

MODEL PLAN FOR PUBLIC DEFENSE SERVICES IN MICHIGAN

Developed by:

THE TASK FORCE ON IMPROVING
PUBLIC DEFENSE SERVICES IN MICHIGAN

A project of the Michigan Council on Crime and Delinquency

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Model Plan for Public Defense Services in Michigan

“ . . . [T]he right of one charged with crime to counsel may not be deemed fundamental and essential . . . in some countries, but it is in ours. From the beginning, our . . . constitution and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. ”

- Justice Hugo Black, 1963

“Defense is an equally essential element of the criminal justice process, one which should be appropriately structured and funded and operating with effective standards. . . . Our system of justice will only work, and will only inspire complete confidence and trust of the people, if we have strong prosecutors, an impartial judiciary, and a strong system of indigent criminal defense. ”

- Attorney General Janet Reno, 1999

“ . . . The objective of the criminal justice system should be fewer victims, not more inmates. ”

- Vincent Schiraldi, 2002

INTRODUCTION

Almost forty years ago, the Supreme Court declared that the Constitution's "noble ideal" of equal justice was not met as long as poor people accused of crimes had no lawyer to defend them. Legal counsel, the Court wrote, is a "fundamental right essential to a fair trial." That landmark ruling, *Gideon V. Wainwright*, required state and local governments to provide legal representation free of charge to criminal defendants unable to afford their own. In 1967, *In re Gault* extended the right to counsel to minors in juvenile delinquency proceedings.

A generation later, *Gideon's* and *Gault's* promise of equal justice is far from realized. In the United States, public defense too often means a lawyer who is overwhelmed, unqualified, or politically compromised. Although fully 85 percent of all those arrested in the U.S. cannot afford an attorney and must rely on the government to provide one; most jurisdictions devote only a small fraction of their criminal justice budgets to public defense. Accused people sometimes wait three months or more in jail before speaking to a lawyer. Low fees and high case loads discourage attorneys from spending the time necessary to investigate the guilt or social history of the accused. Juveniles and those facing serious charges are routinely represented by counsel with no specialized training or experience. Finally, the process of judges appointing defense counsel has led to the perception (justified or not) that this type of patronage can be, and is, corruption of the system.

In November of 2000, the Michigan Council on Crime and Delinquency was approached by the ABA Standing Committee on Legal Aid and Indigent Defendants to determine if the Council was interested in assisting them with a Gideon Initiative in Michigan. The purpose of the ABA Gideon Initiative is to be a catalyst in fostering systemic improvements in the area of public defense.

The staff and Board of the Council were intrigued by the possibility of assisting in the development of a plan to strengthen public defense services, particularly if the role of the defense system was also strengthened in the areas of client-specific planning, mediation, and balanced and restorative justice. The Council's mission is to prevent and reduce criminal behavior, so in addition to strengthening defense services, a process was developed that included exploring the possibility of the defense system playing a role in reducing recidivism for offenders.

All of the states participating in the Gideon Initiative looked at funding, standards, and accountability of defense services. The project developed by the Michigan Council on Crime and Delinquency differs from the other state initiatives in three ways:

- Defense services for juvenile offenders was included;
- A strong emphasis was placed on support services and the role of the defense system in reducing recidivism; and
- The MCCD Initiative was driven by a task force which included representatives of non-lawyer groups whose constituencies are dramatically affected by the justice system.

The Michigan Public Defense Task Force

Background:

In June 2001, the Michigan Council on Crime and Delinquency (MCCD) convened a group of interested people from around the state to share their concerns about Michigan's Public Defense System. At that meeting a statewide citizen's group (the Michigan Public Defense Task Force) was established to develop a model for improving Michigan's defense services for citizens who cannot afford counsel. The 50-member Task Force is geographically representative of the state and includes service providers, state and local elected officials, professors, foundation staff, attorneys, and citizens. The common thread among Task Force members is a commitment to assuring fair and effective justice and the recognition that Michigan's public defense system must be strengthened.

