

**A CONSTITUTIONAL DEFAULT:
SERVICES TO INDIGENT CRIMINAL DEFENDANTS
IN PENNSYLVANIA**

**REPORT OF THE TASK FORCE
AND ADVISORY COMMITTEE
ON SERVICES TO
INDIGENT CRIMINAL DEFENDANTS**

DECEMBER 2011



General Assembly of the Commonwealth of Pennsylvania
JOINT STATE GOVERNMENT COMMISSION
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The release of this report should not be interpreted as an endorsement by the members of the Executive Committee of the Joint State Government Commission of all the findings, recommendations and conclusions contained in this report.

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EXECUTIVE SUMMARY

In the landmark case of *Gideon v. Wainwright*, the U.S. Supreme Court ruled that free counsel for criminal defendants who cannot afford to hire an attorney is mandated upon the states by the Sixth Amendment of the U.S. Constitution. Justice Hugo Black explained why this conclusion is necessary if the courts of this nation are to administer genuine justice:

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.¹

The U.S. Supreme Court has subsequently extended the requirement of free counsel from the felony prosecution involved in *Gideon* to misdemeanor prosecutions and juvenile proceedings and from the trial itself to all “critical proceedings” after arrest.

However, a thorough study of the Commonwealth's indigent defense system (IDS) published in 2003 by the Pennsylvania Supreme Court Committee on Racial and Gender Bias concluded that the Supreme Court's mandate has been ignored by the General Assembly, and largely because of that neglect, is not being fulfilled in Pennsylvania:

Despite the expansive procedural rights afforded under law, indigent criminal defendants in Pennsylvania are not assured of receiving adequate, effective representation. Notably, Pennsylvania, South Dakota, and Utah are the only three states that provide no state funds to ensure that

¹ *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 796-97 (1963).

indigent citizens are afforded adequate criminal defense services. Pennsylvania also does not provide any statewide oversight of indigent defense systems.

The study reported here . . . indicates that Pennsylvania is generally not fulfilling its obligation to provide adequate, independent defense counsel to indigent persons. Contributing factors include the Commonwealth's failure to provide sufficient funding and other resources, along with a lack of statewide professional standards and oversight. In addition, efforts to improve the indigent defense system have been impeded by the lack of reliable, uniform statewide data collection.²

In the intervening eight years, the only significant change is that South Dakota and Utah now do provide some state funding for indigent defense, leaving Pennsylvania as the *only state* that does not appropriate or provide for so much as a penny toward assisting the counties in complying with *Gideon's* mandate.³ This failure is particularly burdensome to the poorer counties, which must contend with the dual handicap of scant resources and high crime rates.

The lack of state financial support and oversight has led to a service deficiency syndrome, as summarized in the *Racial and Gender Bias Report*:

Pennsylvania has no mechanism in place to hold accountable either the lawyers who represent the poor or the county and judicial officials who administer indigent defense systems. The absence of guidelines for the appointment of counsel has resulted in minimal quality control. In addition, the flat fee paid to appointed counsel can be a disincentive to effective preparation and advocacy; the low compensation rates create little incentive to develop expertise in criminal defense. Moreover, the sparse resources available for support services, coupled with exploding and unmanageable caseloads, allow indigent defense counsel little time, training, or assistance for conferring with clients in a meaningful manner, researching relevant case law, reviewing client files, conducting necessary pre-trial investigations, securing expert assistance or testimony, or otherwise preparing adequately for hearings and trials. Compounding these deficiencies is the lack of political independence afforded PDs whose budgets are controlled by local county politicians.⁴

² *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Judicial System (Racial and Gender Bias Report)* (n.p.: Pennsylvania Supreme Court, 2003), 164-65.

³ Some counties received small amounts that helped support indigent defense for juveniles in FY 2010-11 and earlier fiscal years through the Department of Public Welfare (DPW), but that funding has been terminated for FY 2011-12. There has never been a line item in the Commonwealth budget specifically for funding indigent defense, nor do our statutes provide for funding through a special fund or any similar mechanism.

⁴ *Racial and Gender Bias Report*, 168.

For many defendants, this means the attorney's knowledge of the facts of the case will be supplied entirely by the police report, perhaps supplemented by a hurried conversation with the client on the way to the hearing that will dispose of the case. Due to the impediments faced by those representing indigent defendants, despite their best efforts, there have been instances where a man or woman who was completely innocent of the offense or who had a perfectly valid defense to the charge nevertheless served jail time.

The problem is not the public defenders (PDs) themselves, but the system in which they work. Most PDs are hard-working, committed, and competent professionals. The problem is that they must work against daunting obstacles: inadequate training and oversight, severely limited resources, and unmanageable caseloads. In many of Pennsylvania's counties, the most brilliant and accomplished lawyer could not provide adequate representation because he or she simply would not have the time and resources needed to mount a constitutionally adequate defense. Broadly speaking, Pennsylvania's indigent defense labors under an obsolete, purely localized system, a structure that impedes efforts to represent clients effectively. The General Assembly can greatly improve the system by adopting systemic reforms based on the ABA's "Ten Principles of a Public Defense Delivery System,"⁵ which state the widely accepted standards for improving a state indigent defense system (IDS).

Because our IDS is funded and managed exclusively at the county level, there are glaring disparities in the services, training and supervision provided in different counties and often a lack of professional independence from outside interference. The "kids for cash" scandal in Luzerne County has thrown these deficiencies into sharp relief. Former Judge Mark Ciavarella of the Court of Common Pleas of Luzerne County violated the constitutional rights of up to 4,000 juveniles. The special master appointed to determine the final disposition of these cases identified 1,866 cases in which juveniles appeared before Judge Ciavarella without counsel or where the right to counsel was not properly waived. Juveniles who had committed minor offenses were consigned for harshly excessive terms to juvenile detention centers in return for kickbacks and other favors that a co-owner of the centers rendered to Ciavarella and former Judge Michael Conahan. The chief PD of the county at the time directed office staff to deemphasize juvenile cases because of lack of resources. Partly because of this official policy, it became accepted practice before these judges that juveniles would face the court with either no legal representation, or only token representation, and that no effort would be made to ensure that waivers of constitutional rights would be informed and voluntary.

The failure of the legal community to respond appropriately to these unconstitutional practices enabled them to continue unchecked. This scandal illustrates the need for statewide structures to ensure that local IDSs will be overseen and held accountable for unprofessional practices and will be independent of political and judicial interference.

⁵ American Bar Association, "Ten Principles of a Public Defense Delivery System," (ABA, February 2002) <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.

While recognizing the difficult fiscal environment the Commonwealth faces currently, the advisory committee urges the General Assembly to perform its duties under the U.S. Constitution and as a civilized society by finally addressing the deficiencies that undermine its indigent criminal defense system by reforming the system to comply with national standards.

FINDINGS

Based on the data collected for this study and the personal observations of the advisory committee members, based on their extensive experience, the committee presents the following findings regarding the Commonwealth's IDS, many of which are nearly identical to those reached eight years ago in the *Racial and Gender Bias Report*:

- In much of the Commonwealth, the IDS suffers from interference from the county administration and the county judiciary. An IDS can perform its function only when it is free from those influences.
- Lack of standardized, well-defined training, supervision, and accountability has contributed to the failure of some indigent defense practitioners to provide representation that meets professional standards.
- Lack of state support has undermined the effectiveness of indigent defense in much of Pennsylvania.
- Local defenders lack access to resources essential to effective representation: investigators, experts, technology, training and supervision, social workers, administrative staff, private meeting space, and access to legal research materials.
- Salaries for PDs are seriously inadequate and are often below salaries for prosecutors, leading to low morale and high attrition rates.
- Lawyers representing indigent defendants often carry caseloads so excessive as to drastically impede the ability of counsel to provide competent, effective, and ethically responsible representation.
- Processes and practices for appointing and remunerating assigned and conflict counsel result in poor quality representation.
- The system lacks any systematic statewide mechanism for collecting data, and access to existing data is unnecessarily impeded. Since there is no centralized data collection point, the current data from individual counties is so inconsistent and unreliable that no useful statewide caseload numbers can be reported.

- Additional state funding necessary to improve the system is likely to be partially offset by savings generated by reducing the cost of retrials due to ineffective representation and the cost of inappropriate jail sentences.

This report will describe in more detail the deficiencies in the system and recommend that statewide oversight and funding are necessary to create an IDS that recognizes the rights and dignity of individual defendants and complies with the Constitutions of the United States and of Pennsylvania. Throughout the nation, much careful thought has gone into formulating the broad principles and particular standards that should characterize an effective IDS. The “Ten Principles of a Public Defense Delivery System,” as developed by the ABA are the accepted criteria for IDS reform throughout the nation. The Commonwealth must strive to develop and implement these principles if it is to have a system that meets the constitutional demands of basic justice.

The following chart sets forth the advisory committee’s evaluation of Pennsylvania’s IDS as measured against the ABA’s Ten Principles:

ABA PRINCIPLE	PENNSYLVANIA IDS PERFORMANCE
1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.	In many counties, the IDS is subject to interference from the judiciary, the county commissioners, or both.
2A. Where the caseload is sufficiently high, the IDS consists of both a defender office and the active participation of the public bar.	The private bar is meaningfully involved in the provision of indigent defense, but the quality of representation is not monitored and attorneys are significantly underpaid.
2B. There should be state funding and a statewide structure responsible for ensuring uniform quality statewide.	There is no direct state funding, nor is there a statewide administrative structure for ensuring uniform quality of representation or reasonably consistent eligibility standards.
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.	In some counties, representation begins before the preliminary hearing (as it should), but in other counties, that hearing is the first time the attorney meets with the client.

ABA PRINCIPLE	PENNSYLVANIA IDS PERFORMANCE
4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.	Compliance unknown, due to lack of data. However, in some counties problems with providing adequate space have been identified.
5. Defense counsel's workload is controlled to permit rendering of quality representation.	In many if not most counties, attorney workloads substantially exceed recommended limits, which do not include several types of cases that did not exist when those limits were formulated.
6. Defense counsel's ability, training, and experience match the complexity of the case.	Counties use a variety of systems for assigning counsel to cases. In many counties, an attorney license and membership in the county bar are the only requirements for a noncapital case.
7. The same attorney continuously represents the client until the completion of the case.	In many counties, PDs are assigned to courtrooms rather than clients, and it is common for several attorneys to handle a case throughout the entire criminal process.
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.	In most counties, the resources available to the DA are much greater than those of the PD and the DA has more political influence than the defense bar.
9. Defense counsel is provided with and required to attend continuing legal education.	Aside from mandatory CLE requirements, indigent defense counsel generally do not participate in professional development courses, and when they do they often must pay all or part of the cost themselves.
10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.	The system's inability to provide supervision and accountability has resulted in a deterioration of professional standards.

In general, the Defender Association of Philadelphia measures up to these standards much better than IDSs elsewhere in the Commonwealth. However, the compensation for contract and conflict counsel in Philadelphia is lower than in the other counties and thus utterly inadequate. There is considerable variation in the performance of the other county IDSs in Pennsylvania, but the Commonwealth as a whole meets only one of these principles, viz., Principle 2, involvement of the private bar. (Continuing legal education (Principle 9) is mandated but often not “provided” except at the attorney’s expense.) The advisory committee therefore concludes that Pennsylvania fails to meet its constitutional duty to provide effective legal defense for indigent defendants in criminal cases.

