency

When drafting legislation for indigent defense commissions, the question invariably arises about where in a state's government is best to locate the agency: the executive branch, judicial branch, or an independent state agency?

Some believe housing the agency within the judicial branch can be beneficial as the chief justice and other members of the bench will be more inclined to help advocate for adequate indigent defense resources. However, that is not always the case, particularly if indigent defense is a part of the judiciary's budget, and advocating for increased indigent defense funding means less funding for clerks, judges, and court facilities. Others suggest that location in the judicial branch is beneficial to programs with state employees, such as public defenders, as these agencies are not subject to across the board state agency hiring freezes or cutbacks. However, judicial branch functions may still be subject to state budget cutbacks.

Of the state 42 agencies or commissions that have authority over indigent defense services, 24 are housed within the executive branch: Alaska, Arkansas, Delaware, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maryland, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Vermont, West Virginia, Wisconsin and Wyoming. Eighteen are housed within the judicial branch: California, Colorado, Connecticut, Georgia, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New York,[37] North Carolina, Oregon, Texas, Virginia and Washington.

Generally, experience shows that there is no clear advantage to location in the judicial or executive branch. Depending on how the agency or commission is structured, either branch can afford adequate independence, which is the most important aspect to a statewide indigent defense agency or commission. Indeed, in over one-third of these 42 states, the state agency, although housed under the executive or judicial branch for purposes of submitting budgets or for administrative purposes, is largely an independent agency.[38] Consider the following examples:

- In Connecticut, the Public Defender Commission is an "autonomous body within the judicial department for fiscal and budgetary purposes only."
- In Idaho, the state appellate defender agency is created as a self-governing agency under the executive branch.
- In Indiana, the state commission is under the judiciary for administrative purposes only and is an independent agency in terms of decision-making.
- In Kentucky, the Department of Public Advocacy is an "independent agency of state government, attached for administrative purposes to the public protection cabinet."
- In Massachusetts, the Committee for Public Counsel Services is an independent agency which appears as a line item in the judiciary's budget, but is not subject to the approval of the judiciary. Its independence is further secured by the limited

[37] New York's Capital Defender Office has been funded through June 30, 2006, but further appropriations are subject to the state legislature's re-enactment of the death penalty.
[38] For specific statutory citations, see Appendix A.

role of the Supreme Judicial Court, which is empowered only to appoint the members of the committee, and not to supervise its operations.

- In Minnesota, the State Board of Public Defense is, "… a part of, but not subject to the administrational control of, the judicial branch of government."
- In Missouri, the Office of the State Public Defender is an "independent department of the judicial branch of state government."
- In Montana, the Public Defender Commission is established in the department of administration of the executive branch "for administrative purposes only;" the commission and the chief defender hire their own staff and submit budget requests independently.
- In Oregon, although the Public Defense Services Commission is established in the judicial branch, but "[e]xcept for the appointment or removal of commission members, the commission and its employees are not subject to the exercise of administrative authority and supervision by [the judicial department]."

Keys to a Successful Commission

As previously stated, there has been a clear trend among the states toward the creation of a state body to be responsible for the delivery of indigent defense services throughout the state. In addition to ensuring the independence of the defense function, the force behind this movement towards state centralization can be explained by the following major goals which we have heard repeatedly:

- Accountability;
- Oversight;
- Uniform policies and procedures;
- Uniform standards;
- Reliable statistical information;
- Administrative efficiency;
- Cost containment;
- Improved quality of representation; and
- A central voice for indigent defense services.

Independence

The most important role of a successful commission is to insulate the defense function by providing a measure of independence to the indigent defense system from political and judicial influence. Without such independence, the likelihood of successfully improving indigent defense services is greatly diminished. The first of the *ABA's Ten Principles* addresses the critical need for independence in the defense function (see Appendix B). In addition, Standard

5-1.3(b) of the *ABA Standards for Criminal Justice Providing Defense Services* (as cited earlier) calls for the "primary function" of a board to be "to support and protect the independence of the defense services program." In addition, Standard 5-1.3(a) states: "The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence…"

A state oversight body can serve to insulate a state's indigent defense system from political influence and provide a measure of independence. For instance, the oversight body – rather than a political or judicial figure – should appoint the statewide chief or regional chief defender(s). In order to fulfill this critical role of providing independence in the defense function, the body itself should also be independent from personal or political influence. Such independence can be fostered not only by the creation of an independent agency (see above), but also by the makeup of the commission and the terms of commission membership (see Structure of a Commission, below).

Some commissions that have proven to be most effective include those that:

- act with independence and not as a "rubber stamp" for the state public defender or director who controls the commission's agenda;
- speak out when the legislature enacts new laws affecting indigent defense (e.g., enhanced sentencing guidelines) or respond to misconduct by judges or prosecutors;
- maintain contact with the state and local press regarding indigent defense issues and needs;
- challenge inaccurate or misleading statements from the executive and legislative branches regarding the guarantees of effective assistance of counsel and the provision of a quality indigent defense system;
- hold regular and official meetings on a frequent basis to address substantive issues beyond next year's budget; and
- maintain contact with state and local bars and other key players in the criminal justice system, including groups that champion the cause of indigent defense.

Providing a Voice for Indigent Defense and Strong Leadership

As the leader of what is usually a politically unpopular program, to be effective, a chief public defender or executive director of a statewide program must possess an unusual combination of personal and professional skills and management capabilities. A leader cannot afford to be a lightning rod who alienates as many people as he or she energizes. On the other hand, backbone and persistence are integral to the role. Likewise, the ability to discuss issues effectively with diverse audiences and to recruit various constituencies is essential. The leaders

of indigent defense programs need to successfully interface with legislators, judges, prosecutors, community groups, staff, bar associations, and other groups.

Providing Effective Oversight and Adequate State Funding

In order to provide effective oversight of an indigent defense system, a commission needs meaningful standards and guidelines with which to judge the adequacy of the indigent defense providers and individual attorneys. When standards are clearly delineated by statute (as discussed above), the commission is able to act with authority in ensuring compliance. The new Georgia Public Defender Standards Council provides a good example of a commission that is tasked with creating a host of standards that affect the quality of indigent defense representation.[39] The Indiana Public Defender Commission is also required by statute to recommend and adopt standards that govern indigent defense services.[40] However, the existence of standards alone cannot ensure quality indigent defense services. To be effective, standards must be supported by adequate funding.

In order to provide effective oversight, a commission must have sufficient staff and resources to perform its work. A commission cannot monitor caseloads, attorney performance, and compliance with other standards, if it lacks the personnel and resources to discharge its duties. The commission must have the ability to regularly evaluate the indigent defense programs that it oversees. In addition, such evaluations must be performed in a manner that is credible to other state actors and to the programs themselves.

Need for Accurate and Reliable Data

The ability to maintain and assess statewide data on indigent defense is an important component of a successful statewide system and is vital to a commission's ability to oversee - and to predict - costs and caseloads. Therefore, the quality of a state's indigent defense data is a key component to a commission's oversight role. In the event that such a statewide data system does not exist, the state commission and indigent defense agencies to create one since a statewide case-tracking system can be essential to the long-term success of a commission. In the event that such a system exists prior to a commission's formation, the commission and indigent defense agencies should work with other state criminal justice agencies to coordinate all criminal justice data through a uniform statewide case-tracking system.

Unfortunately, the accuracy and usefulness of a state's data often depends on whether local systems are sufficiently and uniformly tracking data. In order to allow for an accurate comparison of caseloads among localities, local programs must be applying the same definition of a case and tracking cases consistently. Thus, localities should be required to track data uniformly and consistently.

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[39] For more information on the enabling statute creating Georgia's commission, see www.gidc.com/aboutus-council-enabling_legislation.htm.

[40] Since 1995, the Indiana Public Defender Commission has adopted standards in non-capital cases, including standards regarding eligibility, appointment and compensation of counsel, caseload limits, and contracts for services. For more information on the Indiana commission's statutory duties and standards, see http://www.in.gov/judiciary/pdc/.

Structure of a Commission

Again, the most important characteristic of an indigent defense commission is its independence or freedom from political or judicial interference in the provision of defense services. In considering the primary aspects of creating a commission, such as appointments, commission members and duties, one should always ask: would this promote or impede the overall independence of the commission or the defense function?

Standard 5-1.3(b) of the ABA Standards for Criminal Justice Providing Defense Services states:

> 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. Boards 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. Boards of trustees should have the power to establish general policy for the operation of the defender, assigned-counsel and contract-for-service programs consistent with these standards and in keeping with the standards of professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees should be members of the bar admitted to practice in the jurisdiction.

Appointing Authority

A variety of methods exist for appointing members to state indigent defense commissions. Examples include:[41]

- Shared responsibility between the chief justice, speaker of the house, the president pro tempore of the senate, the minority leader of the house, the minority leader of the senate and the governor (e.g., Connecticut).

- Shared responsibility between the governor, the chief justice, the board of trustees of the state's criminal justice institute, the speaker of the house of representatives and the president pro tempore of the senate (e.g., Indiana).

- Shared responsibility between the governor, the chief justice, the house, the senate, and six different bar groups, with three additional members appointed by the commission itself (e.g., North Carolina).

[41] See Appendix A.

- Shared responsibility between the governor, the chairman of the legislative council, the chief justice, and the state bar association (e.g., North Dakota).

- Shared responsibility between the supreme court and the governor (e.g., Minnesota).

- Responsibility of the governor, with advice and consent of the senate (e.g., Missouri, Oklahoma).

While some state statutes give the appointing authority much deference in appointing commission members, others require the appointing authority to appoint (or to consider appointing) certain persons. For instance, in Connecticut, the chief justice must appoint two superior court judges, or a current superior court judge and a retired judge (or former judge) of the superior court, circuit court or court of common pleas. In Montana, although all 11 commission members are appointed by the governor, the governor must follow a number of requirements in making such appointments, including appointing: two nominees submitted by the supreme court; three nominees submitted by the president of the state bar; and two non-attorney members of the general public each submitted by the senate and the house. In Massachusetts, where all appointments are made by the state's Supreme Judicial Court, the court must request and give appropriate consideration to nominees for the 15 positions from the Massachusetts Bar Association, county bar associations, the Boston Bar Association, and other appropriate bar groups (e.g., the Massachusetts Black Lawyers' Associations, Women's Bar Association, and the Massachusetts Association of Women Lawyers).

In order to help ensure the independence of commission members, it is best to diversify the delegation of the appointing authority among different governmental bodies or agencies. Such an approach has long been recommended by the ABA standards.[42]

Commission Members

A commission's membership is also related to its independence, as well as that of its appointee(s) and of the indigent defense system or programs that it oversees. Commission members may include a number of categories of persons, including attorneys, non-attorneys, judges, and legislators. However, in determining the categories of persons for potential commission membership, the most important consideration is that the commission have a sufficient number of members so that no single category of members dominates over the others.

Appointed members are usually not compensated for their service, but are often entitled by statute to reimbursement for expenses incurred for their service on the commission (e.g., Colorado, Maryland, North Dakota) and/or a per diem for their work. Because the members' work is normally *pro bono*, it is important to provide for some reimbursement of expenses so that members are not required to donate their financial resources in addition to their time.

[42] *ABA Standards for Criminal Justice Providing Defense Services*, Standard 5-1.3 (b).