The Task Force began by gathering information. This process included examining best practices from around the country, as well as in Michigan Circuit Court jurisdictions. The Task Force also surveyed current Michigan criminal defense attorneys and heard from local and national experts. The first action of the Task Force was to adopt the following vision statement: "*Michigan will have a comprehensive, fair, effective, efficient, and independent system for providing public defense services to juveniles and adults who cannot afford an attorney.*" This statement guided the planning process. This report presents the Task Force findings and recommendations.

Findings:

Before assessing Michigan's system for providing public defense services, and before making recommendations for improvements, it was important for the Task Force to determine what an optimal system should include. The Task Force began by reviewing national standards and reports and hearing from experts from other states. Additionally, current practices in Michigan were examined. This process led to the findings presented in this section.

America's criminal justice system was built on the foundation that everyone who is accused of a crime is entitled to competent, experienced representation in court. Since the United States Supreme Court's 1963 decision in *Gideon V. Wainwright*, legal representation has been the right of all criminal defendants who cannot afford an attorney. In 1855, Michigan was one of the first states to require by statute that counsel be appointed and compensated for defendants who could not afford an attorney. The original statute placed the obligation of public defense services on the counties and there it remains. Consequently, how defense services are delivered varies widely throughout the state. Only six counties (Wayne, Washtenaw, Chippewa, Bay, Kent, and Alpena) have a public defender office. The remaining counties use either contracted counsel or assigned counsel, with the majority using an assignment process. Since 1855, Michigan has gone from being a leader in the U.S. regarding providing public defense services, to ranking at the bottom today. Funding of public defense services was a priority area for the Task Force

Currently, at least 46 states provide some, or all, funding for trials of defendants who cannot afford attorneys. Of those, 24 states provide 100 percent of all public defense costs. Michigan is

one of only four (4) states where that responsibility still rests exclusively on the counties, resulting in grossly inconsistent quality of representation, attorney experience, and defense resources.

In the last 30 years, Michigan has launched two major efforts to reform the system for providing defense representation; one commissioned by the Chief Justice in 1975, and another by the State Bar in 1988. These efforts failed. In Michigan, partly due to inexcusable low rates of compensation, more than 33 percent of all assigned defense counsel ask to be removed from the rosters each year. This often leaves inexperienced attorneys to represent defendants. In some areas fees have been cut by 10 percent and are at 1970 levels. According to the State Appellate Defender Office's survey of criminal defense attorneys, attorney fees are often paid months late or are arbitrarily cut without hearings. Fees often do not cover the costs of experts or investigators, and requests for reimbursement are often rejected. In a Task Force survey of more than 300 of Michigan's defense attorneys, 76 percent report that prosecuting attorneys have somewhat greater (13 percent) or much greater (63 percent) resources available to prepare and present their cases. Assigned counsel fees continue to be the subject of litigation in many states, including Michigan. **The funding mechanism and fees paid for public defense in Michigan must be modified.**

The issue of statewide standards for public defense services was also reviewed by the Task Force. Michigan has no statewide standards for attorneys appointed at the trial court level. Most states are moving toward either a statewide public defender or a state commission charged with assuring fair and equal justice. Thirty-eight states have a state level mechanism for developing standards for public defense attorneys that include years of experience and level of training. **Standards must be developed and applied throughout Michigan.**

Reports and studies regarding fair and accountable appointment processes were reviewed by the Task Force for assigned and contracted counsel. These reports indicate that the judiciary should not administer public defense systems. A random appointment system, whereby elected judges arbitrarily decide which attorneys are appointed, has long been discouraged because it leads to the appearance or reality of patronage or bias. Members of the judiciary are, and must remain, neutral arbiters of the disputes over which they preside, and must not become entangled - as patron, employer, or administrator - with the advocates who appear before them. Even when the appearance of patronage is avoided by routine rotation of assignments under an assigned counsel plan overseen by an administrator, potential conflicts of interest remain if the administrator is not insulated from the reality or appearance of judicial pressure. And if payment for public defense services is a part of the judiciary budget, an obvious conflict is created when a scarcity of funds forces court administrators to choose between funding court functions and paying attorneys whose job includes challenging the courts ruling when client cases so demand.