RECOMMENDATIONS

Recommendation 1: Compliance with the Constitution

The Commonwealth of Pennsylvania should adhere to its obligations regarding the right to competent counsel under the Sixth Amendment of the Federal Constitution and article I, § 9 of the Pennsylvania Constitution, in order to guarantee fair adult criminal and juvenile proceedings. Accordingly, the Commonwealth should assure that quality indigent defense services are provided to accused persons who cannot afford to hire counsel. This can best be done by adopting the ABA's "Ten Principles of a Public Defense Delivery System" as the guiding principles for Pennsylvania's indigent defense system.

Recommendation 2: Statewide Indigent Defense Agency

Pennsylvania should establish a statewide, independent, non-partisan Office of Indigent Defense, headed by a board responsible for all components of indigent defense services. Because of the longstanding status of the Defender Association of Philadelphia (DAP) as the city's the provider of indigent defense services and its recognized excellence in meeting the heavy responsibilities of that task, it should be exempt from the control of the statewide office.

Recommendation 3: Composition of Indigent Defense Agency Board

The members of the board overseeing the indigent defense agency should be appointed by leaders of the executive, judicial, and legislative branches of government. The board should include representatives of local bar associations, among other groups. Members should not bear any obligation to those responsible for their appointments. All members of the board should be committed to the delivery of quality indigent defense services. A majority of the members should have accumulated substantial experience in providing indigent defense representation.

Recommendation 4: Structure of the Statewide Agency

The agency should be under the management of an executive director appointed by the board. The following components of the agency are so essential to its effective functioning that they should be provided for by statute: a capital case division, under a

division director; an appellate and postconviction review division, under a division director; a director of juvenile defense services; an information management and technology officer; and a director of training and professional development.

Recommendation 5: Powers and Duties of the Statewide Agency

The statewide indigent defense agency should have the power and duty to manage the delivery of legal representation for indigent adults in criminal cases and all children in delinquency cases in such a manner as to ensure that such services will be effectively and competently done. The agency should do this primarily by setting statewide standards and enforce compliance with them. The standards should cover all key areas of service delivery and administration, including performance, supervision, training, attorney workload, support services, eligibility of defendants for public counsel, timeliness of commencement of representation, and data collection and analysis. In addition, the statewide agency should have the following powers and duties:

- To contract with county PD offices, non-profit defender agencies, and other providers to deliver local indigent defense services.
- To hire, supervise, and fire county chief PDs serving after reform legislation goes into effect. (Chief county PDs serving currently should be able to retain their current positions, but should be subject to dismissal for good cause.)
- To receive and act upon client complaints of inadequate representation where they indicate a pattern of poor performance.
- To provide for appellate and postconviction litigation services for adults and juveniles, either directly or through contracts with qualified providers.

Recommendation 6: Defender Association of Philadelphia

Because of the unique and outstanding accomplishments of the Defender Association of Philadelphia, the advisory committee recommends that it should continue to handle indigent defense representation for cases arising in Philadelphia. In view of DAP's excellent record in maintaining professional standards, it should not be subject to the professional supervision of the statewide office and should be responsible for formulating and enforcing its own professional guidelines. The statewide office should contract with DAP to remunerate the latter for its handling of appeals arising from Philadelphia cases (including appeals from capital cases). The statewide office should

also contract with DAP to handle 20% of Philadelphia capital trials. The remaining capital cases in Philadelphia should continue to be assigned by the Philadelphia Court of Common Pleas to qualified counsel.

Recommendation 7: Funding

Funding for the agency should be provided primarily by the Commonwealth from the general fund. Such funding should be sufficient to enable publicly funded defense attorneys to deliver zealous and highly competent indigent defense representation in accordance with the adversary system. In addition, the statewide agency and local providers should seek supplemental funding as available from federal and private sources. None of the funding for the IDS should come from its clients.

Recommendation 8: Workload

Caseloads for defense attorneys must be controlled so as to be consistent with the provision of quality defense services as defined by the Rules of Professional Conduct and must take into account administrative responsibilities as well as direct client representation. Standards should be formulated and implemented to ensure that caseloads will not become excessive.

Recommendation 9: Compensation

State and local authorities should provide fair remuneration to publicly funded defenders, including PDs, appointed counsel and contract counsel. Full-time PDs should receive salaries commensurate with their professional experience and equal to equivalent prosecution attorneys when prosecutors are fairly compensated.

Recommendation 10: Conflict Counsel

The IDS must assure that every indigent defendant will be represented by an attorney who is free from a conflict of interest. There should be a pool of conflict counsel in each judicial district, independently managed from the PD of that district, but subject to the jurisdiction of the statewide agency.

Recommendation 11: Full-Time Counsel

The IDS should employ full-time attorneys to the greatest practicable extent. The executive director and the attorneys employed by the office of indigent defense should be required to be full-time employees. Chief PDs should also be required to be full-time, unless the statewide office determines that it is not feasible to require a full-time

commitment in the particular county. Assistant PDs should be full-time to the maximum extent feasible as determined by the statewide office. Full-time PDs should be prohibited from engaging in private practice, but that restriction should not apply to assigned counsel or contract counsel.

Recommendation 12: Data Collection and Access

The system of data collection established by the agency should provide continuous and accurate data, according to a plan that is rationally designed to capture the kinds of data that are most useful for policy analysis. The system's database should include the number of new appointments by case type, the number of dispositions by case type, and the number of pending cases, based on uniform definitions of a "case," and other data as determined by the statewide agency after consultation with local defenders. Funding of local indigent defense agencies should be contingent on their satisfactory compliance with data reporting requirements.

CHAPTER ONE INTRODUCTION

This report is submitted pursuant to 2007 Senate Resolution No. 42, which mandated a study of Pennsylvania’s “current system for providing services to indigent criminal defendants.”⁶ As directed by SR 42, the Joint State Government Commission assembled an advisory committee to guide this study. The advisory committee held a series of meetings with Commission staff, and its guidance was essential to the conduct of the study and the drafting of this report.

Throughout its discussions, the advisory committee held a strong consensus on many basic points. In their view, the indigent defense system (IDS) of the Commonwealth is inadequate to reliably afford defendants the rights they are guaranteed under the Constitutions of the United States and of Pennsylvania. In order to remedy this defect, the Commonwealth must create a statewide office, under an independent board, to administer its IDS in accordance with the “Ten Principles of a Public Defense Delivery System” as formulated by the ABA. The statewide office would ensure that the IDS would be free of political and judicial interference and would operate under high professional standards. Such a system requires state funding for the operation of the central office, but it should incorporate, not supplant, the existing county PDs. Among other advantages, a statewide office with Commonwealth support would help ameliorate the disparities in the quality of representation across counties and help equalize the resources allotted to PD and DA offices.

The advisory committee initially determined that it needed reliable data about the status of indigent defense in Pennsylvania to inform its discussions. A series of surveys were conducted by Commission staff with the assistance of several members of the advisory committee. This study encountered considerable difficulty in collecting usable data, which supports the committee’s call in this report for a rational data collection system administered by the statewide office. In addition to its own surveys, the committee relied to a significant extent on the findings of the 2003 study by the Supreme Court Committee on Racial and Gender Bias in the Justice System.⁷

Several national experts on indigent defense suggested by members of the advisory committee were brought in to address the committee. On September 15, 2009, David Carroll, director of research and evaluation for defender legal services of the National Legal Aid and Defender Association (NLADA), presented his research on indigent defense systems around the country. Mr. Carroll highlighted several states’

⁶ SR 42 is included in this report as Appendix A.

⁷ *Racial and Gender Bias Report*, chap. 5, 163-97, which contains the findings of the extensive study of Pennsylvania’s indigent defense system by the Spangenberg Group.

systems that had faced severe problems and the reforms they implemented with some success. He discussed the ABA principles and how each is being addressed in state reforms.

At that same meeting, Phyllis Subin made a presentation based on her experience as a PD with the Defender Association of Philadelphia (DAP), as chief PD in New Mexico, and as a national consultant. She emphasized the importance of training in creating a culture of adherence to high professional standards through statewide training programs for all supervisory and front-line attorneys.

On November 10, 2009, the committee heard a presentation from Robin Dahlberg, senior staff attorney for the ACLU racial justice program. She discussed the ACLU's reform efforts in Allegheny County and Venango County, as well as in Michigan and Montana. She observed that ACLU's current strategy focuses on litigation to force the creation of state systems where county systems exist. Needed reforms include client-centered adversarial representation, training, supervision, and standards for practice and workload, as well as increased funding.

At the same meeting, Professor Norman Lefstein made a presentation on IDSs and reform efforts throughout the United States. He is dean emeritus and professor of law at the University of Indiana School of Law at Indianapolis and a nationally recognized expert on indigent defense, whose career includes seventeen years of service as chair of the Indiana Public Defender Commission, and co-authorship of *Justice Denied*, the most comprehensive report on contemporary IDSs in the United States. He stressed the importance of the Ten Principles, especially the need for independence from judicial and political interference, control of attorney caseloads, and active involvement of the private bar.

At the committee's next meeting on January 26, 2010, Robert Listenbee, chief of the juvenile unit of DAP and president of the Juvenile Defenders Association of Pennsylvania, and Barbara Krier, senior assistant PD for York County, presented the committee with a draft report of the Pennsylvania Juvenile Indigent Defense Action Network (PA-JIDAN). They provided background information on the structure of juvenile indigent defense and advocated committee approval of PA-JIDAN's recommendations for reform of juvenile defense. These included adoption of standards for PDs and court-appointed counsel representing juveniles, establishment of a Pennsylvania Center for Juvenile Defense Excellence, support for legislation providing that children in the juvenile justice system be deemed indigent and entitled to a court-appointed lawyer, and restriction of waiver of counsel by juveniles and appointment of standby counsel when such waiver is permitted.

At the advisory committee meeting on October 12, 2011, Harry J. Cancelmi, chief public defender of Greene County, and Wieslaw T. Niemoczynski, chief public defender of Monroe County, presented evidence that the wide disparity in resources between DAs and PDs seriously undermines the effectiveness of the latter. Mr. Cancelmi detailed how underfunding the county PDs compromises their independence and impedes the career

development of professional staff. Mr. Niemoczynski emphasized that the support organizations for DAs are far better funded than their counterparts on the defense side and called the imbalance “shortsighted.”

Meetings of the advisory committee took place on March 24, 2010, September 27, 2010, March 3, 2011, and October 12, 2011, to develop and oversee the drafting of the report.

Drafts of the report have been circulated to the members of the advisory committee for review. Factual assertions that are not cited to published sources are supported by the extensive personal experience of advisory committee members. While individual members of the advisory committee may disagree with particular points made in this report, the factual observations and policy recommendations in the report reflect the broad consensus of the advisory committee.

The Joint State Government Commission would like to express its deep appreciation to the members of the advisory committee, to David Carroll, Robin Dahlberg, Barbara Krier, Norman Lefstein, Robert Listenbee, and to the PDs throughout the Commonwealth who contributed invaluable assistance to this study.

CHAPTER TWO

THE RIGHT TO COUNSEL

This chapter describes the leading cases establishing the right to publicly paid counsel for indigent defendants, the constitutional standard regarding the performance of counsel, and litigation regarding the minimum standard of effectiveness for the IDS as a whole.

The right to counsel in the United States is grounded in the Sixth Amendment to the U.S. Constitution, which states in pertinent part as follows: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel in his defense.” When originally adopted as part of the Bill of Rights, the Sixth Amendment applied only to the federal government, not to the states, and it guaranteed only that the government could not prohibit a defendant who had hired counsel to have the benefit of counsel in court.⁸

Since 1776, the Constitution of Pennsylvania has provided that “[i]n all criminal prosecutions, the accused hath a right to be heard by himself and his counsel” This provision, along with guarantees of several other rights relating to criminal proceedings, currently appears in Article I, § 9.