State statutes creating indigent defense commissions set forth in varying degrees of detail certain specifications regarding commission members, including qualifications or background. For example:

- The Colorado State Public Defender's five-member commission consists of three attorneys admitted to practice in Colorado, and two non-lawyer citizens of the state.

- In the District of Columbia, four of the 11 Board of Trustee members are to be non-lawyer residents of the District. Specifications for the remaining seven members are less detailed, except that judges of the U.S. Courts in the District of Columbia and of District of Columbia Courts are barred from serving on the Board.

- Minnesota's state board must consist of one district court judge, four attorneys well familiar with criminal defense work (but not employed as prosecutors) and two public members.

- In Montana, some of the 11 commission members must be a member of an organization that advocates on behalf of (1) indigent persons, (2) a racial minority population, (3) people with mental illness and developmental disabilities, and (4) one must be an employee of an organization that provides addictive behavior counseling.

- In North Carolina, two commission members must be a member of the judiciary - at least one of whom is an active member of the judiciary, two commission members must be non-attorneys, and one member must be a Native American. In addition, three appointed members must reside in different judicial districts.

Some states specify that the members not be over-representative of one political party (e.g., Colorado, Missouri, Ohio, West Virginia). Others ensure that board membership is representative of each of the state's congressional districts (e.g., Kansas, Oklahoma) or of some rural counties (e.g., North Dakota), or that consideration be given to a member's residence, sex, race and ethnic background (e.g., Colorado).

A number of state statutes exclude certain categories of individuals from membership, such as:

- Colorado – "No member of the Commission shall be at any time a judge, prosecutor, public defender or employee of a law enforcement agency."

- Indiana – "…none of whom may be a law enforcement officer or a court employee."

- Kentucky – "…none of whom shall be a prosecutor, law enforcement official, or judge…"

While there is no magic formula for membership, serious consideration must be given to the membership characteristics that are needed to create independence from political and personal conflict as well as fair and equal representation of the statewide indigent defense

community. Again, diversification of membership is also critical. It is also extremely important that the commission contain leading members of the state and criminal defense bar. However, all members do not need to have experience in criminal law if they are strong and respected individuals well known to the courts and to persons within the legislative and executive branches. Indeed, the characteristics and stature of a particular commission member can often be more important than the professional category into which he or she falls. Persons such as retired judges, retired prosecutors and legislators should not be excluded from consideration and can play a strong role in a commission's ability to promote positive change. The importance of a commission's membership cannot be overstated; ultimately, a commission's membership is directly linked to its success and to its ability to effectuate positive reform.

Commission Size

Voting requirements virtually always result in creating boards with an odd number of members. Across the country, commissions consist of as few as three members (Maryland) or five members (Colorado State Public Defender), and as many as 15 members (Massachusetts). Most commonly, commissions consist of seven (Minnesota, North Dakota, Connecticut, Indiana, Missouri, Ohio, Oregon) or nine (Ohio, Wisconsin, Iowa, Kansas, Kentucky) members.

In order for a successful commission to perform substantial work and yield significant authority, it should have no fewer than five members and preferably at least seven. Still, although a commission's size can be an important factor in its success, an even greater factor is the appointment of members who will provide a strong voice for the interests of indigent defense and will be respected in the state government.

Length of Commission Membership

The terms of commission membership are usually set by statute and typically run for three or four years.

During agency start-up years, terms are frequently staggered, such as in Kansas, where three of the nine appointees serve one-year terms, three serve two-year terms and three serve for three-year terms. All subsequent appointments are for terms of three years. The Kansas statute also limits members to no more than two consecutive three-year terms. In the District of Columbia, board members are also restricted to a maximum of two consecutive three-year terms.

Appointment of Chairperson

Most state commissions provide for the appointment of a chairperson. The chair of the commission is most often appointed by the commission itself, frequently to a term established by statute that is shorter than the term for commission members. Less frequently, the chair is appointed by the chief justice of the state's supreme court (formerly the case in North Dakota and Oregon) or by the governor (e.g., Oklahoma and Ohio). The chairperson should be an individual who is clearly well-known to the three branches of government, the bar, and the indigent defense community. The chairperson should also be a strong leader who will well direct the work of the commission.

Appointment of Chief Public Defender

In states with a statewide indigent defense programs, the state commission often appoints an indigent defense director or chief public defender (e.g., Connecticut, Hawaii, Kansas, Massachusetts, Missouri). In the states that have statewide indigent defense programs but no state commission, the chief defender is appointed by the governor (Alaska, Delaware, New Jersey, New Mexico, Rhode Island, Vermont, Wyoming). Several of these states require the governor to seek the advice and consent of the state senate (e.g., New Jersey, Vermont, Rhode Island). In Wyoming, the district public defenders are appointed by the governor upon recommendation from district judges and county commissioners. In West Virginia, however, the governor appoints with advice and consent of the senate. And in Kentucky, the governor appoints the "public advocate" from a list of three individuals recommended by the commission.

In appointing the public defender, it is important that the commission is able to insulate the chief defender from direct political influence. Colorado illustrates a method for achieving independence from political influence for both the state public defender and the state's "alternate defense counsel." Colorado law provides for the commissions of the Office of State Public Defender Commission and the Alternate Defense Counsel to select the heads of each agency. Rather than being accountable to one person for his or her appointment, the public defender and alternate defense counsel are each accountable to a commission whose members are selected by the state supreme court. In this way, the director's job in both agencies is insulated from politics and the desire of a single person.

Once a chief public defender is appointed, it is important that the commission work with the defender and receive his or her input on many issues. At the same time, certain decisions should ultimately be made by the commission alone.

Responsibilities of the Commission

Some state statutes spell out the responsibilities of the commission, the indigent defense director and/or the chief public defender in only a couple of sentences, while other state statutes provide much more detail.[43] Often statutes require that the indigent defense director or chief public defender carry out the wishes of the board or commission, although sometimes statutes specifically enumerate the director's responsibilities. For example, in Kansas, the state director of indigents' defense services is required by statute to:

- "Supervise the operation, policies and procedures of the office of the board;
- Prepare and submit to the board an annual report on the operation of the office in such form as the board directs; and
- Perform such other duties as the board requires."

In Oklahoma, the executive director has over 20 specific statutory powers and duties, including:

[43] For statutory citations, see Appendix A.

- "To enter into contracts to provide counsel [to indigent defendants]…
- To review and approve or disapprove claims for expenditures of monies…
- To promote the education and training of all attorneys representing indigent criminal defendants…
- To employ personnel as necessary to carry out the duties imposed upon the System by law and to set the salaries of such personnel, subject to the salary schedules adopted by the Board…
- To establish reasonable hourly rates of compensation for [appointed attorneys]…
- To establish maximum caseloads for attorneys employed by the System, subject to approval by the Board…"

Over the years, drafters of enabling statutes have approached their tasks in various ways. Some have created a skeletal statute that leaves the details of the indigent defense system to the board, chief defender or director. Others have chosen to create specific statutory requirements deemed essential. Whichever approach is used, most state statutes delineate the responsibilities of the board separately from the responsibilities of any indigent defense director or chief public defender. As called for by ABA standards, while the board or commission "should have the power to establish general policy for the operation" of indigent defense services, it "should be precluded from interfering in the conduct of particular cases."[44]

General responsibilities of a board or commission delineated by statute may include the following:

- "The agency shall have as its principal purpose the development and improvement of programs by which the state provides legal representation to indigent persons." (West Virginia)

- The Georgia Public Defender Standards Council "shall be responsible for assuring that adequate and effective legal representation is provided, independently of political considerations or private interests, to indigent persons who are entitled to representation..." (Georgia)

- "The Board of Trustees shall establish general policy for the service but shall not direct the conduct of particular cases." (District of Columbia)

- The State Board shall "provide supervise and coordinate in the most efficient and economical manner possible, the constitutionally and statutorily required counsel and related services for each indigent person accused of a felony and for such other indigent persons as prescribed by statute." (Kansas)

- "There shall be a committee for public counsel services…to plan, oversee and coordinate the delivery of criminal and certain noncriminal legal services by all salaried public counsel, bar advocate, and other assigned counsel programs, and private attorneys serving on a per diem basis." (Massachusetts)

[44] *ABA Standards for Criminal Justice Providing Defense Services*, Standard 5-1.3(b).

Certain other basic responsibilities may also be delegated to the state commission by statute, such as:

- "The commission may adopt such rules as it deems necessary for the conduct of its internal affairs." (Connecticut)

- "The [Georgia Public Defender Standards Council] shall [for example]: …
    - assist the public defenders throughout the state in their efforts to provide adequate legal defense to the indigent…
    - be the fiscal officer for the circuit public defender offices…
    - collect, maintain, review, and publish records and statistics for the purpose of evaluating the delivery of indigent defense representation in Georgia...
    - approve the development and improvement of programs which provide legal representation to indigent persons and juveniles…
    - improve and implement programs, services, rules, policies, procedures, regulations, and standards as may be necessary…" (Georgia)

- "The commission shall do the following [for example]:
    - Make recommendations to the supreme court concerning standards for indigent defense services provided for [capital] defendants…
    - Adopt guidelines and standards for indigent defense services under which the counties will be eligible for reimbursement…
    - Make recommendations concerning delivery of indigent defense services in Indiana.
    - Make an annual report to the governor, the general assembly, and the supreme court on the operation of the public defense fund." (Indiana)

- "The state board of indigents' defense services shall [for example]: …
    - provide by rule and regulation for the assignment of attorneys to the panel for indigents' defense services…
    - adopt rules and regulations prescribing standards and guidelines governing the filing, processing and payment of claims [for compensation and reimbursement]…
    - collect payments from indigent defendants as ordered by the court…
    - adopt rules and regulations…which are necessary for the operation of the board and the performance of its duties and for the guidance of appointed counsel, contract counsel and public defenders…" (Kansas)

- "The [Public Advocacy Commission] shall [for example]: …
    - Assist the public advocate in drawing up procedures for the selection of his staff;
    - Review the performance of the public advocacy system and provide general supervision of the public advocate;

    - Assist the Department of Public Advocacy in ensuring its independence through public education regarding the purposes of the public advocacy system; and
    - Review and adopt an annual budget prepared by the public advocate for the system and provide support for budgetary requests to the general assembly." (Kentucky)

- "The commission shall [for example]:
    - Develop standards governing the delivery of indigent defense services…
    - Establish and implement a process of contracting for legal counsel services for indigents.
    - Establish a method for accurate tracking and monitoring caseloads of contract counsel and public defenders.
    - Approve and submit a biennial budget request to the office of the budget." (North Dakota)

Some state commissions are directed to develop not only a general plan for the delivery of indigent defense services throughout the state, but also for individual localities, as well. In Kansas, for instance, the state board of indigents' defense services must "establish, in each county or combination of counties designated by the board, a system of appointed counsel, contractual agreements for providing contract counsel or public defender offices, or any combination thereof, on a full-or part-time basis, for the delivery of legal services for indigent persons accused of felonies." The legislation creating North Dakota's new commission calls for it to "[e]stablish public defender offices in the regions of the state as the commission considers necessary and appropriate."