Similarly, public defense services should not be governed in any manner by person or institutions that may be placed in an adversarial relationship to defense services clients. The direct participation by prosecutors and members of law enforcement in policy-making, governing, oversight, or administrative bodies of public defense services should be prohibited. The provision of defense services also requires protection from undue political pressure adverse

to the interests of public defense clients. Constitutionally and statutorily mandated governmental services, and the job security of those who provide these services, should not be eroded in response to polls or headlines about notorious cases. **Appointment of counsel by an independent governing board or commission is necessary for the efficient and effective provision of public defense services.**

The Task Force also examined literature on emerging trends in public defense services, such as problem-solving lawyering, community justice, and justice policy development. These trends place the involvement of defense attorneys in program and policy development as a priority. Two major initiatives in criminal justice are now at the forefront of legal, academic, and policy-making debates. The first is the “community justice” trend which includes community policing, community prosecution, community courts, and community sentencing. The second is the “problem-solving” movement. This includes problem-solving policing strategies and the rise of specialized problem-solving courts such as drug courts, domestic violence courts, mental health courts, and prisoner re-entry courts. Criminal defense attorneys who care about their clients participate in problem-solving lawyering every day. Moreover, by the nature of their duties, public defender offices have focused on community justice issues and have participated in policy development. However, in places with no public defender office or with underfunded offices, the perspective of the defense bar is often missing from the table during policy development. Unfortunately, Michigan only has six defender offices and budget cuts have forced these offices to reduce policy and community involvement. Additionally, few resources are available that provide public defenders and assigned/contracted counsel with the ability to strengthen their “problem-solving” services. A strong public defense structure provides a unique opportunity to ensure comprehensive services that reduce crime and save money. The attorney-client relationship involves a higher level of trust than the client has experienced and, as such, is a vehicle for enabling greater client self-responsibility in committing to services. **The opportunities for attorneys providing public defense services in Michigan to participate in program and policy development must be increased.**

The above findings lead the Task Force to develop a set of principles to be used as a guide for improving defense services in Michigan.

The Eleven Principles of a Public Defense Delivery Systemⁱ

II The public defense function, including the selection, funding, and payment of defense counsel,ⁱⁱ 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.ⁱⁱⁱ To safeguard independence and to promote efficiency and quality of services, an independent board composed of attorneys and non-attorneys should oversee defender, assigned counsel, or contract systems.^{iv} Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.^v Where there is a defender office, 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.^{vi} 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.^{vii}

II Where the caseload is sufficiently high,^{viii} the public defense delivery system consists of both a defender office^{ix} and the active participation of the private bar.

Historically, Michigan's private bar participation has included part time defenders, assigned counsel plan, or contracts for services.^x However, a "mixed system" of a defender office and an appointed counsel system provides the most effective and stable system over time. The defender office can provide a base for training programs, motion banks, investigators, and other support services. Substantial involvement of the private bar increases independence, provides support for and information about the system outside the defender office, and is a relief valve for conflicts and overload in the system. The appointment process of the attorneys should never be ad hoc,^{xi} but should be according to a coordinated plan directed by an administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.^{xii}

II Clients are screened for eligibility,^{xiii} 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 and notified of the appointment, usually within 24 hours of^{xiv} the arrest, detention or request.^{xv}

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

II 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.^{xix} In the absence of local standards, national caseload standards should not be exceeded,^{xx} 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.^{xxi}