INDIVIDUAL REPRESENTATION

Development of the Right to Representation

In *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55 (1932), the federal Supreme Court expanded the Sixth Amendment to guarantee a right to counsel provided at government expense to persons who could not afford a lawyer. This case arose from the famous Scottsboro Boys trial, where nine black youths were accused of raping two white women. In a whirlwind proceeding, all but the youngest were sentenced to death by an all white jury. The defendants were afforded a lawyer, as required by Alabama law in a capital case, but the lawyers were not assigned and did not meet their clients until the very morning of the trial.⁹ Speaking through Justice George Sutherland, the Court held

⁸ The Constitution Project, *Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel* (Washington, D.C.: Constitution Project, 2009), 18.

⁹ *Ibid.*, 18-19.

that the defendants, convicted under these circumstances, were denied meaningful assistance of counsel in violation of the Due Process Clause of the Fourteenth Amendment. The Court elaborated on the importance of counsel in assuring a fair trial:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. 287 U.S. at 68-69, 53 S. Ct. at 64.

The right to counsel at this stage was limited to capital cases, and arguably to defendants who were “incapable adequately of making [their] own defense because of ignorance, feeble-mindedness, illiteracy, or the like.” However, the right already attached “whether requested or not” and was not satisfied “by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation or trial of the case.” 287 U.S. at 71, 53 S.Ct. at 65.

The Court declined to apply the Sixth Amendment to the states in *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252 (1942). In a 6-3 decision, the Court retained a case-by-case approach.

[T]he Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while the want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded to a defendant who is not represented by counsel. 316 U.S. at 473, 62 S. Ct. at 1262.

The Court dealt with *Powell* by recalling that its holding was limited to capital cases (the defendant in *Betts* was charged with robbery) and to defendants whose inability to mount a defense was limited by the factors listed above. 316 U.S. at 463, 62 S. Ct. at 1256-57. The Court then reviewed the corresponding provisions of the various state constitutions both at the time of the Constitution’s enactment and contemporaneously with *Betts*. In three states the state constitution required appointment of counsel where the defendant was unable to afford a lawyer, and in eighteen states a statute provided for a right to free

counsel. In most states, the state constitution guaranteed only that the state could not deny the defendant the right to be represented by counsel retained by the defendant. 316 U.S. at 466-72, 62 S. Ct. at 1258-61.

Writing for the three dissenters, Justice Hugo Black maintained that the Sixth Amendment applies to the states, but noted the majority's disagreement with that position. At the same time, he argued that the conviction of Betts without counsel violated the Due Process Clause, giving a rationale that would be broad enough to apply the Sixth Amendment to the states as a fundamental right.

A practice cannot be reconciled with common and fundamental ideas of fairness and right, which subjects innocent men to increased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented. . . .

Denial to the poor of the request for counsel in proceedings based on charges for serious crimes has long been regarded as shocking to the universal sense of justice throughout this country. 316 U.S. at 476, 62 S. Ct. at 1263 [internal quotations omitted].

In *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963), one of the most celebrated cases in the history of the Supreme Court,¹⁰ Justice Black wrote for the Court in a decision that overturned *Betts v. Brady* and applied to the states the right to free counsel for indigent defendants. As with other decisions of the Warren Court, *Gideon* embraced an approach to the Constitution that was more protective than previous Courts of individual rights and less solicitous of federalist diversity among the states. Justice Black argued strongly that legal representation is essential to the fairness of a criminal proceeding.

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who

¹⁰ The case is the subject of *Gideon's Trumpet* (1964) the bestselling book by Anthony Lewis and a Hallmark Hall of Fame film of the same name, in which Henry Fonda played the defendant Clarence Earl Gideon.

have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions 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. 372 U.S. at 344, 83 S. Ct., at 796-97.

The opinion relied on the passage from *Powell v. Alabama*, quoted above, to establish the need for an attorney to conduct a defense of even an innocent defendant.

By itself, *Gideon* established the right to be represented at trial where the indigent defendant was charged with a felony (in *Gideon*'s case, breaking and entering a pool hall with intent to commit a misdemeanor, which was a felony under Florida law). Subsequent precedents have broadened the right to counsel in several ways.¹¹ It applies to "critical stages" of the criminal justice process prior to trial, but after judicial proceedings are initiated against the defendant; a "critical stage" is "any stage of the prosecution, formal or informal, in court or not, where counsel's absence might derogate from the accused's right to a fair trial."¹² Such stages include line-up identification,¹³ arraignment,¹⁴ preliminary hearing,¹⁵ plea negotiation, entry of a guilty plea,¹⁶ and appeals.¹⁷ Second, the right has expanded to proceedings other than the felony trial involved in *Gideon*, to encompass juvenile delinquency proceedings¹⁸ and misdemeanors that may result in imprisonment.¹⁹ The Court has also afforded the indigent the right to related services other than counsel, including trial transcripts²⁰ and expert assistance.²¹

¹¹ American Bar Association, Standing Committee on Legal Aid and Indigent Defendants (ABA/SCLAID), "*Gideon's* Broken Promise: America's Continuing Quest for Equal Justice" (Chicago: ABA, December 2004).

¹² *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926 (1967).

¹³ *Id.*; *Gilbert v. California*, 388 U.S. 263, 87 S. Ct. 1951 (1967).

¹⁴ *Hamilton v. Alabama*, 368 U.S. 53, 82 S. Ct. 157 (1961).

¹⁵ *Coleman v. Alabama*, 399 U.S. 1, 90 S. Ct. 1999 (1970).

¹⁶ *White v. Maryland*, 373 U.S. 59, 83 S. Ct. 1050 (1963).

¹⁷ *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814 (1963); *Halbert v. Michigan*, 545 U.S. 605, 125 S. Ct. 2582 (2005).

¹⁸ *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428 (1967).

¹⁹ *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006 (1972).

²⁰ *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585 (1956).

²¹ *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087 (1985).

In Pennsylvania, the right to counsel is in certain respects broader than it is under the U.S. Constitution.²² The right applies upon the arrest of the suspect, even if no formal proceedings have commenced.²³ Convicted defendants in Pennsylvania have a constitutional right to representation in postconviction proceedings²⁴ and parole revocation hearings.²⁵ In both respects, Pennsylvania law may exceed the minimum requirements under federal constitutional law.

Effective Representation

In *Strickland v. Washington*, 466 U.S. 468, 104 S. Ct. 2052 (1984), the U.S. Supreme Court held that the right to counsel includes the right to the effective assistance of counsel, which is denied when counsel fails to represent the client competently.²⁶ This case permits a convicted defendant to file a “collateral attack” on the conviction to overturn it if ineffective assistance of counsel is established. The Court laid down the standards under which effectiveness would be determined.

A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. 466 U.S. at 687, 104 S. Ct. at 2064.

²² See The Spangenberg Group, “A Statewide Evaluation of Public Defender Services in Pennsylvania” (West Newton, Mass.: SG, May 2002), 5-7 (Appendix vol. 1 to the *Racial and Gender Bias Report*, 164).

²³ *Commonwealth v. Richman*, 320 A.2d 351, 352-54 (Pa. 1974) (right to counsel commences upon arrest); *Kirby v. Illinois*, 406 U.S. 682 (1972) (right to counsel commences at the indictment), *but see U.S. v. Ash*, 413 U.S. 300 (1973) (right to counsel does not apply to postindictment photograph identification). The governing rule under the Sixth Amendment is that the right attaches upon the initiation of adversary judicial proceedings. *Kirby*, 406 U.S. at 688, 92 S. Ct. at 1881.

²⁴ Compare *Commonwealth v. Mitchell*, 235 A.2d 148 (Pa. 1967) (defendant entitled to free counsel for a collateral attack under PCRA) with *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (U.S. Constitution requires free counsel only for a direct appeal).

²⁵ *Commonwealth v. Tinson*, 249 A.2d 549 (1969) (relying on Public Defender Act, § 6(a)(10); 16 P.S. § 9960(a)(10)); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756 (1973) (applicability of right to counsel to parole revocation hearings is decided on a case-by-case basis).

²⁶ The court had already held that effective assistance could be denied by the government if it “interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense” such as when the government barred counsel from consulting with the defendant during an overnight recess. *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2063 (citing cases).

Clarifying the first prong of this test, the Court added:

When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. . . . The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. 466 U.S. at 687-88, 104 S. Ct. at 2064-65.

These include adhering to the ethical standards applicable to legal representation. Professional guidelines "are guides to determining what is reasonable, but they are only guides." 466 U.S. at 688, 104 S. Ct. at 2065.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission was unreasonable. . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. 466 U.S. at 689, 104 S. Ct. at 2065 [citations omitted].

Justice Denied comments that "commentators have been virtually unanimous" in their criticism of *Strickland* because the standard is so deferential to counsel that it has "proved impossible to meet."²⁷ In Pennsylvania, however, convictions have been overturned due to ineffectiveness of counsel, although the majority of such appeals are unsuccessful.²⁸ The test for ineffectiveness in Pennsylvania, whether applying the U.S. Constitution or article I, § 9 of the Pennsylvania Constitution, is very similar to the *Strickland* test. *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987). The prejudice requirement under Pennsylvania law is more stringent than under federal law, in that the defendant must prove that counsel's ineffectiveness "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii). *Commonwealth v. Buell*, 658 A.2d 771, 777 (Pa. 1995).

²⁷ *Justice Denied*, 40, 41, quoting with approval David Cole, *No Equal Justice*, 78-79 (1999).

²⁸ 42 Pa.C.S.A. § 9543 nn. 91-180. See, e.g., *Commonwealth v. Hague*, 840 A.2d 1018 (Pa. Super. 2003), appeal denied, 878 A.2d 863 (Pa. 2005); *Commonwealth v. Johnson*, 875 A.2d 328 (Pa. Super. 2005), appeal denied, 892 A.2d 822 (Pa. 2005); *Commonwealth v. Scassera*, 965 A.2d 247 (Pa. Super. 2009), appeal denied, 985 A.2d 219 (Pa. 2009). Ineffectiveness challenges are governed by the Post Conviction Relief Act (PCRA), 42 Pa.C.S. Ch. 95, Subch. B, §§ 9541—9546.

The U.S. Supreme Court further spelled out its analysis of ineffectiveness of counsel in *United States v. Cronin*, 466 U.S. 648, 104 S. Ct. 2039 (1984). It laid down three conditions, proof of which enabled ineffectiveness to be presumed, so that it did not need to be established by the detailed facts of a particular case. These are the complete failure to furnish counsel at all, the failure of the opposing counsel to subject the prosecutor's case to any meaningful adversarial scrutiny, and circumstances where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Cronin*, 466 U.S. at 658-60, 104 S. Ct. at 2046-47 (1984). Although *Cronin* is not directly applicable to a broad challenge to the constitutionality of an IDS (because it involved a posttrial collateral attack on the result of a single prosecution), it has been argued that the third criterion can serve as a test of whether the IDS as a whole meets the requirements of the Constitution, especially where defense counsel are faced with clearly excessive caseloads.²⁹

INDIGENT DEFENSE SYSTEMS

Because of the real or perceived inadequacies of IDSs across the United States, a variety of court challenges have been mounted in order to have the system declared unconstitutional. These challenges have been adjudicated at both the state and federal level, with a variety of results. In many cases, the litigation has terminated in a settlement that avoided a final judgment. In others, courts have ordered remedies that threatened to bring the criminal justice system to a halt unless the issue was addressed.