Other statutes charge state commissions with specific substantive responsibilities, such as establishing certain standards and guidelines for indigent defense. The standards may cover topics including:

- Indigency determination;
- Caseload limits;
- Attorney qualifications and training;
- Conflict of interest determinations;
- Attorney compensation;
- Provision of experts and other services; and
- Staffing levels.

In some states, the authority for the adoption of standards or program operation is either assumed in general authority, found in another statute, or placed within the authority of the state supreme court. In Georgia, although the former commission (GIDC) could make recommendations regarding standards, the authority for promulgating standards rested with the Georgia Supreme Court. Now, the new commission has been given the responsibility and authority for creating a number of standards itself. In North Carolina, in capital cases, the Indigent Defense Services (IDS) Commission has placed the responsibility for appointments of counsel, approval and compensation of experts, and compensation of attorneys on the statewide

Capital Defender and IDS staff; in appellate cases, the responsibility is placed on the Appellate defender and IDS staff.

In Massachusetts, the Committee for Public Counsel Services (CPCS) is given authority to establish the rate of compensation for court-appointed counsel, but only "subject to appropriations" which has severely limited this authority in the past.[45] On the other hand, the Massachusetts statute is unusual in placing the power of appointment of counsel with CPCS and removing it from the courts. The statute states, "A justice or associate justice shall assign a case to the committee, as hereafter provided, after receiving from the probation officer a written report containing the probation officer's opinion as the defendant's ability to pay for counsel, based upon standards and procedures provided for in section two." With the exception of emergency or bail-only cases, once indigency is determined, the particular attorney or organization to be appointed to a case is determined by CPCS. For cases that are not assigned to CPCS staff attorneys, CPCS certifies private attorneys, or bar advocates, for appointment and contracts with local bar advocate programs in each county that are responsible for assigning the bar advocates to arraignment sessions to receive new cases and for assigning other cases as needed.

STUDY COMMISSIONS

In many states, the catalyst for the creation of a state indigent defense commission has been a prior study commission or task force. Study commissions have been created in various ways, including at the behest of the legislature, by the state supreme court, and from the state bar's initiative. The most successful study commissions have critically examined the issues confronting the state's indigent defense system and made thoughtful recommendations for change.

Key Characteristics of a Successful Study Commission (Task Force)

- The selected task force members are respected individuals representative of the key stake-holders in the criminal justice system: judges, prosecutors, the state's county association, bar associations and criminal defense lawyers.[46] Beyond these system stake-holders, the task force should also have legislative representation and, when appropriate, persons from the private sector.

- The chair of the task force takes his or her role seriously, and sets a serious, high-level tone for other task force members, is ambitious in directing the role and work of the task force, and assures that recommendations are carefully crafted and that necessary follow-through with the legislature occurs. Several successful task

[45] Prior to the 2005 legislative approval that increased compensation rates to $50/$60/$100 district court/superior court/murder cases, respectively, CPCS had recommended rates for assigned counsel at $60/$90/$120, but the Massachusetts legislature since 1996 had appropriated the rates at $30/$39/$54.

[46] Involving current prosecutors and judges can be an important component of a study commission; their input and support can be very useful. However, in order to keep the defense function insulated and independent from the judicial and prosecutorial functions, acting prosecutors and judges should not normally be members of a permanent commission.

forces have been chaired by a highly respected corporate lawyer who had no prior involvement with indigent defense but who accepted appointment to the task force out of a public service commitment.

- An in-depth study of the state's current indigent defense system, which documents weaknesses and areas for needed change, is undertaken. Blue ribbon task forces are typically comprised of very busy individuals who lack the time to do detailed data collection, data analysis or extensive site work to examine the operation of their state's indigent defense system. It is extremely important for the study commission to provide reliable statements, reports, and quantitative data on the indigent defense system. In this regard, many task forces secure resources to hire expert consultants to study and document deficiencies in the system.[47]

- In addition to retaining the services of experts to conduct a broad-based study of the indigent defense system, many task forces solicit direct input from individuals working "in the trenches," such as private bar members who serve as assigned counsel, public defenders, prosecutors, judges, sheriffs and others with knowledge of pre-trial jail population trends, county officials and community members. Task forces hold public hearings to receive testimony on a variety issues. In building support for legislative proposals, it is crucial for the task force to reach out to all affected parties during the fact gathering process to build allies for support during the legislative session.

- The task force should have several open meetings around the state to provide interested persons with the opportunity to give oral and written testimony about the condition and future of indigent defense services in the state.

- Successful task forces have invited representatives from effective indigent defense programs in other states to testify and also have learned from persons that have succeeded in reforming their state systems.

- Transparency is important for successful task forces. Normally, meetings of the task force should be open and available to the public. Executive sessions should be reserved for meetings in which sensitive decision are discussed.

Typically, study commissions have recommended that the legislature create a permanent, statewide commission on indigent defense. Another common recommendation is that the state legislature appropriate adequate funds for the commission to properly oversee indigent defense services in the state.

Forming a high profile study commission and providing the necessary resources for it to adequately study indigent defense is no guarantee its recommendations will eventually become

[47] The Spangenberg Group has served in this capacity for more than 25 study commissions, most recently in New York, Missouri, Virginia, Georgia and Texas.

legislation. In at least nine states,[48] one or more task forces have fought for changes that were never implemented; these nine states, along with several others,[49] still have no statewide structure to oversee indigent defense services. In some instances, study efforts were not successful during their first year or more of existence; however, many had success after a period of several years as the case for reform was established and the legislature was persuaded of the need for action. Positive reform takes time. In Georgia, for instance, study efforts took place over a period of 20 or more years before seeing any real measure of success.

Even in states with an existing statewide structure or commission, it is often necessary over time to revise or improve the state's indigent defense system. The creation of a state commission is by no means a panacea to a system's problems, and updated studies can be helpful to review an existing system for further areas in need of reform.

CONCLUSION

As this report has shown, numerous variations exist among the indigent defense systems of the 50 states. Those seeking change should know that there is not one magic formula for effectuating reform. While improvements have occurred across the country by various ways and means, three ingredients are essential to creating a quality indigent defense system: increased state funding, independence and meaningful statewide oversight.

Within the past several years alone, four states have created significant positive changes to their indigent defense systems by establishing new statewide oversight bodies. Two of these states have also created state public defender systems. Several states currently have study commissions that are working for reform. A number of additional states have recently achieved positive reform, whether through the work of a study commission, litigation, or otherwise, and provide encouraging examples for other states that are struggling to achieve reform. The unmistakable trend across the nation is towards greater state funding and oversight. Given these developments, there is genuine hope for substantial improvements to states' indigent defense systems across the country.

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[48] Alabama, Arizona, Illinois, Maine, Michigan, Mississippi, New York (although recommendations of a current commission are pending), Pennsylvania, and Washington.
[49] California, Idaho, South Dakota, and Utah.

Appendix A

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STATEWIDE INDIGENT DEFENSE SYSTEMS: 2006

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STATEWIDE INDIGENT DEFENSE SYSTEMS: 2006

In the decades since the opinion in *Gideon v. Wainwright* was issued, states have adopted varying approaches to fulfill the U.S. Supreme Court's mandate to provide counsel at government expense to indigent persons in criminal (and various other) proceedings. In some states, the responsibility for indigent defense services is entirely a state responsibility: both funding and oversight operate at a state level. In other states, indigent defense services remain primarily a county responsibility. In still other states, indigent defense is a shared responsibility between state and local governments.[50]

Despite these variations, there is a clear trend among states to develop some sort of statewide oversight. In many states, both those with a statewide public defender program and those without, such oversight is provided exclusively through a state commission or oversight board. The oversight board is typically charged with setting policy for indigent defense services and advocating for state resources. In several states the commission provides some statewide oversight, but lacks full authority over indigent defense services. In other states, the oversight is provided exclusively by the chief public defender, and there is no commission.

The accompanying table, *Statewide Indigent Defense Systems: 2005*, sets out the statewide delivery systems, where they exist, used among the states and the District of Columbia. For the majority of states, the table describes the type of system used to oversee provision of all indigent defense services, including trial and appellate cases. However, for a few states, there are more specialized programs listed, such as statewide appellate or capital post-conviction defender programs.

For each program listed, the table indicates:

- whether it is a statewide public defender system. The table further indicates whether a public defender program handles all criminal cases at the trial level, or handles some other type of cases, such as selected cases at the trial level, direct appeals or capital post-conviction;
- whether it has an oversight commission;
- if a commission exists, the duties and responsibilities of the commission;
- if it is a state public defender program, the selection process, term, qualifications and duties of the chief public defender;
- if it is a commission without a public defender program, the selection process, qualifications and duties of the executive director; and
- in which state governmental branch the agency is housed, as well as a citation to the enabling statute.

[50] In 17 states, counties are responsible for more than 50 percent of indigent defense services funding. In two of these states, Pennsylvania and Utah, indigent defense funding at the trial level is 100 percent a local responsibility.

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For the purposes of the table, a statewide public defender system is defined as a program where the primary representation of indigent defendants is provided throughout the state by salaried, staff public defenders paid entirely with state funds. Nineteen states[51] have a state public defender system providing trial level representation statewide in felonies, misdemeanors and juvenile delinquency cases, and primary appellate services.

As previously mentioned, a number of the states with public defender programs also have oversight commissions, but that is not always the case. Similarly, there are five states that have oversight commissions with full authority over indigent defense services statewide, but there is not a full-service statewide public defender program that is responsible for all cases.[52]

Two states (Florida and Tennessee) are served by state-funded elected public defender offices. Due to the independence of elected officials, there is no state oversight for those programs, and we have not categorized them as statewide public defender systems. Ten states fall into the category of having an oversight commission for trial-level services that lacks full authority over indigent defense services.[53] Finally, 15 states have trial-level indigent defense systems that resist easy categorization. In 11 of these 15 states, indigent defense funding is primarily a county responsibility.[54]

Nine of the states[55] that have no statewide public defender system providing trial level representation do have statewide appellate defender offices funded by the state. Offices in California, Indiana, Mississippi and Tennessee are specialty programs handling select types of appeals (such as capital post-conviction proceedings).

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[51] Alaska, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Maryland, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, Rhode Island, Vermont, Wisconsin and Wyoming.
[52] Massachusetts, North Carolina, Oregon, Virginia and West Virginia. All of these states make use of public defender programs but the programs either do not serve all areas of the state or are restricted to select cases, such as just felonies.
[53] Georgia, Kansas, Indiana, Louisiana, Nebraska, Nevada, Ohio, Oklahoma, South Carolina and Texas.
[54] Alabama, Arizona, California, Idaho, Illinois, Maine, Michigan, Mississippi, Montana, New York, North Dakota, Pennsylvania, South Dakota, Utah and Washington.
[55] California, Idaho, Illinois, Indiana, Kansas, Michigan, Mississippi, Oklahoma and South Carolina.