II 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.^{xxii}

- II 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.^{xxiii} The attorney assigned for the direct appeal should represent the client throughout the direct appeal. Except for emergencies, substitute or stand-in counsel should not be used as a routine method to handle additional cases. The client and the court are entitled to have the approved attorney prepare and handle the case.
- II 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.** Public defense should participate as an equal partner in improving the justice system.^{xxiv} There should be parity of workload, salaries and other resources between prosecution and defense in criminal cases in which the accused has been provided counsel at public expense.^{xxv} Assigned counsel should be paid a reasonable fee, taking overhead into consideration, and should be reimbursed for expenses.^{xxvi} Where they exist, contracts with private attorneys for public defense services must never be primarily on the basis of cost; and should specify performance requirements and the anticipated workload, and provide for contingencies such as excess cases, high profile or complex cases,^{xxvii} and funding for expert and investigative services.^{xxviii}
- II 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.^{xxix}
- II 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.^{xxx}
- II When there is a defender office, one function of the office will be to explore and advocate for programs that improve the system and reduce recidivism.** The defense attorney is in a unique place to assist clients, communities and the system by becoming involved in the design, implementation and review of local programs suited to both repairing the harm and restoring the defendant to a productive, crime-free life in society.

These 11 Principles include the principles adopted by the American Bar Association (ABA) regarding public defense services. The Task Force added Principle 11 as a result of their research and findings. The 11 Principles were subsequently adopted by the State Bar of Michigan. These Principles were the foundation for the recommendations adopted by the Task Force. Those recommendations follow.

RECOMMENDATIONS

1. Recommendation: The Michigan State Legislature shall establish a Commission for Public Defense Services as an antonymous agency with the necessary authority and resources to develop and implement standards and administer systems for public defense services in the state. Using the "Eleven Principles of a Public Defense Delivery System" as a foundation, the Commission shall lead the effort to assure quality legal representation throughout the state in the most cost-effective manner possible. Commission Members shall be appointed by the Governor upon recommendation from the following:

- **Governor** **2** (**Treatment Community/non-attorneys**)
- **Michigan Supreme Court** **2** (**1 Former Criminal Court Judge;**
1 Former Juvenile Court Judge)
- **Legislature** **2** (**1 Representative; 1 Senator**)
- **Prosecuting Attorneys of MI** **2**
- **State Bar of Michigan** **2**
- **Criminal Defense Attorneys of MI** **2**
- **MI Association of Counties** **2**
- **Commission** **3**

Commentary

The Task Force reviewed the processes used by other states and looked at Michigan's history of efforts to reform the justice and human services systems when developing this recommendation. Currently, 32 states and the District of Columbia have statewide commissions responsible for governing all or part of the public defense delivery systems in their respective states. Of the remaining 19 states, 11 have statewide defender systems. Florida has a council for the elected defender office. Only seven have no statewide structure. Additionally, Michigan has a long history of establishing commissions charged with improving specific aspects of the justice system. These commissions have included: Juvenile Justice Services Commission; Sentencing Guidelines Commission; and the Community Corrections Board. The Task Force also reviewed the membership requirements of Michigan commissions and those in other states. The membership recommendation is based on this review.

Appointees shall have significant criminal defense experience or other relevant experience working with or on behalf of adults and/or juveniles charged with crimes. All appointees shall be committed to ensuring quality representation for everyone as described in the Guiding Principles. Commission members shall not include active law enforcement officials, active judges, active prosecutors, or others with interest that may conflict with the mission of the Commission. The majority of Commission members shall include active or retired attorneys. The

membership shall reflect the diversity of the state to the extent possible. The Commission shall elect the Commission Chair. The provision for Commission self-appointment allows for the addition of needed areas of expertise as determined by the appointed members.

The Task Force concluded that to avoid fiscal, professional, and political conflicts of interest, public defense services must be overseen by an independent governing body. The Commission shall address the unique facets of public defense services to ensure the prudent expenditure of public funds, the achievement of constitutional mandates, and the delivery of fairness that is essential to public trust and confidence in the legal system. Additionally, reliable and sufficient funding mechanisms shall be determined in order to assure the effective and efficient provision of public defense services.