Indigent defense attorneys have sued on behalf of all indigent defendants to obtain sweeping relief. In *Lavallee v. Justices in Hampden Superior Court*, (2004)³⁰ indigent defendants in Massachusetts petitioned the trial court with the claim that insufficient compensation for their defense had led to a withdrawal of attorneys from the system, leaving an insufficient number of attorneys willing to accept assignments of cases. The Supreme Judicial Court upheld this claim. Though it did not directly grant increases in compensation rates, the Court ruled that "any indigent defendant incarcerated pretrial in the county had to be released after seven days if counsel was not appointed, and any pending case against an indigent defendant had to be dismissed after 45 days if no attorney filed a court appearance on the defendant's behalf."³¹ The cases were dismissed "without prejudice," meaning that charges could be refiled until the statute of limitations ran out on the offense. The following year, the Massachusetts legislature raised the compensation to \$100 per hour for homicide cases, \$60 per hour for trial court cases, and

²⁹ *Justice Denied*, 110-11.

³⁰ <http://caselaw.findlaw.com/ma-supreme-judicial-court/1014501.html>; 812 N.E.2d 895 (Mass. 2004).

³¹ *Justice Denied*, 113-14.

\$50 per hour for other cases, and appropriated funding for 100 additional PDs.³² Similar litigation claiming that insufficient compensation for assigned counsel in New York City denied indigent defendants their right to counsel resulted in a permanent injunction requiring the City to pay counsel \$90 per hour pending legislative relief, which was enacted by the New York General Assembly while the case was on appeal.³³

³² Ibid., 114, n. 44.

³³ Ibid., 114, referring to *New York County Lawyers' Association v. New York*, 196 Misc. 2d 761 (N.Y. Sup. Ct. 2003).

CHAPTER THREE

INDIGENT DEFENSE SYSTEMS IN OTHER STATES

GENERAL STRUCTURES

There are three basic types of indigent defense systems in the United States: assigned counsel, contract attorney, and public defender.³⁴

Under the assigned counsel system, private attorneys represent indigent defendants. There are two variations to the assigned counsel model, the ad hoc model, and the coordinated assigned counsel model. In the ad hoc model, attorneys are selected without any system or set of criteria for the assignment. Often a judge assigns a case to an attorney who happens to be in the courtroom at the defendant's first appearance or arraignment. Attorneys who are appointed through the ad hoc assigned counsel system are usually paid an hourly fee for their work, and must petition the court to pay expenses for expert witnesses, investigators, and support staff. Criticisms of the ad hoc assigned counsel system include complaints that it allows selection by political patronage, disregards attorney qualifications, and leads to ineffective representation.³⁵

The second variation of the assigned counsel system is the coordinated assigned counsel model. This assigned counsel system features an administrative or oversight agency that determines minimum qualification standards for assigned attorneys, and provides supervision, training, and support. The agency may coordinate a rotation system for assignments and may recommend attorneys based on their training and expertise in relation to the case.³⁶

In the contract attorney system, the court contracts with one or more private attorneys, law firms, bar associations, or nonprofit organizations for indigent defense. There are two types of contract systems: fixed price and fee per case. In fixed price contracts, the attorney's fees are fixed for the duration of the contract, regardless of the number or complexity of the cases assigned. The attorney is responsible for all support costs, secretarial services, expert witnesses, investigators, and other litigation expenses. The financial burden placed on the attorney by this arrangement can be so oppressive as to lead to ineffective representation. For this reason, much criticism has been directed at the fixed fee system, so much so that in 1985 the ABA issued a resolution condemning the awarding of contracts based on price. The fee per case system awards contracts based

³⁴ Marea L. Beeman and Robert L. Spangenberg, "Toward a More Effective Right to Assistance of Counsel," *Law and Contemporary Problems* 58, no. 1 (Winter 1995): 32.

³⁵ *Ibid.*, 33.

³⁶ *Ibid.*

on a set fee for a predetermined number of cases. When the stipulated number of cases has been assigned, the contract allows the provider to renegotiate the terms and conditions.³⁷

The predominant system in Pennsylvania and many other states is the PD system, which is defined as a “public or private nonprofit organization staffed by full- or part-time attorneys . . . designated by a given jurisdiction to provide representation to indigent defendants in criminal cases.”³⁸ Pennsylvania counties are required to establish a PD by statute.³⁹ Ideally, this system should put indigent defense on an equal or nearly equal footing to the prosecution in that the state provides both functions with support personnel and technology.⁴⁰

When adequately funded and staffed, defender organizations employing full-time personnel are capable of providing excellent defense services. By devoting all their efforts to legal representation, defender programs ordinarily are able to develop unusual expertise in handling various kinds of criminal cases. Moreover, defender offices frequently are in the best position to supply counsel soon after an accused is arrested. By virtue of their experience, full-time defenders also are able to work for changes in laws and procedures aimed at benefiting defendants and the criminal justice system.⁴¹

The PD model can readily be supplemented by attorneys from the private bar, who can handle excess case loads and represent defendants that the PD is unable to handle due to conflict of interest.⁴²

SYSTEMS IN SELECTED STATES

A number of sister states that have IDSs may serve as useful models for Pennsylvania. Some of the states have recently instituted comprehensive reforms of their systems, whether by legislative initiative or in response to judicial mandates. States such as Montana have moved to a statewide PD system while others, such as Indiana, have established oversight boards that set standards for performance, training, and funding. Regardless of their different forms, IDSs throughout the U.S. have come under increasing fiscal pressure due to the current economic difficulties.

³⁷ Ibid., 34.

³⁸ Ibid., 36.

³⁹ Act of December 2, 1968 (P.L.1144, No.358) (Public Defender Act); 16 P.S. §§ 9960.1–9960.13.

⁴⁰ Amy Bach, *Ordinary Injustice: How America Holds Court* (New York: Metropolitan Books), 28.

⁴¹ ABA Standards for Criminal Justice: Providing Defense Services, 3rd ed. (Washington, D.C.: ABA, 1992), 7.

⁴² Ibid., 7, 8.

Robert Spangenberg has developed a useful typology of the IDSs of the states, which is adopted in *Justice Denied*. Twelve states use a state PD with an oversight commission, and another seven states have a state indigent defense director, who is also supervised by a commission. Another eight states use a statewide director who operates without an oversight commission but with comprehensive authority. Nine states have a state commission, but the counties maintain substantial authority over the administration of their respective systems. Six states have statewide commissions whose authority is limited to appellate defense. Finally, eight states, including Pennsylvania, use a localized system with no statewide body. The trend in recent years has been toward centralizing authority with the state. Of the eleven states that have changed their systems in 2000 or thereafter, eight have adopted a commission and state PD or director with full supervisory authority and three have a statewide body with partial authority. The full authority systems are almost entirely state funded, while all but two of the eight partial authority states rely predominantly on local funding. *Justice Denied* advocates a statewide, full authority structure comprised of a state PD or director and an appointed commission to provide oversight and help protect the system's independence.⁴³

Georgia

Structure and Funding

Responding to the recommendations of a study commission established by Supreme Court Justice Robert Benham, Georgia enacted the Georgia Indigent Defense Act of 2003 (GIDA).⁴⁴

This legislation provides a more centralized system, whereas the former system was funded and operated almost entirely by the counties. The state funds defense for adult felonies, criminal appeals, and juvenile delinquency cases, while counties pay for misdemeanors and violations of ordinances. The system nevertheless remains predominantly county funded.⁴⁵

GIDA created an eleven member oversight board, the Georgia Public Defender Standards Council (GPDSC) to oversee the PDs serving in the state's 49 judicial districts. The board has authority to set performance standards and the power to remove PDs who fail to meet them. The board also directs the provision of administrative assistance, education, and training. Counties that can demonstrate that their PD systems meet or exceed the state standards can opt out of the statewide system but must forgo state

⁴³ *Justice Denied*, 151-166. The table at p.151 of the source shows the states that operate under each of these systems and the year each state's system was established. A table showing the respective funding responsibilities of the states and counties is at p. 54 of the source.

⁴⁴ Stephen B. Bright and Lauren Sudeall Lucas, "Overcoming Defiance of the Constitution: The Need for a Federal Role in Protecting the Right to Counsel in Georgia," (Washington, D.C.: American Constitution Society, September 2010), 3. The Georgia Indigent Defense Act of 2003 is codified at Ga. Code §§ 17-12-1—17-12-81.

⁴⁵ *Justice Denied*, 54, 56.

funding if they do. Cases that are heard by the Superior or juvenile courts are handled by the new system. State court cases are handled by county offices that contract with the PD offices.

From 2003 to 2004, the budget for indigent defense increased from \$7.5 million to \$9.5 million, a 32 percent increase.⁴⁶ This increase was requested by the Council to increase local funding for indigent defense.⁴⁷ As of the 2005 Spangenberg report, there were full-time PDs working in the 43 judicial districts under the statewide system, while six counties opted out of that system. From 2005 to 2010, the percentage of county funding has stood at about 63 percent, and expenditures have increased from \$55.6 million to \$70 million. The state expenditure has increased from \$31 million to \$41 million.⁴⁸ Georgia's system is funded through fees and surcharges on civil and criminal cases, bail bonds, and application fees for PD services. These sources are not sufficient to cover rising costs and are unpredictable.⁴⁹ Because the funding mechanism created by GIDA was not explicitly earmarked for indigent defense, from 2006 through 2010, approximately \$30 million of the amounts collected under the legislation was appropriated for other purposes.⁵⁰

A Problematic Reform

This diversion of funds was an indication that the reformist impulse behind GIDA has dissipated, and the system is now seen as a grossly inadequate one that suffers from many of the inadequacies that characterize ineffective IDSs around the country.

While unquestionably an improvement over the fragmented approaches that existed before it, the new system has in some cases failed completely to provide representation to some indigent defendants and has provided inadequate representation to many others. Many PDs carry crushing caseloads, often lack the investigative and expert assistance needed to represent their clients effectively, and are pressured to represent defendants with conflicting interests. Some capital cases have gone without funding for counsel, investigation, and experts for years, making a timely investigation and a fair trial impossible. Hundreds of defendants in felony cases have not had *any representation*—some pre-trial and others

⁴⁶ “Governor Sonny Perdue Signs Indigent Defense Legislation,” May 22, 2003, http://gov.georgia.gov/00/press/detail/0,2668,78006749_91290006_91665626,00.html.

⁴⁷ Vicky Eckenrode, “Georgia’s Public Defender Funds Running Low; Council Requests \$9.5 million for Local Judicial Circuits,” *Augusta Chronicle*, Jan. 28, 2007, <http://www.nacdl.org/public.nsf/defenseupdates/georgia026?opendocument>.

⁴⁸ Georgia Public Defenders Standards Council Legislative Oversight Committee Annual Report (Feb. 2010), 18, <http://www.gpdsc.com/docs/2010%20Public%20Defenders%20LegislativeOversightCommitteeReport.pdf>.

⁴⁹ *Ibid.*, 4. See Ga. Code § 15-21A-6(a) (\$15 civil action filing fee); § 15-21A-6(c) (\$50 indigent defense application fee).