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STATEWIDE INDIGENT DEFENSE SYSTEMS: 2006

STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
ALABAMA			None	Not applicable	None	Not applicable
ALASKA State Public Defender Agency (executive agency, Department of Administration, est. 1980), ALASKA STAT. §§ 18.85.010-85.180.	√		None	Not applicable	**Chief Public Defender** appointed by Governor from nominations of judicial council. Confirmed by majority of legislature in joint sitting. Four-year term; renewal requires legislative confirmation. Member of bar. Governor can remove for good cause.	Appoint, supervise and control assistant public defenders and other employees. Submit annual report to legislature & Supreme Court on number and types of cases, dispositions and expenditures. Full-time; private practice prohibited.
ALASKA Office of Public Advocacy (executive agency, Department of Administration, est. 1984), ALASKA STAT. §§ 44.21.410-21.420.	√		None	Not applicable	**Public Advocate** appointed by Governor. Serves at will of Governor.	Provides Guardians Ad Litem for abused and neglected children and status offenders. Provides representation in conflict cases from the Alaska Public Defender Agency. Acts as Public Guardian and conservator for citizens with disabilities.
ARIZONA			None	Not applicable	None	Not applicable
ARKANSAS Arkansas Public Defender Commission (executive agency, est. 1997), ARK. CODE ANN. §§ 16-87-101 to -87-110.	√		Seven member Commission appointed by Governor: at least four licensed Arkansas attorneys experienced in criminal defense; at least one county judge. Governor designates one member as Chair. No more than two residents of same congressional district. No two members from same county. Serve five-year terms.	Establish policies and standards for Public Defender System. Approve budgets for trial public defender offices. Require annual reports from trial public defender offices. Appoint Executive Director. Evaluate performance of Executive Director, Capital, Conflicts & Appellate Office, trial public defenders and private assigned counsel. Maintain list of private attorneys willing and qualified to accept capital case appointments. Authorize contracts with trial public defenders.	**Executive Director** appointed by Commission. Must have experience in defense of capital cases. Serves at will of commission.	Maintain records of operation of public defender system. Prepare budget for commission. Implement attorney performance procedures pursuant to commission's standards. Maintain court opinions, statutes, etc. for use by trial public defenders and court-appointed counsel. Supervise capital conflict and appellate office. Maintain appellate brief bank. Convene training program related to public defender system. Prepare annual report.

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STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
CALIFORNIA California Habeas Corpus Resource Center (judicial branch, est. 1998), CAL. GOV'T CODE §§ 68660-68666.		√	Five-member Board of Directors confirmed by the Senate. Each of the state's five Appellate Projects shall appoint one board member; all must be attorneys. No lawyer working as judge, prosecutor or in a law enforcement capacity is eligible. Four year terms.	Appoint Executive Director.	**Executive Director** appointed by Board of Directors. Must be member of California State Bar during the five years preceding appointment and possess substantial experience in the representation of accused or convicted persons in criminal or juvenile proceedings during that time. Serves at the will of the board.	Hire up to 30 attorneys to represent any indigent person convicted and sentenced to death in California in postconviction actions in state and federal courts. Work with the supreme court to recruit attorneys to accept death penalty habeas case appointments and to maintain a roster of attorneys so qualified. Employ investigators and experts to provide services to appointed attorneys in capital postconviction cases. Develop and maintain brief bank for use by appointed counsel. Review case billings and recommend compensation of members of the private bar to the court. Prepare annual report on the status of appointment of counsel for indigent prisoners in capital postconviction cases.
CALIFORNIA Office of the State Public Defender (judicial branch, est. 1976), CAL. GOV'T CODE §§ 15400-15404, 15420-15425.		√	None	Not applicable	**State Public Defender** appointed by Governor subject to confirmation by the Senate. Must be member of California State Bar for the five years preceding appointment and must have substantial experience in the representation of accused or convicted persons in criminal or juvenile proceedings during that time. Appointed for term of four years.	Employ deputies and other employees, establish and operate offices as needed. May contract with county public defenders, private attorneys, and nonprofit corporations to furnish legal services to indigent defendants. May hire 15 additional staff attorneys and support staff. Since 1990, Office of the State Public Defender has been required by all three branches of government to focus exclusively on representation in death penalty direct appeal cases.
COLORADO Office of State Public Defender (judicial agency, est. 1969), COLO. REV. STAT. §§ 21-1-101- to -1-106.	√		Five member Office of State Public Defender Commission appointed by Supreme Court. No more than three from same political party. Three attorneys, two non-attorneys. No judges, prosecutors, public defenders or law enforcement personnel.	Appoint State Public Defender and discharge for cause.	**State Public Defender** appointed by Commission. Five-year, renewable term. Member of bar five years prior to appointment. Full-time position.	Employ and set compensation for all employees (salaries approved by Supreme Court); establish regional offices as necessary; provide legal services to indigents accused of crimes that are "commensurate with those available to non-indigents" independently of any political consideration or private interests.

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STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
COLORADO Office of Alternate Defense Counsel (judicial agency, est. 1997), COLO. REV. STAT. §§ 21-2-101 to -2-106.			Nine member Office of Alternate Defense Counsel Commission appointed by Supreme Court. No more than five from same political party. Six member lawyers, each representing one of the six congressional districts, all of whom are Colorado licensed lawyers practicing criminal law. Three members citizens not licensed to practice law in Colorado. No member at any time a judge, prosecutor, public defender or employee of a law enforcement agency. Serve four-year terms.	Select an Alternate Defense Counsel; serve as an advisory board to the alternate defense counsel; advise alternate defense counsel on development and maintenance of competent and cost-effective representation. Shall meet at least annually.	**Alternate Defense Counsel** appointed by Commission to renewable five-year term. Must be licensed to practice law in Colorado for at least five years prior to appointment. May not hold private practice. Serves at will of the Commission.	Employ and set compensation for all employees. Provide legal representation to indigent persons and partially indigent persons in circumstances when the state public defender has a conflict of interest by contracting with licensed attorneys and investigators. Legal services provided to indigents shall be commensurate with those available to non-indigents and independent of any political considerations or private interests.
CONNECTICUT Public Defender Services Commission (autonomous body within judicial department for fiscal and budgetary purposes only, est. 1974), CONN. GEN. STAT. §§ 51-289 to 51-300.	√		Seven member Commission: two judges appointed by Chief Justice; one member appointed by each: Speaker of House, President Pro Tem of Senate, minority leader of House, minority leader of Senate. Chairman appointed by Governor. Three-year term. No more than three, other than chairman, from same party. Two of four non-judicial members non-attorneys. No public defenders.	Adopt rules for Division of Public Defender. Establish a compensation plan comparable to state's attorneys. Establish employment standards. Appoint Chief Public Defender and Deputy Chief Public Defender. Remove Public Defender and Deputy Public Defender for cause following notice and hearing. Submit annual report to Chief Justice, Governor and Legislature by October 15. (See duties of public defender.)	**Chief Public Defender** appointed by Commission for a four-year term. Member of state bar for five years. Full-time position.	Direct and supervise work of all personnel. Submit annual report, including data and recommendations for changes in law, to Commission by September 15. (Note extensive list in Sec. 51-291.)
DELAWARE Office of the Public Defender (executive agency, est. 1953), DEL. CODE ANN. tit. 29, §§ 4601-4607.	√		None	Not applicable	**Public Defender** appointed by Governor. Six-year term. Qualified attorney licensed in Delaware.	Appoint assistant attorneys, clerks, investigators and other employees as necessary and set salaries. Determine indigency prior to arraignment. Prepare annual report.

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STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
DISTRICT of COLUMBIA D.C. Public Defender Service (independent agency, est. 1960), D.C. CODE ANN. §§ 1-2701 to 1-2708.			Eleven member Board of Trustees. Appointed by panel of two U.S. judges, two D.C. judges and Mayor of D.C. Three-year term; not more than two consecutive. No judges. Four of eleven members non-attorney residents of D.C.	Establish general policy but shall not direct conduct of particular cases. Submit fiscal year report to Congress, chief judges of U.S. Courts and D.C. Courts and D.C. Mayor. Arrange annual independent audit. Quarterly reports to court on matters relating to appointment system. Appoint Director and Deputy Director and set their salaries.	**Director** appointed by Trustees. Serve at pleasure of Trustees. Member of D.C. Bar. No private practice.	Employ and supervise personnel. Set compensation not to exceed salary paid to U. S. Attorneys and staff.
FLORIDA Florida Public Defender Association (FPDA), Est. 1972; Florida Public Defender Coordination Office (FPDCO), not statutorily established.			None per se, but the FPDA is governed by a Board of Directors comprised of the 20 elected public defenders in Florida, two representatives of the assistant public defender staff and one representative apiece from public defender investigative and administrative staff. The FPCDO works with the FPDA.	The FPDA engages in activities that promote and develop the public defender system in Florida. The FPCDO coordinates FPDA meetings; collects caseload and budget information from public defenders; analyzes public defender workload; prepares annual funding formulae which are based on caseload and attorney unit cost and used by the three branches of government and the circuit public defenders in the budget request process; monitors pertinent legislative developments; conducts training for public defender staff; and circulates pertinent case law to the elected public defenders.	Not applicable	Not applicable

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STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
GEORGIA Georgia Public Defender Standards Council (independent agency within judicial branch, est. 2003), GA. CODE ANN. §§ 17-12-1 to -12-128.		√[56]	Eleven member council. Members appointed by the Governor, Lt. Governor, Speaker of the House, Chief Justice of the Supreme Court, and Chief Judge of the Court of Appeals. One member from each of the state's 10 judicial districts who serve four-year terms, plus a circuit public defender, selected by a majority of the circuit public defenders, who serves a two-year term.	Adopt standards on: staff size, qualifications and caseloads for circuit public defender offices; minimum experience, training, performance and compensation for appointed counsel; qualifications and performance of counsel in capital cases; determination of indigence; a uniform definition of a "case"; and use of contract systems. Appoint the Mental Health Advocate and Georgia Capital Defender.	**Director** appointed by Council. Must be member in good standing of the State Bar with at least three years experience in the practice of law.	Administer and coordinate the operations of the Council and supervise compliance with rules, policies, procedures, regulations, and standards adopted by the Council.
HAWAII Office of State Public Defender (executive agency, Department of Budget and Finance, est. 1970), HAW. REV. STAT. §§ 802-1 to 802-12.	√		Five member Defender Council (est. 1971). Appointed by Governor. Serve at Governor's pleasure. One member from each county.	Council is governing body of Office of State Public Defender. Shall appoint Public Defender. Approve employment decision of Public Defender. Council Chairman selected by members of the Defender Council.	**State Public Defender** appointed by Council. Four-year term. Qualified to practice law in Hawaii. Full-time position.	Employ assistant public defenders, investigators and other support personnel, subject to approval by the Council. Assistant public defenders may be part-time and engage in private practice other than criminal law.
IDAHO State Appellate Public Defender (within executive branch agency, the Department of Self-Governing Agencies, est. 1998), IDAHO CODE §§ 19-867 to 19-872.		√	None	Not applicable	**State Appellate Defender** appointed by the governor, with advice and consent of the senate, from a list of 2-4 persons recommended by a committee comprised of the president of the Idaho state bar association, chairmen of the senate judiciary and rules committee, and a citizen at large appointed by the governor. The chief justice of the Idaho supreme court, or her designee, is ex officio member of the committee. Public defender must be attorney licensed to practice in Idaho with at least five year experience practicing law. Four-year term; removed only for good cause.	Provide appellate and postconviction representation to indigent defendants convicted of felony offenses in those counties which participate in the capital crimes defense fund; prepare annual report. Employ deputy state appellate defenders and other employees. Adopt necessary policies or rules.

[56] Public defender offices represent indigent defendants in Superior Court matters (felonies and juvenile delinquency cases) statewide.