2. Recommendation: At a minimum, the Commission shall establish standards that address the following:

a) Circumstances under which circuits will be required to establish public defender offices

Commentary

At a minimum, standards shall designate minimum caseloads for establishing a public defense system. The selection of the chief defender and staff shall be made on the basis of merit, and recruitment of attorneys shall involve special efforts aimed at achieving diversity in attorney staff. Since the responsibility to provide defense services rests with the state, there shall be state funding and a statewide structure responsible for uniform quality statewide. These standards call for the involvement of the private bar as a relief valve for conflicts and overload in the system.

b) Timely screening of client eligibility, and appointment and notification of attorneys

Commentary

At a minimum, standards shall assure that counsel is assigned and notified within 24 hours of arraignment and that attorneys attempt to contact clients within 24 hours of their assignment. Problems that routinely arise from late eligibility and notification of the appointment of counsel are: unnecessary days in jail due to delay in bond reduction motions; loss of employment due to delays in release; lost opportunities for diversion or early plea programs; lost witnesses or memories due to delays in investigation and needless court congestion; and less trust in the advice of counsel who has seemingly ignored

the jailed defendant. The National Advisory Committee on Criminal Justice Standards and Goals (NAC) and the American Bar Association (ABA) have both addressed this area and have recommended standards, and these were reviewed by the Task Force. These standards call for an attorney appointment process that adheres 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.

c) Provision of sufficient time and space for attorneys to meet privately and confidentially with clients

Commentary

The Task Force used existing ABA standards and recommendations by the National Study Commission on Defense Services (NSC) as a basis for this recommendation. Counsel shall interview the client as soon as practicable before the preliminary examination or the trial date. Counsel shall have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space shall be available in jails, prisons, courthouses, and other places where defendants must confer with counsel. In delinquency cases, standards shall assure that attorneys also have suitable time and space to meet with the client's family members.

d) Controlling workload in order to provide quality representation

Commentary

The NSC, ABA, and NAC have adopted standards relating to caseloads or workloads. There is general agreement that counsel's workload, including appointed and other work, shall 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. In the absence of local standards, national caseload standards shall not be exceeded; however, 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. Major felonies will ordinarily take significantly more time on average than misdemeanors. Case weighting systems can be used to pace the number and mix of assignments to assure adequate time to prepare and litigate the assigned work. Factors that can increase or decrease the capacity of the attorney are: access to investigators and other support personnel and services such as automated research, motion and brief banks, etc.; number of different courts and/or counties in which assignments are accepted; and other common sense factors that might affect the ability of the attorney to provide competent

representation. The case weighting system must also take into consideration the expanded role of defense counsel in being an active participant in programs to reduce recidivism as contemplated by the 11th Principle.

e) Providing counsel whose training and experience match the complexity of the case

Commentary

Although ABA standards call for attorneys to refuse cases if they cannot provide ethical high-quality representation, it is essential that case assignments match training and experience to the complexity of the case. Continuing education and training requirements for attorneys who provide public defense representation shall also be established by the Commission. Standards shall require that attorneys, once qualified, maintain their competence through training and education. The Commission shall approve local education and training programs for compliance with the standards. Additionally, the Commission may establish training and education programs.

f) The provision of the same defense counsel from arraignment to sentencing

Commentary

The client and the court are entitled to have the approved attorney prepare and handle the case. It is the right of the client to approve substitute counsel in cases of emergency. The need for vertical representation is crucial in delinquency cases where building and maintaining trust is particularly difficult. Probation revocation proceedings shall be viewed as the continuation of the original case, with continuous representation maintained wherever possible. The Task Force reviewed the literature and concluded that, except for emergencies, substitute or stand-in counsel shall not be used as a routine method to handle additional cases. The attorney assigned for the direct appeal shall represent the client throughout the direct appeal.

g) Assuring parity of resources between defense counsel and prosecutors on: 1) a particular case (investigation, experts, overhead, compensation, etc.); and 2) statewide availability of general support services (legal research assistance, publications, training, etc.)