⁵⁰ Stephen B. Bright and Lauren Sudeall Lucas, “Overcoming Defiance”, 3.

on motions for new trial and appeal. And fixed-fee contracts have increasingly been used to provide only nominal representation to many other defendants.⁵¹

The system has failed to provide counsel for defendants seeking a new trial or an appeal. A class action lawsuit was filed in December 2009 on behalf of 187 defendants at these stages who were awaiting appointment of counsel for up to three years. On February 23, 2010, the Superior Court granted the plaintiffs class certification and directed the State and the GPSDC through a writ of mandamus to provide members of the plaintiff class “effective and conflict-free counsel” within 30 days of receiving a request (or within 30 days of the court order in this case for current members of the class).

Noted civil rights activist Steven Bright and his colleague Lauren Sudeall Lucas charge that “cost containment has prevailed over constitutional rights.” They conclude that litigation is “the sole means to compel compliance from such a mismanaged system.” and that only federal oversight could discourage Georgia and other states from perpetuating unconstitutionally ineffective systems.⁵²

A widely distributed book on America’s criminal justice system cited Georgia’s experience as a prime example of the failure of a state IDS to provide adequate indigent defense.⁵³ According to PDs and DAs interviewed for the book, continued underfunding, overwhelming caseloads, and the stagnant culture of Georgia’s indigent defense in most of the state have thwarted the reform attempted by GIDA. Problems that range from poor data collection to lack of computer resources to the lack of office supplies as common as postage stamps have continued to plague indigent defense in Georgia.

The GPDSC Legislative Oversight Committee Annual Report of 2010 charged that, despite the reforms that created the statewide system, “external forces have caused parts of the system to become structurally broken.” The report argued that the Georgia IDS faced collapse because reformist “crusaders” had used litigation “to seek judicial orders that usurp and disregard the policies of the elected legislature in favor of compelling the State to adopt expensive and unattainable goals that exceed the requirements of the Georgia Constitution.”⁵⁴ The report cited the substantial burden caused by postconviction review and the Georgia state bar’s formal advisory opinion requiring conflict counsel to be appointed whenever two attorneys under a common supervisor would represent defendants in the same case, thereby disallowing “Chinese wall” arrangements to address such conflicts.⁵⁵

⁵¹ Ibid., 2.

⁵² “Overcoming Defiance,” 20.

⁵³ Amy Bach, *Ordinary Justice*, 11-76.

⁵⁴ Georgia Public Defenders [sic] Standards Council Legislative Oversight Committee Annual Report (February 2010), 2.

⁵⁵ Ibid., 7, 8.

The *Augusta Chronicle* reported that the statewide system was foundering under financial difficulties (especially the cost of defending death penalty cases) and received only “tepid” support from Georgia lawmakers. The system’s inadequacies resulted in trial delays and failures to provide attorneys for appeals, spawning a number of lawsuits aimed at reforming the system. The article observed that the system faced the threat of being parceled back to the counties by legislative action. The chair of the House Judiciary-Non-Civil Committee delayed action on proposed legislation until the end of 2010 in order to give the GPDSC time to reach a compromise with “other legal groups.”⁵⁶

In May 2011 legislation was enacted revising the provisions that govern the Georgia Public Defender Standards Council. The board overseeing the council is reduced from 15 members to nine, five of whom will be appointed by the governor. The legislation also expands the director’s authority to remove attorneys. Under the previous system, attorneys could be removed only by action of the board. Finally, this legislation permits appointment of an attorney from a judicial circuit other than the one where the defendant resides. While critics concede that consolidating decision power in the director of the GPDSC may raise the quality of indigent defense, they fear that placing the majority of members under the Governor’s appointment power jeopardizes the independence of the agency. Stephen Bright observes that cross-circuit representation will cause scheduling conflicts and further burden overworked PDs.⁵⁷

Indiana

Indiana indigent defense is funded in part by a block grant program administered through the Indiana Public Defender Commission (IPDC). The duties of the Commission include:

- Making recommendations to the Supreme Court regarding:
 - determining indigency and eligibility for legal representation
 - selection and qualifications of attorneys to represent indigent defendants at public expense
 - determining conflicts of interest
- Determining guidelines and standards for reimbursement to participating counties, including:
 - determining indigency and eligibility for legal representation
 - enforcement of court orders for reimbursement of defense costs
 - use of county supplemental PD services funds

⁵⁶“Public Defender Shakeup Delayed,” *Augusta Chronicle*, Apr. 23, 2010, <http://chronicle.augusta.com/news/metro/2010-04-23/public-defender-shakeup-delayed?v=1272066374>.

⁵⁷ Georgia House of Representatives Bill No. 238; Jon Mosher, “A lack of independence in Georgia’s public defense system,” NLADA Justice Standards, Evaluation & Research Initiative, May 4, 2011, <http://www.nlada.net/jseri/blog/lack-independence-georgia%E2%80%99s-public-defense-system>. Bill Rankin, “New legislation proposed for struggling public defender system,” *Atlanta Constitution Journal*, February 11, 2011, <http://www.ajc.com/news/georgia-politics-elections/new-legislation-proposed-for-835520.html>.

- qualifications of attorneys practicing indigent defense
 - compensation rates for salaried, contractual, and assigned counsel
 - minimum and maximum caseloads of PD offices and attorneys
- Making recommendations concerning delivery of indigent defense services
 - Submitting an annual report to the Governor, Legislature, and Supreme Court⁵⁸

In addition to the commission, Indiana also has established a PD council comprised of PDs and contract counsel, with the responsibility to establish centralized resources, such as procedure manuals, and assistance with briefs and jury instructions.⁵⁹

According to the ABA, the state's legislation prescribes an effective means for enforcing indigent defense standards.⁶⁰ However, *Justice Denied*, which was cowritten by Norman Lefstein, the former chair of the IPDC, gives a more guarded assessment of its effectiveness:

The experience of Indiana, which is one of the more successful partial-authority commissions, illustrates the difficulty with such programs. In Indiana, the state provides less than half of the funding for indigent defense, although the commission has persuaded the more populous of the state's 92 counties to create independent local boards to oversee indigent defense in their jurisdictions, which includes determining the indigent defense delivery method. In order to qualify for 40% state reimbursement of the county's indigent defense expenses, counties have had to adhere to the commission's caseload standards and increase their overall expenditures. In some years, however, the commission has received less funding from the state than was needed for its reimbursements to the counties, so reimbursements were reduced to less than 40%, which in turn has frustrated the counties that were part of the program. In addition, many of the smaller counties have never agreed to become part of the commission's reimbursement program, and therefore, have not been obligated to increase their expenditures or improve their indigent defense systems. Thus, in Indiana, there is not full statewide oversight and, rather than having just one commission with full authority over the entire state, there is a single partial commission and numerous local boards, all of which are independent of one another.⁶¹

⁵⁸ Ind. Code § 33-40-5-4.

⁵⁹ Ind. Code § 33-40-4 et seq.

⁶⁰ ABA/SCLAID, "Indiana" American Bar Association, 2005, <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/downloads/in.pdf>.

⁶¹ *Justice Denied*, 171.

ABA/SCLAID echoed these criticisms and also noted the system's lack of complete independence from undue judicial and political interference.⁶²

In order to qualify for the state block grant, a county must submit a plan that complies with IPDC guidelines.⁶³ Fifty-eight of the state's 92 counties, containing 65% of the state's population, are eligible to receive reimbursement for non-capital cases.⁶⁴ The 2010-11 appropriation to the Public Defense Fund, which funds these reimbursements, is \$18.25 million.⁶⁵

On the local level, county PD boards may be established by the county executive. The board appoints the county PD, who may use his or her staff to provide representation, contract out services, or use assigned counsel in accordance with its comprehensive plan. The county board may apply to the commission for the reimbursement for noncapital cases other than misdemeanors.⁶⁶ In counties with a population under 400,000, the court may contract to provide counsel for indigents at the county's expense.⁶⁷

Louisiana

The state's IDS was fundamentally reformed by the enactment of the Louisiana Public Defender Act in 2007.⁶⁸ This act was adopted to remedy a severely dysfunctional system.

Until the passage of the Louisiana Public Defender Act (Act 307), public defense was carried out through a variety of delivery mechanisms with only superficial oversight by the state PD agency. Many offices could not produce accurate caseload information, had limited access to investigative or expert witness resources, were unable to spend adequate time with their clients, and struggled to retain qualified, competent counsel. Most PDs had no health insurance or retirement plan, were forced to pay for their own investigators, support staff, office space and overhead expenses out of inadequate flat fee contracts and handled workloads far in excess of reasonable expectations.⁶⁹

⁶² ABA/SCLAID, "Indiana."

⁶³ Ind. Code §§ 33-40-6-4 and 33-40-6-5.

⁶⁴ Indiana State Court Administration, Public Defender Commission, "About the Commission," last modified Sept. 15, 2010, <http://www.in.gov/judiciary/pdc/about.html>.

⁶⁵ *Ibid.*

⁶⁶ Ind. Code § 33-40-7 et seq.

⁶⁷ Ind. Code § 33-40-8 et seq.

⁶⁸ La. Rev. Stat. §§ 15:141—15:183.

⁶⁹ Louisiana Public Defender Board, "Louisiana Public Defender Act," <http://lpdb.la.gov/Serving%20The%20Public/Legislation/Louisiana%20Public%20Defender%20Act.php> (accessed May 24, 2010).

The Act delegated supervisory responsibilities to the statewide Public Defender Board, and dissolved the existing 41 local indigent defense boards.⁷⁰ The system is a full authority statewide commission with a director who acts as chief PD.⁷¹ In addition to an executive director, the Act mandates the appointment of a director of training, director of juvenile defender services, budget officer, information technology and management officer, trial-level compliance officer, and juvenile justice compliance officer. The statute spells out in detail their qualifications and duties of the mandatory officers.⁷² In addition, the board is authorized to establish up to eleven service regions and is mandated to hire a regional director for each region.⁷³

The primary source of funding for the parish indigent defense is the state appropriation, which more than quadrupled from \$7 million in 2004 to over \$28 million in the 2007 budget.⁷⁴ Additional revenue is supplied by surcharges on court costs.⁷⁵ Most of the parishes operate on a contractual system, which may be in addition to a full-time PD office.⁷⁶

The PD system of Louisiana has not escaped the funding challenges confronting these systems throughout the nation. For instance, the PD of Calcasieu Parish stopped taking new cases as of August 1, 2010, because the office lacked the resources to provide adequate defense. In a letter to the district's chief judge, the chief defender stated that the office's workload exceeded state standards, and the moratorium was necessary given the office's lack of adequate funding and the potential civil liability of staff attorneys.⁷⁷

The Louisiana Public Defender Board received a budget increase of \$5.3 million for FY 2011-2012, raising the agency's budget to \$33.1 million. The increase is seen as an example of the commitment of the governor and legislature to the Public Defender Act of 2007. (The amount budgeted represents about \$7.35 per Louisiana resident, which would correspond to about \$93.4 million for Pennsylvania.) Further, the LPDB believes that its increased emphasis on training and data collection, its being named in the litigation alleging the Calcasieu Parish PD failed to provide constitutionally required right to counsel, and threats of similar litigation in other parishes contributed to the willingness of the governor and legislature to increase its appropriation.⁷⁸

⁷⁰ Ibid.

⁷¹ *Justice Denied*, 166.

⁷² La. Rev. Stat. §§ 15:153, 15:154, 15:155, 15:156, and 15:157.

⁷³ La. Rev. Stat. §§ 15:159 and 15:160.

⁷⁴ Louisiana Justice Coalition, "History," <http://www.lajusticecoalition.org/About/History.php> (accessed Feb. 8, 2011).

⁷⁵ "Louisiana Public Defender Act."

⁷⁶ Louisiana Public Defender Board, "The State We're In," 4 <http://lpdb.la.gov/About/txtfiles/pdf/LPDB%20Fact%20Sheet.pdf> (accessed September 8, 2010).