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STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
ILLINOIS Office of State Appellate Defender (agency of the Judicial department, est. 1972), 725 ILL. COMP. STAT. 105/1 – 105/11.		√	Nine member Board of Commissioners appointed by various courts and bars. Governor appoints Chair. Serves one six-year term.	Approve budget. Advise Appellate Public Defender on policy. Can recommend dismissal of the Appellate Public Defender.	**State Appellate Defender** appointed by Illinois Supreme Court. Four-year term. Qualified to practice law in Illinois.	Provide representation in criminal appeals. Establish offices around the state. Train and assist trial level defenders.
INDIANA Public Defender Commission (judicial agency, est. 1989), IND. CODE §§ 33-40-5 to -40-5-5.			Eleven member Public Defender Commission: three appointed by Governor; three appointed by Chief Justice; one appointed by Board of Indiana Criminal Justice Institute; two House members appointed by the Speaker of the House; two Senate members, appointed by Speaker Pro Tempore of the Senate. Four-year term. No law enforcement officers or court employees. Members designate one member Chair.	Set standards for indigent defense services in capital and non-capital cases. Adopt guidelines and fee schedule under which counties may be reimbursed. Make recommendations concerning the delivery of indigent defense services in Indiana. Prepare annual report on operation of public defense fund.	None	Not applicable
INDIANA Public Defender of Indiana (judicial agency, est. 1945), IND. CODE §§ 33-40-1 to -40-1-6.		√	None	Not applicable	**Public Defender** appointed by Supreme Court. Four-year term. Resident. Practicing lawyer in Indiana for three years.	Represent all indigent defendants in post-conviction proceedings only.
IOWA Office of the State Public Defender (independent agency within executive branch, est. 1981), IOWA CODE §§ 13B.1-13B.11.	√		Five member Indigent Defense Advisory Commission: no more than three licensed to practice law in Iowa. Three members appointed by Governor - one who is nominated by Iowa State Bar, and one who is nominated by state supreme court. Two members from the General Assembly, one from each chamber and no more than one from each political party. Each member serves a three-year term.	Advise the Governor, General Assembly and the state public defender regarding hourly rates and per case fee limitations for court-appointed counsel.	**State Public Defender** appointed by Governor. Four-year term. Licensed to practice law in Iowa.	Oversee all 18 public defender offices. Coordinate non-public defender indigent defense program. Contract with attorneys when public defender unable to take case.

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STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
KANSAS State Board of Indigents' Defense Services (executive branch agency, est. 1982), KAN. STAT. ANN. §§ 22-4501 to -4529.		√[57]	Nine member Board: five lawyers, four non-lawyers. Appointed by Governor and confirmed by Senate. Two members from First Congressional District, one of whom is a registered Kansas lawyer, and at least one member from each other Congressional District. At least one (and up to five) registered Kansas lawyers from each county with over 100,000 population. No members may be judicial or law enforcement personnel. Three-year terms.	Appoint Director and public defenders. Maintain statistics on indigent defense representation. Conduct training programs. Establish public defender offices. Enter into contracts with attorneys to provide indigent defense representation and with cities or counties for misdemeanor representation. Provide technical assistance to public defenders and private attorneys.	**Director** appointed by Board. Must be licensed in Kansas and demonstrate commitment and ability in criminal law.	Serve as Chief Executive Officer of Board. Supervise operation, policies, procedures of Board. Prepare annual report.
KENTUCKY Department of Public Advocacy (independent state agency within executive branch, est. 1972), KY. REV. STAT. ANN. §§ 31.010-31.015.	√		Nine appointed members plus deans of Kentucky law schools. Two members appointed by Governor. One by speaker, one by president of the senate, two by Supreme Court; two criminal lawyers appointed by Governor from list of five submitted by Bar Association, one appointed by Governor from list submitted by Kentucky Protection and Advocacy Advisory Board. Four-year term. No prosecutors or law enforcement officials. Chair elected by Commission to one-year term. Also a 17-member citizen advisory board appointed by the Public Advocate.	Recommend to Governor three attorneys as nominees for Public Advocate. Assist Public Advocate in selecting staff. Provide general supervision of Public Advocate and review performance. Engage in public education and generate political support. Review and adopt annual budget. Not interfere with handling of cases.	**Public Advocate** appointed by Governor from nominees submitted by Commission. Member of Kentucky Bar with five years experience. Four-year term.	Appoint Deputy Public Defender. Appoint assistant public defenders and other personnel. Serve as ex officio, non-voting member of Commission. Appoint 17-member Advisory Board for Protection and Advocacy Division.

[57] Public defender offices represent indigent defendants in felony cases statewide.

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STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
LOUISIANA Louisiana Indigent Defense Assistance Board (separate board within executive branch, est. 1997), LA. REV. STAT. ANN. §§ 15:151-15:151.4.			Fifteen-member Board. The governor appoints six members and designates the chairman; the chief justice and president of the Louisiana State Bar Association each appoint two members; the president of the Senate and the speaker of the House of Representatives each appoint one member; and the president of the Louisiana Chapter of the Louis A. Martinet Society, the chairman of the Louisiana State Law Institute's Children Code Committee and the executive director of the Louisiana Interchurch Conference each appoint one member, subject to confirmation by the Senate. (Eligiblity requirements of some members not listed.) In addition, there are two ex officio, nonvoting members of the board, one each appointed by the Louisiana Association of Criminal Defense Lawyers and the Louisiana Public Defender's Association.	Sets terms of employment and compensation of Director. May provide supplemental funds and shall adopt rules for providing supplemental funds to judicial district indigent defender boards; may set the terms of employment and compensation of a director and staff; and enter into contracts for the purpose of maintaining and operating an office. In capital cases, board appoints counsel, adopts rules and retains counsel to represent capital defendants on direct appeal and for post-conviction relief. Administers the DNA Testing Post-Conviction Relief for Indigents fund. Prepares annual report for legislature.	**Director** selected by Board. Attorney with five years prior experience in criminal practice. Board sets term.	Assist Board in enforcing its standards and guidelines. Supervise attorneys in appellate Division and Capital Litigation programs. Manage monies in Expert Witness/Testing Fund and District Assistance Fund.
MAINE			None	Not applicable	None	Not applicable
MARYLAND Office of the Public Defender (executive agency, est. 1971), MD. ANN. CODE art. 27A, §§ 1-14.	√		Three-member Board of Trustees; two must be active attorneys. Appointed by Governor. Three-year term. Chair designated annually by Trustees.	Study and observe operation of Public Defender office. Coordinate activities of district Advisory Boards. Appoint Public Defender. Advise Public Defender on all relevant matters.	**Public Defender** appointed by Board of Trustees. Term is at the pleasure of Trustees. Attorney admitted in Maryland plus five years in practice.	Appoint Deputy Public Defender with Board approval. Appoint First District Defender in each judicial district. Appoint assistant public defenders with advice of District Defenders. Appoint other employees. Maintain at least one office in each district. General responsibility for operation of all offices. Maintain records. Supervise district defenders' maintenance of local attorney panels.

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STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
MASSACHUSETTS Committee for Public Counsel Services (independent agency; judicial branch for budget purposes only, est. 1983), MASS. GEN. LAWS ch. 211D, §§ 1-15.		√[58]	Fifteen member Committee. Appointed by Justices of Supreme Judicial Court. Three-year term. Chair elected by the Committee.	Establish standards for public counsel and private counsel divisions. Establish uniform standards of indigency. Establish guidelines for training and for qualification and removal of counsel in public and private divisions. Prepare annual report. Appoint chief counsel and two deputies. Extensive list of other duties and responsibilities enumerated by Statute.	**Chief Counsel** appointed by Committee. Attorney. Serves at pleasure of Committee.	Overall supervision of various divisions of committee. Perform duties as defined by the Committee. Authorize all payments certified by judges for private counsel.
MICHIGAN State Appellate Defender Office (agency of judicial branch, est. 1969), MICH. COMP. LAWS §§ 780.711-780.719.		√	Seven member Appellate Defender Commission appointed by Governor. Two recommended by Supreme Court; one recommended by Court of Appeals; one recommended by Michigan Judges Association; two recommended by State Bar; one non-attorney. Four-year term. No member a sitting judge, prosecutor or law enforcement officer.	Choose State Appellate Defender. Develop appellate defense program. Develop standards for program. Maintain list of attorneys willing and qualified for appointment in indigent appellate cases. Provide CLE training for attorneys on list.	**State Appellate Defender** chosen by Commission. Can only be removed for cause.	Provide appellate representation in not less than 25% of felony appeals statewide. Maintain a manageable caseload. Prepare and maintain brief bank available to court-appointed attorneys who provide appellate services to indigents.

[58] Public defender offices represent indigent defendants in felony cases statewide.

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STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
MINNESOTA State Board of Public Defense (separate agency within judicial branch, est. 1986), MINN. STAT. § 611.215.	√		Seven member Board. One district court judge appointed by Supreme Court. Four attorneys familiar with criminal law but not employed as prosecutors, appointed by Supreme Court. Two public members appointed by Governor. In addition, nine member ad hoc board established when appointing a district public defender. Must include two residents of the district, appointed by the chief judge of the district, to reflect characteristics of the population served by that district.	Elect chair and appoint State Public Defender. Chair may appoint Chief Administrator. Appoint a chief district public defender for each judicial district. Prepare annual report. Recommend budget for Board, Office of State Public Defender and public defense corps. Establish procedures for distribution of funds for public defense. Set standards for state and district public defenders and court-appointed system.	**State Public Defender** appointed by Board to four-year term. Must be full-time qualified attorney, licensed to practice in the state.	Provide trial, juvenile, appellate and post-conviction proceeding representation in all indigent cases. Assist in trial representation in conflict of interest cases when requested by a district public defender or appointed counsel. Conduct training programs.
MISSISSIPPI Office of Capital Defense Counsel (judicial branch agency, est. 2000), MISS. CODE ANN. §§ 99-18-1 to -18-19.		√			**Director** appointed by Governor with advice and consent of senate for term of four years. Must be active member of the Mississippi Bar. May be removed by the Governor.	Provide representation to persons under indictment for death eligible offenses. Establishes staff salaries and expenses of the office. General office administration. Must prepare monthly report fir the Administrative Office of Courts on the activities, receipts and expenditures of the office and a docket of all indicted state death eligible cases.
MISSISSIPPI Office of Capital Post-Conviction Counsel (judicial branch agency, est. 2001), MISS. CODE ANN. §§ 99-39-101 to -39-119.		√			**Director** appointed by Chief Justice of the state supreme court with approval of a majority of the justices voting. Four-year term. Active member of the Mississippi Bar or, if not, must apply within twelve months of hiring. May be removed by Chief Justice.	Provide representation to indigent parties sentenced to death in post-conviction proceedings. Appoints attorneys and support staff. Establishes staff salaries and expenses of the office. General office administration. Must keep a docket of all state death penalty cases and a roster of all death penalty cases originating in Mississippi courts and pending in state and federal courts. Copies must be submitted to state supreme court. Must provide monthly report to the Chief Justice on the activities, receipts and expenditures of the office.