Commentary

Data reviewed by the Task Force indicate that attorney fees often do not cover overhead expenses and that reimbursement for investigators and experts is routinely denied. Standards for determining the resources available for defense services shall

be based on the principle that adequate representation requires a defense that is at least equal to the quality of the prosecution. Standards for determining attorney compensation and expense reimbursement rates must consider variations in county and circuit circumstances with regard to overhead costs and prevailing rates.

Parity of resources for statewide support services (similar to the resources provided by the state to the Prosecuting Attorneys Coordinating Council) would provide for defense participation in developing public policy in the criminal and juvenile justice systems.

h) Collecting and utilizing data from throughout the state in order to monitor compliance and assure continued quality defense representation

Commentary

The Task Force determined that current information and data were inadequate for monitoring and evaluating the public defense system. Information needs to be compiled in a uniform manner throughout the state. The Commission shall determine what data shall be collected and reported. The Commission shall use this data to monitor standards' compliance, allocate resources, and provide for continuous improvement of the defense system.

i) Assuring that defense counsel from local systems are involved in continuous improvement of the system and securing necessary treatment services for clients that will reduce repeat criminal behavior

Commentary

The Task Force reviewed available information on the involvement of Michigan public defense attorneys in systems improvement and provision of services. The defense attorney is in a unique position to assist clients, communities, and the system by becoming involved in the design, implementation, and review of local programs suited to both repairing the harm and restoring the defendant to a productive, crime-free life in society. Additionally, the defense attorney has a responsibility to provide a sentencing plan for convicted clients. This plan shall include appropriate services and sanctions.

3. Recommendation: Local Public Defense Boards shall be organized within each circuit court jurisdiction or combination of jurisdictions that will be responsible for developing, implementing, and monitoring local public defense systems that comply with the standards developed by the Commission. Local Boards shall be established by the County Commissioners and consist of seven (7) to nine (9) members,

including the following:

- ▶ **Two (2) members appointed by the largest general purpose bar association in the circuit(s) (where a local bar association does not exist, the State Bar shall make these appointments)**
- ▶ **Two (2) County Commissioners**
- ▶ **Three (3) members appointed by sitting judges in the circuit(s)**

The majority of the members shall be practicing public defense attorneys; however, at least two (2) members shall be non-attorneys.

Commentary

The Task Force determined that local involvement and control is a necessary aspect of an effective public defense system. A local Board established by County Commissioners will remove any appearance of impropriety or conflict of interest from the attorney selection process. The creation of a local Board to implement state standards and funding is not unique to this recommendation. The Michigan Community Correction Act established a state Board that set standards and allocated funds and local Boards that developed funding plans and monitored local service delivery.

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i. The Representative Assembly of the State Bar of Michigan adopted the bold letters of the “Eleven Principles” (i.e., not including commentary) on April 27, 2002.

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

iii. 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). Each board should be developed consistent with national standards.

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

v. ABA, *supra* note 2, Standard 5-4.1

vi. 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).

vii. 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).

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

ix. 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.

x. 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.

xi. NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

xii. 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).

xiii. For screening approaches, see NSC, *supra* note 2, Guideline 1.6 and ABA, *supra* note 2, Standard 5-

7.3.

xiv. NSC, *supra* note 2, Guideline 1.3.

xv. 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).

xvi. NSC, *supra* note 2, Guideline 1.3.

xvii. 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.

xviii. ABA Defense Function, *supra* note 15, Standard 4-3.1.

xix. NSC, *supra* note 2, Guideline 5.10; ABA Defense Function, *supra* note 15, Standards 4-2.3, 4-3.1, 4-3.2; Performance Guidelines, *supra* note 15, Guideline 2.2.

xx. 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”].

xxi. 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.

xxii. Performance Guidelines, *supra* note 11, Guidelines 1.2, 1.3(a); Death Penalty, *supra* note 15, Guideline 5.1.

xxiii. 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).

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

xxv. Support services include benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and expert witnesses. 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 4.71; 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.)

xxvi. ABA, supra note 2, Standard 5-2.4; Assigned Counsel, supra note 2, Standard 4.7.3.

xxvii. 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.

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

xxix. 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).

xxx. 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.