⁷⁷ Jason Brown, "Calcasieu To Stop Taking Indigent Cases," *2theadvocate*, May 29, 2010, <http://www.2theadvocate.com/news/95165714.html>. Calcasieu, a rural parish in the southwestern part of the state, is one of only two parishes that exclusively employs a full-time PD staff, the other being Orleans Parish.

⁷⁸ Louisiana Public Defender Board, "Legislature Approves \$5.3 Million LPDB Budget Increase For FY 11," July 10, 2010, <http://lpdb.la.gov/Serving%20The%20Public/News/News12.php>.

Massachusetts

Indigent defense in Massachusetts is provided through the Committee for Public Counsel Services. The Massachusetts Supreme Judicial Court appoints the 15 member board that oversees indigent representation in criminal and civil cases. Approximately 3,000 attorneys receive training and certification to receive appointments. The system is subdivided into the Private Counsel Division, the Children and Family Law Division, the Mental Health Litigation Unit, and the PD Division. Approximately 200 attorneys staff the Committee's PD Division and are located in offices throughout the commonwealth. The PDs represent indigent defendants in Superior, District, and Juvenile Courts.⁷⁹ The Massachusetts system is noteworthy for its effectiveness in involving the private bar in the provision of indigent defense services.⁸⁰

Early in the 2000s, Massachusetts faced a crisis in indigent representation because of shortages in available attorneys, due primarily to the rates of compensation paid to appointed counsel. A lawsuit alleging that the shortage of attorneys led to violation of defendants' right to counsel reached the Supreme Judicial Court. In July 2004, the Court held that defendants were indeed denied their right to counsel, yet also that the Court lacked authority to raise the compensation rates, because setting compensation rates is the legislature's responsibility. Using its supervisory power, the Court decreed that indigent defendants in the affected county would be released after seven days if counsel was not appointed, and cases would be dismissed after 45 days if no counsel entered an appearance before then.⁸¹

In a second lawsuit, petitioners asked the Court to set rates through the appointment of a special master. The Court stayed the lawsuit after a slight increase in rates appeared to pave the way for future increases. However, the increases were not sufficient to attract and retain enough defenders. In August 2003, judges began to conscript attorneys to serve as court-appointed defenders under the Professional Ethics Rules of Massachusetts.⁸²

In response to this crisis, the Governor and Legislature appointed a nine member Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts. In 2005 the commission recommended that by 2008 hourly compensation rates should be increased from \$61.50 to \$110 for homicide cases, from \$46.50 to \$70 for felony cases,

⁷⁹ Committee for Public Counsel Services website, <http://www.publiccounsel.net/> (accessed August 9, 2010).

⁸⁰ Professor Norman Lefstein presentation to SR42 Advisory Committee, November 10, 2009.

⁸¹ *Justice Denied*, 113-114. See *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004) <http://caselaw.findlaw.com/ma-supreme-judicial-court/1014501.html>.

⁸² NACDL, "The Reform Efforts in Massachusetts," <http://www.nacdl.org/public.nsf/defenseupdates/mass010> (accessed Feb. 8, 2011).

and from \$37.50 to \$55 for all other cases.⁸³ In July 2005 the legislature raised the compensation rates to their current schedules, effective January 1, 2006. Rates range from \$50 to \$100 per hour.⁸⁴

The National Association of Criminal Defense Lawyers (NACDL) reports continuing difficulties with the Commonwealth's indigent defense program:

In July of 2005, a number of court-appointed counsel chose not to renew their contracts. In Suffolk County, which includes Boston, only 140 of the 320 bar advocates renewed, and in Middlesex County, only 90 of the 325 lawyers renewed. The result was yet another indigent defense crisis. On the first day of the new fiscal year, courts statewide were without defenders. At least one judge threatened to hold a lawyer in contempt for refusing to accept a case, even though the lawyer did not have a contract. It is noteworthy that the Massachusetts Association of Criminal Defense Lawyers immediately offered to represent any attorney charged with contempt, and no attorneys were jailed for their refusal to take new cases.⁸⁵

In early 2011, Governor Deval L. Patrick announced a plan to reconstruct the IDS. The Governor's plan, which is included in his proposed budget for FY 2012, would create a Department of Public Counsel Services in the executive branch and abolish the Committee for Public Counsel Services.⁸⁶ About 90 percent of indigent cases that are now handled by private attorneys would be transferred to state employed PDs. Currently, 200 PDs represent 10 percent of indigent cases. The plan would add 1,000 new PDs and cut 3,000 private attorneys contracted through the Committee for Public Counsel Services.⁸⁷ Supporters of the plan predict the plan will reduce the annual cost of providing indigent defense by \$45 million from the current \$207 million budget.⁸⁸ (The current budget represents \$30.60 per Massachusetts citizen, which would correspond to \$401.4 million for Pennsylvania.) In defense of its plan, the Patrick administration reports that the amount budgeted for the Committee for Public Counsel Services has increased by \$100 million since 2003. The plan would tighten eligibility requirements for indigency.⁸⁹ Critics of the plan argue that the present system is, in the long run, less expensive than PDs would be, because the Commonwealth is not obligated to pay for personnel, office,

⁸³ Ibid.

⁸⁴ Committee for Public Counsel Services website, "V. Policies and Procedures Governing Billing and Compensation," last modified Apr. 6, 2006 http://www.publiccounsel.net/Billing_Information/compensation_rates.html.

⁸⁵ NACDL, "Reform Efforts."

⁸⁶ Andrea Estes, "Call for Public Defender Overhaul," *Boston Globe*, January 24, 2011, http://www.boston.com/news/local/massachusetts/articles/2011/01/24/patrick_wants_to_end_use_of_private_attorneys_for_public_defense/.

⁸⁷ Chris Cassidy, "Public Defenders Question Patrick's Legal System Plan," *The Salem News*, January 25, 2011, <http://www.salemnews.com/local/x530800184/Public-defenders-question-Patricks-legal-system-plan>.

⁸⁸ Estes, "Call for PD Overhaul."

⁸⁹ Ibid.

and other expenses of private attorneys currently representing indigent defendants.⁹⁰ The proposal is expected to meet with stiff resistance in the legislature, which includes many former defense attorneys.⁹¹

Michigan

Michigan's 83 counties are responsible for organizing and funding their own IDSs.⁹² They use PDs, assigned counsel, or contract attorneys. The state role in the administration of the system is restricted to providing appellate representation.⁹³ There are two divisions of appellate counsel. The State Appellate Defender Office (SADO) provides appeal services for 25 percent of indigent defendants who are pursuing appeals. SADO is funded by the state and overseen by a seven member board, the Appellate Defender Commission, appointed by the governor. The Appellate Defender Commission also oversees the Michigan Appellate Assigned Counsel System (MAACS). Administrative costs for MAACS are provided for by the state, and counsel costs are borne by the counties in which the assigned counsels serve.⁹⁴

The Michigan system has come under withering criticism. A 2003 study conducted by the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) listed the following deficiencies in the U.S. indigent defense systems, with the implication that Michigan's system suffered from all of them:

- Lack of independence of counsel from judges and politicians
- Absence of sufficient training, qualification standards, and performance evaluations for counsel
- Inordinately high caseloads
- Lack of standards and accountability
- Lack of uniformity of service within the state
- Absence of statewide oversight
- Inadequate funding
- Lack of resources for investigative, expert and other support services

⁹⁰ Cassidy, "Public Defenders Question."

⁹¹ Estes, "Call for PD Overhaul."

⁹² Spangenberg Group, "State and County Expenditures for Indigent Defense Services in Fiscal Year 2005," 16.

⁹³ *Justice Denied*, 149, 151.

⁹⁴ NACDL, "Michigan Indigent Defense," <http://www.nacdl.org/public.nsf/DefenseUpdates/Michigan1> (accessed Feb. 8, 2011).

- Inadequate compensation for counsel
- Disparity in funding and resources for indigent defense versus prosecution⁹⁵

A second detailed study was published by NLADA in 2008.⁹⁶ The method consisted of an in-depth analysis of the system in ten representative counties using the ABA's Ten Principles as the basis for evaluation. Like the ABA study, the NLADA found widespread failure to meet the standards, due in part to the deficiencies in the structure and funding of the system. The report noted that all of the system's funding is supplied by the counties and there is no statewide administrative oversight. Michigan spent \$7.35 per capita on indigent defense, ranking 44th among the states. (At that time, Pennsylvania ranked 40th at \$8.10; the national average was \$11.86.) While there was some variation among the counties studied, the NLADA found all of the ten counties constitutionally deficient.⁹⁷ The report emphasized that the state's responsibility to fulfill the Sixth Amendment cannot be completely delegated to the counties. "Though some may argue that it is within the law for state government to pass along its constitutional obligations to the counties, it is also the case that the failure of the counties to meet constitutional muster regarding the right to counsel does not absolve state government of its original responsibility to assure its proper provision."⁹⁸

A class action lawsuit filed in Michigan is currently a significant legal battleground in the debate about judicial review of allegedly deficient IDSs. *Duncan v. Michigan* was filed in 2007 by the ACLU and the Brennan Center on behalf of indigent defendants in three Michigan counties, claiming that the PD system was not meeting its constitutional obligations and that the plaintiffs' Sixth Amendment rights had been and would be violated.⁹⁹ On June 11, 2009, the plaintiffs prevailed before the Michigan Court of Appeals on a 2-1 decision. On April 30, 2010, the Michigan Supreme Court upheld the Court of Appeals decision on the ground that it was premature to dismiss the suit without allowing the petitioners to present evidence, and further directed the trial court to consider the plaintiffs' motion for class certification.¹⁰⁰

⁹⁵ ACLU, "ACLU of Michigan Argues in Supreme Court that the Poor Have a Right to Counsel," April 25, 2005. <http://www.aclu.org/racial-justice/aclu-michigan-argues-supreme-court-poor-have-right-counsel>.

⁹⁶ NLADA, *Evaluation of Trial-Level Indigent Defense Systems in Michigan: A Race to the Bottom; Speed and Savings over Due Process; A Constitutional Crisis* (NLADA, June 2008).

⁹⁷ NLADA, *Race to the Bottom*, i-v.

⁹⁸ *Ibid.*, 5.

⁹⁹ Tresa Baldas, "Michigan Faces Constitutional Case Over Cash-Strapped Public Defenders," *National Law Journal*, December 24, 2009, <http://www.nacdl.org/public.nsf/DefenseUpdates/Michigan052>.

¹⁰⁰ The Michigan Supreme Court reversed this decision on July 16, 2010, but reinstated it on November 30, 2010 http://coa.courts.mi.gov/documents/sct/public/orders/20101130_s139345_117_139345_2010-11-30_or.pdf.