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STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
MISSOURI Office of State Public Defender (independent department in judicial branch, est. 1982), MO. REV. STAT. §§ 600.010 - 600.166.	√		Seven member Public Defender Commission: four lawyers; no more than four from same party. Appointed by Governor with advice and consent of Senate. Six-year term. State Public Defender is ex officio member without vote. Chair elected by members.	Select director and deputies. Establish employment procedures. Review office performance and monitor director. Public education to ensure independence of system. Advise on budgetary matters. Contract with private attorneys. Approve fee schedule for assigned counsel.	**Director** appointed by Commission. Four-year term. Attorney with substantial criminal law experience, also experienced in personnel administration.	Administer and coordinate operation. Direct and supervise work of employees. Submit annual budget report to Commission. Supervise training. Contract out for legal services with approval of Commission.
MONTANA Public Defender Commission (within the department of administration, executive branch agency for administrative purposes only, est. 2005), MONT. CODE ANN. §2-15-1028.	√		Eleven members selected by the Governor: two attorneys selected by nominees offered by the supreme court; three attorneys from nominees submitted by the president of the State Bar of Montana including attorneys experienced in felony defense, juvenile delinquency and abuse and neglect cases; two non-attorneys or judges nominated by the president of the senate and the speaker of the house; one person from each of the following types of organizations: an organization that advocates on behalf of indigent persons, racial minorities, people with mental illness and developmental disabilities, and one that provides counseling for addictive behavior.	Replaces Appellate Public Defender Commission. Establish qualifications, duties and compensation of the chief public defender; appoint chief public defender; establish statewide standards for the qualification and training of assistant public defenders including establishing acceptable caseloads and workload monitoring protocols; review and approve the strategic plan and budget proposals submitted by the chief public defender; establish policies and procedures related to conflict of interests; establish policies and procedures to ensure that detailed expenditure and caseload data is collected and reported; submit a biennial report to the Governor, supreme court and Legislature.	**State Public Defender** appointed by, and serves at the pleasure of, the Commission.	Hire or contract for and supervise necessary personnel including a chief appellate defender and a chief contract manager to oversee and enforce the contracting program. Act as secretary to the commission and provide administrative staff support to the commission; develop and present for the commission's approval a regional strategic plan for the delivery of public defender services; establish policies for conflicts of interest; establish procedures regarding the use of information technology to monitor caseloads and expenditure data; establish procedures for managing caseloads and assigning cases; establish policies for assigning counsel in capital cases; establish and supervise training for both attorneys and non-attorneys; maintain a minimum client caseload; actively seek alternative revenue sources including government grants for the public defender office.
NEBRASKA Nebraska Commission on Public Advocacy (executive branch agency, est. 1995), NEB. REV. STAT. §§ 29-3923 to 29-3930.			Nine member Commission: six members for each judicial district; chair and two positions at large. Governor appoints from list prepared by State Bar. Non-salaried. Qualified attorneys with criminal defense experience or demonstrated commitment.	Provide legal services and resources to assist counties in providing effective assistance to indigent persons through its capital litigation, appellate and felony resource center divisions. Select a chief counsel.	**Chief Counsel** selected by Commission. Serves at will of Commission. Five years Nebraska practice. Criminal defense experience including capital case defense.	Overall supervision of appellate, capital and major case divisions and litigation support fund. Prepare budget and annual report. Establish and administer projects and programs for the operation of the commission. Oversee training programs.

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STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
NEVADA State Public Defender (agency within the State Department of Human Resources, executive branch, est. 1971), NEV. REV. STAT. 180.010 - 180.110.			None	Not applicable	**Chief Public Defender** serves for a four-year term. Selected by Governor. Must be a member of the Nevada Bar.	Establish statewide system for all counties with populations under 100,000 which do not create a county public defender office. Oversee activities of these programs. Prepare annual budget. Annual report to legislature.
NEW HAMPSHIRE Judicial Council (judicial branch agency, est. 1945), N.H. REV. STAT. ANN. §§ 494:1 - 494:7.			Twenty-four member Council: the five members of the judicial branch administrative council; the attorney general or designee; a clerk from each the superior, district and municipal courts; the president-elect of the NH Bar Association; chairperson of the senate judiciary committee or designee; chairperson of the house judiciary and family law committee or designee; eight members appointed by the governor and council; and five members appointed by the chief justice of the supreme court.	The Judicial Council's responsibilities related to indigent defense include processing payments for legal representation and guardian ad litem services provided to indigent individuals, contracting with local defender corporations and individual attorneys for provision of defense services and general supervision of indigent programs.	**Executive Director** of the Judicial Council serves at the pleasure of the Council. Has a three-member staff.	Executive Director's responsibilities are contained in a contract with the Judicial Council.
NEW HAMPSHIRE New Hampshire Public Defender (judicial branch, est. 1972), N.H. REV. STAT. ANN. §§ 604-B:1 – B:8.	√		Volunteer Board of Directors of a private non-profit corporation. The Judicial Council contracts with an organization or group of lawyers approved by the board of governors of the New Hampshire Bar Association to operate a public defender program.	Oversees program's operations.	**Chief Public Defender** appointed by Board of Directors.	Represents children in juvenile delinquency cases, adults in misdemeanor, felony, homicide and capital cases, and handles appeals.

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STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
NEW JERSEY Office of the Public Defender (executive agency, part of Division of the Public Advocate, est. 1967), N.J. STAT. ANN. §§ 2A:158A-1 to :158A-25.	√		None	Not applicable	**Public Defender** appointed by Governor with advice and consent of Senate. Five-year term. Attorney, experienced in practice in New Jersey.	Appoint deputy and assistant public defenders as well as support personnel. Establish State Public Defender system for all counties. Engage and compensate assigned counsel.
NEW MEXICO State Public Defender (executive department, est. 1973), N.M. STAT. ANN. §§ 31-15-1 to -15-12.	√		None	Not applicable	**Chief Public Defender** appointed by and serves at pleasure of Governor. Attorney active for five years prior to appointment and is experienced in defense or prosecution.	Manage all operations of department. Set fee schedule for assigned counsel. Establish local public defender districts. Appoint district public defenders who serve at his/her pleasure.
NEW YORK Capital Defender Office (independent agency in judicial branch, est. 1995), N.Y. Jud. Ct. Acts § 35b.			Three-member Board of Directors. Members may not be an attorney employed as a judge, prosecutor or in a law enforcement capacity. One member appointed by the chief judge of the court of appeals, one by the temporary president of the senate and one by the speaker of the assembly. Serve a three year term.	Reviews office policy, appoints Capital Defender.	**Capital Defender** selected by Board of Directors.	In consultation with Board of Directors, hire attorneys as deputy capital defenders, investigators and other staff. The Capital Defender Office provides both direct representation and consultation services; it also has responsibility for determining, in consultation with the administrative board of the judicial conference, attorney qualification standards.

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STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
NORTH CAROLINA Office of Indigent Defense Services (independent office in judicial department, est. 2000), N.C. GEN. STAT. §§ 7A-498 – 498.8.			Thirteen member Commission on Indigent Defense. Chief Justice appoints one active or former member of North Carolina judiciary; Governor appoints one non-attorney; General Assembly appoints one member recommended by President Pro Tempore of the Senate and one member recommended by the Speaker of the House of Representatives; the North Carolina Public Defenders Association, the North Carolina State Bar, the North Carolina Bar Association, the North Carolina Academy of Trial Lawyers, the North Carolina Association of Black Lawyers and the North Carolina Association of Women Lawyers each appoint one member. The Commission appoints three members, who must reside in different judicial districts from one another - one must be a non-attorney, one may be an active member of the North Carolina judiciary, one must be Native American.	Appoint the Director of the Office of Indigent Defense Services and elect Commission Chair. Develop standards and guidelines governing provision of indigent defense services. Determine methods of delivering indigent defense services (appointed counsel, contract counsel, part-time public defender, full-time public defender, appellate defender or some combination of these) throughout the state. Establish compensation rates for court-appointed counsel and schedules of allowable expenses, appointment and compensation for expert witnesses. Approve budget for Office of Indigent Defense Services.	**Director** of the Office of Indigent Defense Services appointed by Commission, chosen on the basis of training, experience, and other qualifications. The Commission must consult with the Chief Justice and Director of the Administrative Office of the Courts in selecting a Director, but has final authority in making the appointment.	Director of Office of Indigent Defense Services prepares and submits to the Commission a proposed budget for the Office and an annual report containing pertinent data on the operations, costs, and needs of the Office; assist the Commission in developing rules and standards for the delivery of services; administer and coordinate the operations of the Office and supervise compliance with standards adopted by the Commission; hire professional, technical, and support personnel as deemed necessary; conduct training programs for attorneys.

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STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
NORTH DAKOTA North Dakota Commission on Legal Counsel for Indigents (executive branch agency, est. 2005), N.D. CENT. CODE ch. 54-61 (2005)			Seven members. Two members appointed by the Governor, one of whom must be appointed from a county with a population of not more than ten thousand. Two members from the legislative assembly, one from each house, appointed by the chairman of the legislative council. Two members appointed by the chief justice of the supreme court, one of whom must be appointed from a county with a population of not more than ten thousand. One member appointed by the Board of Governors of the State Bar Association of North Dakota. New Commission established by Legislature in 2005 replaces former Commission established by juridical rule.	Develop standards: governing eligibility for indigent defense services; for maintaining and operating regional public defender offices if established; prescribing minimum experience, training and other qualifications for contract counsel and public defenders; for contract counsel and public defender caseloads; for the evaluation of contract counsel and public defenders; for dealing with conflicts of interest; for reimbursement of expenses incurred by contract counsel; and any other necessary standards. Establish and implement a process of contracting for legal counsel services. Establish public defender offices. Monitor and track caseloads of contract counsel and public defenders. Approve and submit a biennial budget request.	**Commission Director** appointed by Commission on the basis of training, experience and other qualifications deemed appropriate. Must be licensed attorney in North Dakota and eligible to practice law.	Assists Commission in developing standards for the delivery of adequate indigent defense services; administers and coordinates these services and supervises compliance with commission standards; recommend the establishment of public defender offices when appropriate; conduct regular training programs for contract counsel and public defenders; hire personnel, including attorneys to serve as public defenders; prepare and submit to the Commission a proposed biennial budget and an annual report of the operation, needs and costs of the indigent defense contract system and public defender offices.
OHIO Ohio Public Defender Commission (independent commission within the executive branch, est. 1984), OHIO REV. CODE ANN. §§ 120.01 - 120.05.			Nine member Commission. Chair appointed by Governor. Four appointed by Governor; two of whom are from each political party. Four members appointed by Supreme Court. Chair and at least four members are bar members. Four-year terms.	Provide, supervise and coordinate legal representation. Establish rules for Public Defender such as compensation, indigency standards and caseloads. Approve budgets. Appoint State Public Defender.	**State Public Defender** appointed by Commission. Attorney with minimum of four years experience. State bar member.	Appoint Assistant State Public Defender. Supervise maintenance of Commission standards. Keep records and financial information. Establish compensation procedures.
OKLAHOMA Oklahoma Indigent Defense System (executive branch agency, est. 1991), OKLA. STAT. tit. 22, §§ 1355-1369.		√	Five member Board of Directors appointed by Governor subject to advice and consent of Senate for five-year terms. At least three lawyers. Governor designates Chair.	Make policies for indigent defense programs. Approve budget. Appoint advisory council of indigent defense attorneys. Establish policies on maximum caseloads. Appoint Executive Director.	**Executive Director** appointed by and serves at pleasure of Board. Licensed as Oklahoma attorney for four years. Experienced in criminal defense.	Develop state system, with exception of Oklahoma and Tulsa counties. Prepare system budget. Keep list of private attorneys for capital and non-capital case appointments. Advisor to indigent defenders. Act on system's behalf in legislative efforts. Conduct training.