The Judicial Crossroads Task Force, a collaboration of civic, business, and bar association leaders, recently released a report advocating reforms to the Michigan justice system.¹⁰¹ The task force recommends that Michigan take the following actions:

- Create and enforce statewide standards for the delivery of indigent public defense to reduce errors and costs
- Shift the responsibility for public defense funding from local government to the state
- Create the necessary mechanisms to implement, measure, enforce, and fund statewide standards for indigent defense that will meet national norms and thereby reduce costly errors
- Enact statutory changes related to indigent defense to free up funds for the state's public defense system¹⁰²

Montana

A class-action lawsuit filed by the ACLU in 2002 led to the nation's first state legislation aimed at implementing the Ten Principles.¹⁰³ The lawsuit (*White v. Martz*, CDV-2002-133), filed in February 2004, claimed that inadequate funding and lack of state oversight in Montana's PD system rendered Montana's IDS constitutionally deficient.¹⁰⁴ The lawsuit was stayed when Montana's Attorney General agreed to advocate for improving indigent defense services before the state legislature.¹⁰⁵

Prompted by the impending lawsuit and the findings of its Law and Justice Interim Committee, the Legislature created a statewide PD system with statewide funding and comprehensive authority.¹⁰⁶ In June 2005, the Legislature passed the Montana Public Defender Act. The act replaced judicial appointment of counsel, local PD offices, and contract counsel with a single statewide system of assigned counsel. The system is supervised by an appointed independent, eleven-member Public Defender Commission and is administered by the Office of State Public Defender. All cases were publicly

¹⁰¹ Judicial Crossroads Task Force, "Report and Recommendations, Delivering Justice in the Face of Diminishing Resources," Judicial Crossroads Task Force, State Bar of Michigan, January 2011. <http://www.michbar.org/judicialcrossroads/>.

¹⁰² *Ibid.*, 15.

¹⁰³ ACLU, "ACLU Hails Montana's Public Defense Bill as Leading National Trend," June 8, 2005, http://www.aclu.org/racial-justice_prisoners-rights_womens-rights_immigrants-rights/aclu-hails-montanas-public-defense-b.

¹⁰⁴ ACLU, "ACLU Agrees to Postpone Trial over Lack of Legal Defense for Montana's Poor While Attorney General Seeks Legislative Remedy," May 7, 2004, http://www.aclu.org/racial-justice_prisoners-rights_womens-rights_immigrants-rights/aclu-agrees-postpone-trial-over-lack.

¹⁰⁵ NACDL, "ACLU Lawsuit against Montana," <http://www.nacdl.org/public.nsf/defenseupdates/montana006> (accessed May 13, 2010).

¹⁰⁶ *Justice Denied*, 56, 148.

funded counsel is mandated by law are under the act, including felonies, misdemeanors, civil cases involving child abuse and neglect, juvenile delinquency, involuntary civil commitment, and guardianship.¹⁰⁷

The office selects a state PD, who is directed to develop a strategic plan for delivering indigent defense services throughout the state. The Commission is also responsible for establishing statewide standards for qualification and training of public defense attorneys, caseloads, performance measures, and evaluation. Appellate defense is handled by the Office of Appellate Defender, which serves under the state PD. The act transferred authority to determine indigency from the judiciary to the PD so that statewide standards for indigency could be implemented. A person is considered indigent if his or her gross household income is at or below 133 percent of the federal poverty level, or whose personal and household assets are at a level that makes hiring an attorney a substantial hardship.¹⁰⁸

Prior to the adoption of reform legislation, indigent defense was financed by the counties and reimbursed by the state at 65 percent.¹⁰⁹ Under the act, the Office of State Public Defender is funded by the state. The FY 2007 budgeted amount was \$13.8 million.¹¹⁰ This amount represents about \$14.20 per capita, which corresponds to about \$180 million for Pennsylvania.

In July 2009, American University issued a draft assessment of the performance of the Office of State Public Defender to the Public Defender Commission.¹¹¹ The report contained 32 recommendations for improvement in such areas as caseloads and caseload controls, data collection and sharing, training, and communications between office staff and attorneys, and lines of authority. In response to the draft report, the ACLU commented that the report demonstrates how the PD system has improved under the new office, but that further progress is still needed.¹¹²

As of March 2010, the Office of State Public Defender included eleven regions and used the services of 114 staff attorneys and 225 contract attorneys. The office covers 56 district courts, 140 lower courts, and 20 specialty courts. The budget for each of 2010 and 2011 is \$19.9 million (\$20 per person as of 2010). The office handled 28,417 new cases in 2009, at an average cost of \$700 per case.¹¹³

¹⁰⁷ Montana Legislative Services Division, Bill Summary: SB 146 (Montana Public Defender Act) (June 2005), http://publicdefender.mt.gov/forms/pdf/bill_summary.pdf; Mont. Code § 47-1-101 et seq.

¹⁰⁸ Bill Summary, SB 146.

¹⁰⁹ Spangenberg Group, "State and County Expenditures FY 2005," 19.

¹¹⁰ Bill Summary, SB 146.

¹¹¹ American University, School of Public Affairs, "Assessment of the Initial Period of Operations of the Montana Statewide Public Defender System" (Washington, D.C.: American University, July 2009), <http://publicdefender.mt.gov/meetings/docs/07302009/AUDraftRecomm.pdf>.

¹¹² ACLU of Montana, "Public Defenders Office Scrutinized," Aug. 3, 2009, http://www.aclumontana.org/index.php?option=com_myblog&show=Public-Defenders-Office-scrutinized.html&Itemid=44.

¹¹³ Phil Drake, "Public Defender: Cuts to Department Not Possible" (Montana Policy Institute, March 16, 2010), http://www.montanapolicy.org/main/story.php?story_id=46.

Nevada

Nevada's system has moved from legislative to judicial management. The enabling statute established a limited authority commission system.¹¹⁴ Indigent defense services were provided by the state PD offices. Counties with populations under 100,000 without a county PD office received services through the state office. The state PD was appointed by the governor to serve a four year term. In addition to providing services for the specified counties, the state PD handled post-trial proceedings and appeals on behalf of the county PDs.¹¹⁵

In 2007 the Nevada Supreme Court created the Indigent Defense Commission to examine the state's IDS and recommend improvements. The commission was directed to make recommendations for performance standards, removing judges from the appointment of counsel process, and to put the rural IDS offices under the supervision of the statewide office. In 2009 the Supreme Court accepted the report and ordered that standards be put in effect in April of that year.

David Carroll of the NLADA commented that the Nevada judiciary responded effectively to the system's deficiencies. In a single administrative order, the judges ended judicial control of the appointment of counsel, defined uniform eligibility standards for indigent defendants, adopted the ABA standards, established a statewide commission, and developed a system of case-weighting to help control workloads. The judiciary tailored the ABA and NLADA standards for juvenile and appellate representation, reforms that have not occurred in other states.¹¹⁶

New Mexico

Recently reformed in accordance with national models, the New Mexico Public Defender Department is a fully state-funded statewide system. The judiciary plays no role in qualifying or selecting contract counsel. The department establishes qualifications, reporting requirements and fees. The courts appoint contract and conflict counsel as named by the department by random assignment. New Mexico's centralized PD system under the governor's jurisdiction allows reforms to be implemented through executive order. New Mexico's Chief PD serves as a member of the Governor's cabinet and can advocate effectively for the system from that position. The state PD has overridden trial judges when they have attempted to bypass the standards to retaliate against zealous PDs.¹¹⁷

¹¹⁴ *Justice Denied*, 151, 170; Nev. Rev. Stat. § 180.101 et seq.

¹¹⁵ Nev. Rev. Stat. § 180.060.

¹¹⁶ Carroll, David, presentation to the SR 42 Advisory Committee, Joint State Government Commission, September 15, 2009.

¹¹⁷ Phyllis Subin, presentation to the SR 42 Advisory Committee, Joint State Government Commission, September 15, 2009. Ms. Subin was Chief Public Defender of New Mexico from 1997 to 2003.

New Mexico's system is funded entirely through state appropriations for trial and appellate cases.¹¹⁸ There are two divisions of the department. On one side of the agency, state employees at the centralized state PD office staff ten trial offices and four statewide units providing for appeals, mental health, post-convictions, and serious case representation. On the other side of the Public Defender Department, attorneys are contracted for primary and conflict counsel.¹¹⁹ The office is equipped with updated technology statewide; especially notable are the case tracking and case management systems. The office's attorneys are supported by paralegals, investigators, social workers, an alternative sentencing advocate, and technology staff.¹²⁰ Private contract attorneys provide indigent defense services in counties where the state office is not present.

According to Tony Ortiz, Director of the New Mexico Sentencing Commission, funding for indigent defense services has not increased since the onset of the Great Recession.¹²¹

Oregon

The Oregon Public Defense Services Commission consists of seven members appointed by the chief justice and is an independent agency within the judicial branch.¹²² The Office of Public Defense Services works under the oversight of the commission and consists of two divisions. Trial-level services are provided by contract defenders, certified and overseen by the Contract and Business Services division, which oversees training for psychologists, investigators, and other professionals who assist defense services. The other division, Legal Services, represents indigent clients in criminal appeals, and parole board and postconviction appeals.¹²³

The ABA attributes the success of the Commission to its having a sufficient budget for indigent defense services provided entirely by the state.¹²⁴ NACDL reported in June 2009 that Oregon was among the top states in per capita spending for indigent defense, having maintained per capita funding of approximately \$24 for several years.¹²⁵ (For Pennsylvania, this level of funding would correspond to about \$305 million.)

¹¹⁸ Robert L. Spangenberg, "State and County Expenditures FY 2005," 21.

¹¹⁹ E-mail from Phyllis Subin to Joint State Government Commission staff, April 22, 2010.

¹²⁰ ABA/SCLAID, "Primary Indigent Defense Delivery System."

¹²¹ Telephone conversation between Mr. Tony Ortiz, Director of the New Mexico Sentencing Commission and Commission staff, August 9, 2010.

¹²² The Oregon indigent defense system is governed by Ore. Rev. Stat. ch. 151.

¹²³ NACDL, "Oregon Indigent Defense" (Washington, D.C.: NACDL) <http://www.nacdl.org/public.nsf/defenseupdates/Oregon001> (accessed August 18, 2010).

¹²⁴ ABA, "State Commissions Project: Final Report" American Bar Association, 5, accessed August 18, 2010, <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/statecommfinalreport.pdf> (site discontinued).

¹²⁵ Rick Jones, "The New Frontier in Indigent Defense—Big Firms in State Trial Courts," *The Champion*, NACDL, 30, <http://www.criminaljustice.org/public.nsf/01c1e7698280d20385256d0b00789923/cf5666f1ea26a303852576190065f43c?OpenDocument> (accessed August 18, 2010).

Texas

Texas has a county based system with partial state agency oversight and predominantly state funding.¹²⁶ The Texas Fair Defense Act of 2001 provides state funding for counties to improve local IDSs and for state oversight through the Texas Task Force on Indigent Defense. The state has nearly doubled its contribution since enactment.¹²⁷

The Fair Defense Act was prompted by reports by the State Bar of Texas and the Spangenberg Group¹²⁸ that documented the problems with indigent defense in the state.¹²⁹ Prior to enactment all responsibility for the funding and management of indigent defense fell to the state's 254 counties. The act created a statewide agency to administer statewide policies and appropriations. In exchange for state funding, the local judiciary submits indigent defense plans to the Task Force.¹³⁰ Each of the counties organizes and funds its own indigent defense program; most rely on assigned counsel and contract defenders.¹³¹ To comply with the Fair Defense Act, counties must establish procedures for providing prompt access to appointed counsel, fair and neutral selection methods for appointed counsel; qualifications for appointed counsel; financial standards and procedures for determining indigency; and procedures and fees for appointed counsel, experts, and investigators.¹³²

The Task Force on Indigent Defense is composed of 13 members. It is responsible for analyzing county expenditures, policies, and procedures; developing policies and standards; promoting local compliance and proficiency, assuring accountability in meeting statutory and constitutional indigent defense requirements, guided by evidence-based practices; and allocating and accounting for the effective distribution of state funds.¹³³

Funding is provided to the counties by one of seven methods. Formula grants are awarded to counties that have submitted plans to improve indigent defense, accounting for \$12 million to 219 counties. Direct disbursement grants are provided to counties that do not apply for formula grants, and accounted for \$180,818 appropriated to 35 counties.¹³⁴ Equalization disbursement funds are made available to counties that have

¹²⁶ *Justice Denied*, 54, 151, 170.