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STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
OREGON Public Defense Services Commission (agency in judicial branch but outside the state court system, est. 2001), OR. REV. STAT. §§ 151.010 - 151.505.			Seven member Commission, appointed by order of the Chief Justice, who serves as non-voting, ex-officio member. Members must include at least: two non-lawyers; one criminal defense lawyer whose practice does not serve primarily indigent defendants; and one former Oregon state prosecutor. No current judge, prosecuting attorney, or law enforcement officer may serve. Four year terms. Chief Justice appoints chairperson and vice chairperson.	Effective October 1, 2001, Commission assumed responsibility for the Office of Public Defense Services (formerly the appellate State Public Defender). Effective July 1, 2003, the Commission assumed responsibility for the administration of the Indigent Defense Program, including all related administrative tasks formerly handled by the courts and the State Court Administrator's office, except for appointing counsel. Judges continue to make the appointments, subject to Commission rules. Other responsibilities include hiring Executive Director and adopting rules regarding: indigency determination; appointment of counsel; fair compensation of appointed counsel; resolution of appointed counsel compensation disputes; costs associated with representation of persons by appointed counsel; and performance standards.	**Executive Director** of OPDS selected by PDSC. Four-year term. Active member of Oregon State Bar, private practice prohibited.	Employ deputies and other staff, including expert investigators, witnesses and interpreters.
PENNSYLVANIA			None	Not applicable	None	Not applicable
RHODE ISLAND Office of the Public Defender (agency of executive branch, est. 1941), R.I. GEN. LAWS §§ 12-15-1 to -15-11.	√		None	Not applicable	**Chief Public Defender** appointed by Governor with advice and consent of Senate. Three-year term. Attorney with five years experience.	Appoint, supervise and direct assistants as necessary. Develop and oversee statewide system by regions.

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	Trial	Other				
SOUTH CAROLINA Office of Indigent Defense (independent agency within executive branch, est. 1993), S.C. CODE ANN. §§ 17-3-300 to -3-360.[59]		√	Fifteen member Commission on Indigent Defense. Eleven members appointed by Governor as follows: six members on recommendation of South Carolina Public Defender Association, one from each congressional district; one member from state at-large who serves as Chair; a member, appointed upon recommendation by the respective president of the following organizations: the South Carolina Bar, the South Carolina Trial Lawyers Association, the South Carolina Criminal Defense Lawyers Association, and the South Carolina Public Defender Association. Four-year terms. Remaining four members appointed as follows: two by the Chief Justice of the South Carolina Supreme Court, one of whom must be either a retired family court judge or a retired appellate court judge, and the Chairmen of the Senate and House Judiciary Committees or their legislative designees.	May establish divisions within the Office of Indigent Defense to provide necessary services. Appoint Executive Director of the Office of Indigent Defense Services. Shall develop rules, policies, procedures, regulations and standards for providing indigent defense services, including the nature and scope of services to be provided, the clientele to be served, and the establishment of criteria to be used in determining indigency and qualification for services. Shall cooperate and consult with state agencies and various organizations concerning the causes of criminal conduct, the rehabilitation and correction of persons charged with and convicted of crimes, the administration of criminal justice and the improvement and expansion of defender services.	**Executive Director** appointed by Commission.	May hire other administrative, clerical, and legal staff and is authorized to contract with outside consultants on behalf of the office. Shall: administer and coordinate the operations and divisions within the office and supervise compliance with rules, procedures, regulations, and standards adopted by the commission; maintain records of all financial transactions related to the operation of the office; coordinate the services of the office with any federal, county, private, or other programs established to provide assistance to indigent persons and consult with professional organizations concerning the implementation and improvement of programs for providing indigent services; and perform other duties as the commission assigns.
SOUTH DAKOTA			None	Not applicable	None	Not applicable

[59] As of July 1, 2005 the former statewide Office of Appellate defense, which had a seven-member Commission of Appellate Defense, was incorporated into the Office of Indigent Defense (OID). It is now a Division within OID.

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	Trial	Other				
TENNESSEE District Public Defenders Conference (agency of the judicial branch, est. 1989), TENN. CODE ANN. §§ 8-14-301 to -14-501.			There is no statewide commission in Tennessee, however, the District Public Defenders Conference is a statewide system of elected public defenders. Public defenders in Tennessee are publicly elected.	All 31 judicial districts are served by public defenders and the Office of the Executive Director serves as the central administrative office for all but two of the district public defenders.	**Executive Director** is elected by the district public defenders for a four-year term and serves as a member of the Judicial Council and other judicial planning groups.	The executive director is responsible for budgeting, payroll, purchasing, personnel, and administration of all fiscal matters pertaining to the operation of district public defender offices. Other duties include coordinating defense efforts of the various district public defenders, development of training programs, and maintaining liaison with various state government agencies.
TENNESSEE Office of the Post-Conviction Defender and Post-Conviction Defender Commission (est. 1995), TENN. CODE ANN. §§ 40-30-201 to -30-210.		√	Nine members: two appointed by the Governor; two appointed by the lieutenant governor; two appointed by the speaker of the House of Representatives; three appointed by the Supreme Court of Tennessee. Serve four-year terms.	Appoint Post-Conviction Defender; prepare annual budget for the Office of Post-Conviction Defender.	**Post-Conviction Defender** appointed by Post-Conviction Defender Commission. Four-year term. Must be lawyer in good standing with Supreme Court of Tennessee and possess demonstrated experience in capital case litigation.	Provide legal representation to indigent persons convicted and sentenced to death; hire assistant post-conviction defenders, investigators and support staff; maintain clearinghouse of materials and brief bank for public defenders and private counsel who represent indigents charged or convicted of capital crimes; provide CLE training and consulting services to lawyers representing defendants in capital cases; recruit qualified members of the bar to provide representation in state death penalty proceedings.

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STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
TEXAS Task Force on Indigent Defense (standing committee of Texas Judicial Council, est. 2001), TEX. GOV'T CODE ANN. §§ 71.051 - 71.063.			*Eight ex officio members*: chief justice of the supreme court; presiding judge of the court of criminal appeals; member of the senate appointed by the lieutenant governor; member of the house of representatives appointed by the speaker of the house; a courts of appeal justice serving on the judicial council designated by the governor to sit on Task Force; a county court, statutory county court or probate court judge serving on the judicial council designated by governor to sit on Task Force; chair of the Senate Criminal Justice Committee; and chair of the House Criminal Jurisprudence Committee. *Five appointive members*: Governor appoints, with advice and consent of senate: active district judge serving as presiding judge of an administrative judicial region; either a judge of a constitutional county court or a county commissioner, practicing criminal defense attorney; public defender, either a judge of a constitutional county court or county commissioner in county with >250,000 population.	Develop policies and standards for providing legal representation and other defense services to indigent defendants at trial, on appeal and in post-conviction proceedings. Develop a plan that establishes statewide requirements for counties relating to reporting indigent defense information. Use the information collected to monitor the effectiveness of the counties' indigent defense policies, standards and procedures. Submit annual report to governor, lieutenant governor, speaker of the house, and council regarding the quality of legal representation provided to indigent defendants; current indigent defense practices in Texas as compared to state and national standards; efforts made by the task force to improve indigent defense; and recommendations by the task force for improving indigent defense in the state. Distribute state funds for indigent defense to county governments.	**Director** of the Task Force on Indigent Defense is hired by the Commission. Under statutory authority the Task Force hires employees "who are assigned to assist the task force in performing its duties," as authorized by the Appropriations Act.	The Director is charged with implementing a statewide system of standards, financing and other resources for indigent defense. Responsibilities include overseeing the distribution of state funds provided to county governments; collecting, reviewing and maintaining all county expenditure data and plan information relating to county indigent defense services for each of Texas' 254 counties.
UTAH			None	Not applicable	None	Not applicable

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STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
VERMONT Office of the Defender General (agency of executive branch, est. 1972), VT. STAT. ANN. tit. 13, §§ 5251-5258.	√		None	Not applicable	**Defender General** appointed by Governor with advice and consent of Senate. Four-year term.	Operates program through public defenders and deputy public defenders or by contracting out to private attorneys. May establish local offices headed by a public defender. Contract with member of bar to serve as assigned counsel coordinator.
VIRGINIA Virginia Indigent Defense Commission (agency of judicial branch, est. 2004), VA. CODE ANN. §§ 19.2-163.01 to -163.02.			Consists of 12 members, including the chairmen of the House and Senate Committees for Courts of Justice; the chairman of the Virginia State Crime Commission; the Executive Secretary of the Supreme Court or his designee; two attorneys officially designated by the Virginia State Bar; two persons appointed by the Governor, the Speaker of the House of Delegates, and the Senate Committee on Privileges and Elections. At least one of the appointments made by the Governor, the Speaker, and the Senate Committee on Privileges and Elections must be an attorney in private practice with a demonstrated interest in indigent defense issues. Persons who are appointed by virtue of their office shall hold terms coincident with their terms of office. All other appointments are for three years.	Publicize and enforce qualification standards for court-appointed attorneys; develop initial training courses and CLE courses for court-appointed counsel and public defenders; maintain a qualified list of court-appointed attorneys; establish standards of practice for court-appointed counsel to follow in representing clients and guidelines for the removal of an attorney from the official list; establish and maintain standards of conduct for indigent defense counsel; establish caseload limits for public defender offices; maintain all public defender and regional capital defender offices; hire, employ and remove an executive director, counsel and other necessary employees for each public defender or capital defender office; authorize each public defender or capital defender to employ necessary assistants and support staff and to maintain an office; require and ensure that each public defender office collects and maintains caseload data.	**Executive Director**, selected by Commission, serves at pleasure of Commission.	Appoints chief public defenders and chief capital defenders in local offices, fixes the compensation of all personnel within the offices.

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STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
WASHINGTON Office of Public Defense (independent agency of the judicial branch, est. 1996), WASH. REV. CODE §§ 2.70.005 – 70.050.			Nine member Advisory Committee: three persons appointed by the chief justice; two non-attorneys appointed by the governor; two senators and two members of the house of representatives; one person appointed by the court of appeals executive committee; and one member appointed by the Washington State Bar Association.	Submit three names to the Supreme Court for Director of the Office of Public Defense.	**Director** serves at the pleasure of the supreme court, which selects from list of three names submitted by Advisory Committee. Director must have: practiced law in Washington for at least five years, represented criminal defendants, and proven managerial or supervisory experience.	Administers all criminal appellate indigent defense services; submits to state legislature a biennial budget for costs related to appellate indigent defense; recommends indigency standards; collects information and reports to the legislature on indigency cases; coordinates with the supreme court and judges of each division of the court of appeals to determine how attorney services should be provided. The Office of Public Defense does not provide direct representation.
WEST VIRGINIA Public Defender Services (agency of executive branch, est. 1989), W. VA. CODE §§ 29-21-3 to -21-6.			None	Not applicable	**Executive Director** is appointed by the Governor with the advice and consent of the Senate. Serves at will of Governor. Must be member of the bar of the supreme court of appeals.	Oversees agency responsible for the administration, coordination and evaluation of local indigent defense programs in each of West Virginia's 31 judicial circuits. Hires staff as necessary. May promulgate rules to effectuate the governing statute. Operates a criminal law research center, an accounting and auditing division to monitor local public defender corporations compliance with statute and an appellate advocacy division.
WISCONSIN Office of the State Public Defender (independent agency within executive branch, est. 1977), WIS. STAT. §§ 977.01 – 977.09.	√		Nine member Public Defender Board. Appointed by Governor, approved by Senate. At least five must be attorneys. Three-year terms. Chair is elected by Board.	Appoint state Public Defender and establish salary. Approve budget and submit to Governor. Promulgate standards of indigency. Promulgate rules for assignment of private counsel in regard to standards, payments and pro bono programs. Perform all other duties necessary and incidental. Contract with federal agencies and local public defender organizations for provision of services.	**State Public Defender** appointed by Board. Member of Wisconsin Bar. Five-year term.	Supervise operation of all state and regional public defender offices. Maintain data and submit biennial budget to Board. Delegate cases to any member of Wisconsin Bar. Negotiate contracts for representation as directed by Board. Appoint staff.

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STATE Program (Where located in government)	Statewide Public Defender System?		Commission	Commission Duties and Responsibilities	Director or Chief Public Defender Selection Process, Terms and Qualifications	Director or Public Defender Duties and Responsibilities
	Trial	Other				
WYOMING State Public Defender (executive agency, est. 1977), WYO. STAT. ANN. §§ 7-6-101 to -6-114.	√		None	Not applicable	**State Public Defender** appointed by Governor. No term specified. Member of Wyoming Bar with experience in defense or prosecution.	Administer public defender program in districts and oversee operation of public defender system statewide. Assistant public defenders appointed by Governor and serve at pleasure of Public Defender. Public Defender may require them to be full-time. Public defender in each district appointed by Governor upon recommendations from district judge and county commissioners.

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Appendix B

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TEN PRINCIPLES

Of a Public Defense Delivery System

February 2002

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On Legal Aid And Indigent Defendants

2001-2002

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TEN PRINCIPLES

Of a Public Defense Delivery System

February 2002

Approved by American Bar Association House of Delegates, February 2002. The American Bar Association recommends that jurisdictions use these Principles to assess promptly the needs of public defense delivery systems and clearly communicate those needs to policy makers.

INTRODUCTION

The *ABA Ten Principles of a Public Defense Delivery System* were sponsored by the ABA Standing Committee on Legal and Indigent Defendants and approved by the ABA House of Delegates in February 2002. The Principles were created as a practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems. The Principles 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. The more extensive ABA policy statement dealing with indigent defense services is contained within the ABA Standards for Criminal Justice, *Providing Defense Services* (3d ed. 1992), which can be viewed on-line (black letter only) and purchased (black letter with commentary) by accessing the ABA Criminal Justice Section homepage at http://www.abanet.org/crimjust/home.html.

ACKNOWLEDGMENTS

The Standing Committee on Legal Aid and Indigent Defendants is grateful to everyone assisting in the development of the *ABA Ten Principles of a Public Defense Delivery System*. Foremost, the Standing Committee acknowledges former member James R. Neuhard, Director of the Michigan State Appellate Defender Office, who was the first to recognize the need for clear and concise guidance on how to design an effective system for providing public defense services. In 2000, Mr. Neuhard and Scott Wallace, Director of Defender Legal Services for the National Legal Aid and Defender Association, jointly produced a paper entitled "The Ten Commandments of Public Defense Delivery Systems," which was later included in the Introduction to Volume I of the U.S. Department of Justice's Compendium of Standards for Indigent Defense Systems. The *ABA Ten Principles of a Public Defense Delivery System* are based on this work of Mr. Neuhard and Mr. Wallace.

Special thanks go to the members of the Standing Committee and its Indigent Defense Advisory Group who reviewed drafts and provided comment. Further, the Standing Committee is grateful to the ABA entities that provided invaluable support for these Principles by co-sponsoring them in the House of Delegates, including: Criminal Justice Section, Government and Public Sector Lawyers Division, Steering Committee on the Unmet Legal Needs of Children, Commission on Racial and Ethnic Diversity in the Profession, Standing Committee on Pro Bono and Public Services. We would also like to thank the ABA Commission on Homelessness and Poverty and the ABA Juvenile Justice Center for their support.

L. Jonathan Ross
Chair, Standing Committee on
Legal Aid and Indigent Defendants

ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

Black Letter

1 The public defense function, including the selection, funding, and payment of defense counsel, is independent.

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

3 Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

4 Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

5 Defense counsel's workload is controlled to permit the rendering of quality representation.

6 Defense counsel's ability, training, and experience match the complexity of the case.

7 The same attorney continuously represents the client until completion of the case.

8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

9 Defense counsel is provided with and required to attend continuing legal education.

10 Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

With Commentary

1 **The public defense function, including the selection, funding, and payment of defense counsel,[1] is independent.** The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.[2] To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.[3] Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.[4] The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.[5]

2 **Where the caseload is sufficiently high,[6] the public defense delivery system consists of both a defender office[7] and the active participation of the private bar.** The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services.[8] The appointment process should never be *ad hoc*,[9] but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.[10] Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.[11]

3 **Clients are screened for eligibility,[12] and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.** Counsel should be furnished upon arrest, detention, or request,[13] and usually within 24 hours thereafter.[14]

4 **Defense counsel is provided sufficient time and a confidential space within which to meet with the client.** Counsel should interview the client as soon as practicable before the preliminary examination or the trial date.[15] Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client.[16] To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.[17]

5 **Defense counsel's workload is controlled to permit the rendering of quality representation.** Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.[18] National caseload standards should in no event be exceeded,[19] but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.[20]

6 Defense counsel's ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.[21]

7 The same attorney continuously represents the client until completion of the case. Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing.[22] The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.[23] Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.[24] Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases,[25] and separately fund expert, investigative, and other litigation support services.[26] No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system.[27] This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

9 Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.[28]

10 Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel,or contract defenders should be supervised and periodically evaluated for competence and efficiency.[29]

NOTES

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

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

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

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

[5] ABA, *supra* note 2, Standard 5-4.1

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

[7] NAC, *supra* note 2, Standard 13.5; ABA, *supra* note 2, Standard 5-1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2. "Defender office" means a full-time public defender office and includes a private nonprofit organization operating in the same manner as a full-time public defender office under a contract with a jurisdiction.

[8] ABA, *supra* note 2, Standard 5-1.2(a) and (b); NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

[9] NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

[10] ABA, *supra* note 2, Standard 5-2.1 and commentary; Assigned Counsel, *supra* note 2, Standard 3.3.1 and commentary n.5 (duties of Assigned Counsel Administrator such as supervision of attorney work cannot ethically be performed by a non-attorney, citing ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct).

[11] NSC, *supra* note 2, Guideline 2.4; Model Act, *supra* note 2, § 10; ABA, *supra* note 2, Standard 5-1.2(c); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (provision of indigent defense services is obligation of state).

[12] For screening approaches, see NSC, *supra* note 2, Guideline 1.6 and ABA, *supra* note 2, Standard 5-7.3.

[13] NAC, *supra* note 2, Standard 13.3; ABA, *supra* note 2, Standard 5-6.1; Model Act, *supra* note 2, § 3; NSC, *supra* note 2, Guidelines 1.2-1.4; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(A).

[14] NSC, *supra* note 2, Guideline 1.3.

[15] American Bar Association Standards for Criminal Justice, *Defense Function* (3rd ed. 1993) [hereinafter "ABA Defense Function"], Standard 4-3.2; *Performance Guidelines for Criminal Defense Representation* (NLADA 1995) [hereinafter "Performance Guidelines"], Guidelines 2.1-4.1; ABA Counsel for Private Parties, *supra* note 2, Standard 4.2.

[16] NSC, *supra* note 2, Guideline 5.10; ABA Defense Function, *supra* note 15, Standards 4-3.1, 4-3.2; Performance Guidelines, *supra* note 15, Guideline 2.2.

[17] ABA Defense Function, *supra* note 15, Standard 4-3.1.

[18] NSC, *supra* note 2, Guideline 5.1, 5.3; ABA, *supra* note 2, Standards 5-5.3; ABA Defense Function, *supra* note 15, Standard 4-1.3(e); NAC, *supra* note 2, Standard 13.12; Contracting, *supra* note 2, Guidelines III-6, III-12; Assigned Counsel, *supra* note 2, Standards 4.1, 4.1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2(B)(iv).

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

[20] ABA, *supra* note 2, Standard 5-5.3; NSC, *supra* note 2, Guideline 5.1; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980) [hereinafter "Appellate"], Standard 1-F.

[21] Performance Guidelines, *supra* note 15, Guidelines 1.2, 1.3(a); Death Penalty, *supra* note 19, Guideline 5.1.

[22] NSC, *supra* note 2, Guidelines 5.11, 5.12; ABA, *supra* note 2, Standard 5-6.2; NAC, *supra* note 2, Standard 13.1; Assigned Counsel, *supra* note 2, Standard 2.6; Contracting, *supra* note 2, Guidelines III-12, III-23; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(B)(i).

[23] NSC, *supra* note 2, Guideline 3.4; ABA, *supra* note 2, Standards 5-4.1, 5-4.3; Contracting, *supra* note 2, Guideline III-10; Assigned Counsel, *supra* note 2, Standard 4.7.1; Appellate, *supra* note 20 (*Performance*); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(B)(iv). *See* NSC, *supra* note 2, Guideline 4.1 (includes numerical staffing ratios, e.g.: there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). *Cf.* NAC, *supra* note 2, Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

[24] ABA, *supra* note 2, Standard 5-2.4; Assigned Counsel, *supra* note 2, Standard 4.7.3.

[25] NSC, *supra* note 2, Guideline 2.6; ABA, *supra* note 2, Standards 5-3.1, 5-3.2, 5-3.3; Contracting, *supra* note 2, Guidelines III-6, III-12, and *passim*.

[26] ABA, *supra* note 2, Standard 5-3.3(b)(x); Contracting, *supra* note 2, Guidelines III-8, III-9.

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

[28] NAC, *supra* note 2, Standards 13.15, 13.16; NSC, *supra* note 2, Guidelines 2.4(4), 5.6-5.8; ABA, *supra* note 2, Standards 5-1.5; Model Act, *supra* note 2, § 10(e); Contracting, *supra* note 2, Guideline III-17; Assigned Counsel, *supra* note 2, Standards 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA *Defender Training and Development Standards* (1997); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(A).

[29] NSC, *supra* note 2, Guidelines 5.4, 5.5; Contracting, *supra* note 2, Guidelines III-16; Assigned Counsel, *supra* note 2, Standard 4.4; ABA Counsel for Private Parties, *supra* note 2, Standards 2.1 (A), 2.2; ABA Monitoring, *supra* note 3, Standards 3.2, 3.3. Examples of performance standards applicable in conducting these reviews include NLADA Performance Guidelines, ABA Defense Function, and NLADA/ABA Death Penalty.

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