¹²⁷ ABA/SCLAID, "Primary Indigent Defense Delivery System"; *Justice Denied*, 56.

¹²⁸ The Spangenberg Group is a nationally recognized research and consulting firm specializing in improving justice programs. It has conducted nationwide research projects on a variety of topics relating to IDSs. See <http://www.spangenberggroup.com/>.

¹²⁹ Spangenberg Group, "State and County Expenditures FY 2005," 29.

¹³⁰ Texas Task Force on Indigent Defense (TFID), "Who We Are and What We Do," accessed May 14, 2010, <http://www.courts.state.tx.us/tfid/whoweare.asp>.

¹³¹ "State and County Expenditures FY 2005," 30.

¹³² *Ibid.*, 29.

¹³³ TFID, "Who We Are and What We Do."

¹³⁴ Dollar amounts and numbers of affected counties are as of FY 2009.

increased indigent defense costs and a low proportion of state funds. Extraordinary grants are given to counties suffering financial hardship. The remaining funding streams are targeted specific funding, technical support funding, and discretionary grants.¹³⁵

Several counties have taken initiatives to improve funding for their IDSs, which have come under increasing financial pressure. Property taxes have been the main tax revenue stream funding indigent defense services, but these taxes have not been able to maintain adequate funding, especially in the face of the Great Recession.

In 2007, 70 counties formed a regional PD office to handle capital cases. The counties pay a yearly fee into the cost-sharing system, which provides lawyers and investigators for each case. According to reports, the system saved the participating counties \$400,000 in its first year of operation. Other counties have attempted to improve screening and verification systems for defendants claiming indigence. It was estimated that up to \$2 million could be saved annually if 25 percent of defendants currently receiving indigent services were found ineligible.¹³⁶

Utah

Utah's 29 counties are solely responsible for providing indigent defense services. Two of the counties have PD offices, with the remaining 27 counties relying on contract and assigned counsel. The NLADA ranks Utah 48th among the states in per capita spending for indigent defense services at \$5.22 per resident (the corresponding spending level for Pennsylvania would be \$66.3 million). There are glaring funding disparities within the state. For example, training is provided and CLE expenses covered for prosecutors by statute, while no standard training is provided for PDs, and defense attorneys must pay for their own CLE.¹³⁷

In 2009 the Utah legislature established financial assistance for indigent defense in the form of four special funds administered by the state's Division of Finance: the Indigent Aggravated Murder Defense Trust Fund, the Indigent Felony Defense Trust Fund, the Indigent Inmate Defense Fund, and the Post Conviction Indigent Defense Fund. Counties that participate in these voluntary funds obligate themselves to contribute an amount based on formulas according to population and assessed property values. In exchange for its contribution to the Indigent Aggravated Murder Defense Trust Fund, a county is eligible to apply for benefits if the county has incurred or expects to incur

¹³⁵ Texas Task Force on Indigent Defense, 2009 Annual and Expenditure Report 2009 (Austin: TFID, Jan. 10, 2010), 9-10, <http://www.courts.state.tx.us/tfid/pdf/09AnnualReportFINAL011110.pdf>.

¹³⁶ Jared Janes and Jeremy Roebuck, "Texas Counties Take Different Approach to Common Indigent Defense Problem," *The Monitor*, December 21, 2009, <http://www.nacdl.org/public.nsf/defenseupdates/texas057?opendocument>.

¹³⁷ Marina Lowe, "Utah Ranks First in the Nation When It Comes to Literacy, Volunteerism, Jell-O Consumption, and Birth Rates. Unfortunately, Utah's Ranking Dips Dramatically When It Comes to Providing for Indigent Defense," *The Defender UACDL*, Winter 2009. <http://www.aclutah.org/uacdl.pdf>.

expenses “arising out of a single criminal episode.”¹³⁸ Similarly, a county that participates in the Indigent Felony Defense Trust Fund may apply for benefits if it has incurred or expects to incur expenses in excess of \$20,000 arising from a single criminal episode.¹³⁹ The Indigent Inmate Defense Fund is to defray defense costs for inmates accused of a crime while serving a sentence in state prison. As of 2009, only one county participated in this fund.¹⁴⁰ The Felony Defense Fund was seeded with a one time appropriation from the legislature, and the Aggravated Defense Fund receives an annual appropriation from the legislature. The Post Conviction Indigent Defense Fund provides financial assistance for post-conviction appeals of indigents who have received a death sentence. Litigation and other expenses are paid for out of state funds without county financial involvement.¹⁴¹ At its inception, this fund was overseen by the Attorney General, but it was subsequently moved into the Division of Finance because of the conflict of interest in having the state’s head prosecutor fund defense representation.¹⁴²

Virginia

The Virginia Indigent Defense Commission (VAIDC) was established within the judicial branch in 2004.¹⁴³ The VAIDC oversees and supports indigent defense services, including certification of qualified attorneys, provided by PDs and the private bar. According to the NACDL, the fees paid to court-appointed attorneys for the indigent are among the lowest in the country. Entry-level PDs received \$38,000, while entry-level prosecutors received \$50,000.¹⁴⁴ In 2004, NACDL reported a long history of the barely functioning IDS in Virginia, including anecdotes from court-appointed attorneys who admitted to providing inadequate defense and PDs who reported that cutting corners to stay within their budgets is standard procedure taught to all new PDs. Several defenders reported struggles with obsolete equipment.¹⁴⁵

¹³⁸ Utah Code §§ 77-32-601—77-32-604.

¹³⁹ Utah Code §§ 77-32-701—77-32-704.

¹⁴⁰ Utah Office of the Legislative Fiscal Analyst, Capital Facilities and Government Operations, “Summary, Budget Brief—Post Conviction Indigent Defense Fund,” Jan. 9, 2007, <http://le.state.ut.us/interim/2007/pdf/00000513.pdf>.

¹⁴¹ Utah State Legislature, Compendium of Budget Information for the 2009 General Session, Capital Facilities & Government Operations, Appropriations Subcommittee, accessed Dec. 6, 2010, http://www.le.state.ut.us/lfa/reports/cobi2009/LI_FKA.htm.

¹⁴² “Summary, Budget Brief – Post Conviction Indigent Defense Fund.”

¹⁴³ Spangenberg Group, “Statewide Indigent Defense Systems: 2006,” 20.

¹⁴⁴ NACDL, “Virginia’s Indigent Defense System,” <http://www.nacdl.org/public.nsf/defenseupdates/Virginia028> (accessed May 17, 2010).

¹⁴⁵ NACDL, “Virginia’s Indigent Defense System Still Failing,”

<http://www.nacdl.org/public.nsf/DefenseUpdates/Virginia025> (accessed May 17, 2010). These accounts were excerpted from the Spangenberg Group, “A Comprehensive Review of Indigent Defense in Virginia (February 2004).”

In 2007, the NACDL threatened a lawsuit over caps imposed on the funding of indigent defense that were the lowest in the country.¹⁴⁶ To forestall the lawsuit, the Virginia legislature approved two bills that allowed judges to lift the caps on fees paid to court-appointed defense attorneys. Under the caps, the limit paid for a defendant facing a felony conviction of life imprisonment capital case was \$1,235, while cases carrying sentences of up to 20 years were reimbursed at \$445. The legislation allowed judges to reimburse an additional \$850 for the most serious felony cases and an additional \$120 for lesser cases. Capital murder case reimbursements were, and remained, uncapped. The expected budget for the reimbursements was \$8.2 million, which contributed to the total \$58 million Virginia paid for court-appointed indigent defense work.¹⁴⁷

It was reported in March 2010 that the caps may be reinstated because of budget pressures faced by the Commonwealth of Virginia, which faced a \$4 billion shortfall.¹⁴⁸ Observers feared that the IDS would fail to provide adequate services if the budget was reduced and that attorneys would refuse to take court-appointed cases. However, in subsequent reporting of the budget difficulties, it appears that waivers of the caps will be available.¹⁴⁹

¹⁴⁶ Larry O'Dell, "Va. Lawmakers May Again Impose Strict Fee Caps," HamptonRoads.com, March 4, 2010, <http://hamptonroads.com/2010/03/va-lawmakers-may-again-impose-strict-fee-caps>.

¹⁴⁷ Nolan, Jim, "Bills Lift Fee Caps for Defense Attorneys: Court-Appointed Attorneys' Low Pay Can Hurt Cases, Legal Experts Say," *Richmond-Times Dispatch*, February 27, 2007.

¹⁴⁸ O'Dell, "Va. Lawmakers May Again Impose Strict Fee Caps."

¹⁴⁹ VLW Blog, "Fee Cap Waivers Survive Budget Crunch," *Virginia Lawyers Weekly*, March 16, 2010. <http://valawyersweekly.com/vlwblog/2010/03/16/fee-cap-waivers-survive-budget-crunch/>.

CHAPTER FOUR DATA COLLECTION

DEFICIENCIES IN INDIGENT DEFENSE DATA

Lack of systematic and complete data hampers analysis and evaluation of our IDS, as it did when the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System Report issued its report in 2003:

Policymakers need complete and accurate data if they are to make informed decisions about improving public legal defense systems. One of the biggest challenges [The Spangenberg Group]¹⁵⁰ encountered . . . was the lack of systematic data reporting, collection, and maintenance. In particular, information concerning caseloads was woefully inadequate. Many of the smaller counties could not even estimate their caseloads; other counties collected certain data, but could not break down the data into types of cases.¹⁵¹

This study was equally frustrated by the lack of adequate data about the system. The advisory committee directed Commission staff to gather data on county PD offices and court-appointed counsel statewide. This proved impossible because complete data is not collected on court-appointed counsel or PD offices on such basic factors as staffing levels, budgets, and caseloads. Without adequate recent data, it is impossible for the public to make a quantitative evaluation of the system's performance.

Because each county is responsible for collecting its own data and substantive policies differ from county to county, there are numerous inconsistencies in the available data. PD offices and AOPC define "case" differently, and this makes it difficult to reconcile AOPC and PD office data.

The advisory committee emphasizes that the lack of available statistical data should not be taken as an excuse for failure to address the deficiencies of the Commonwealth's IDS that are detailed in this report. Most of the shortcomings were pointed out in the *Racial and Gender Bias Report* published in 2003. Such factors as excessive caseloads, inadequate resources, inappropriate interference from other

¹⁵⁰ The Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System commissioned the Spangenberg Group to review Pennsylvania's indigent defense system.

¹⁵¹ *Racial and Gender Bias Report*, 184.

governmental bodies, and lack of statewide management guidance and assistance are regularly and personally experienced by members of the advisory committee, especially the chief PDs on the committee.

DATA COLLECTION FOR THIS STUDY

The advisory committee determined that this study should attempt to collect data from each county relevant to the issues facing the Commonwealth's local indigent defense systems. Key issues where data collection would assist analysis of the IDS include the following:

- Staff (full and part-time attorneys, investigators, social workers, and clerical workers)
- Caseloads (total number of cases handled and cases per attorney)
- Representation (PD, court-appointed, contract)
- Expenditures

Several preexisting data sources were consulted. Data is routinely collected by the Administrative Office of Pennsylvania Courts (AOPC) in a database called the Common Pleas Court Management System (CPCMS) from information collected by the county clerks. This database contains the total number of felony, misdemeanor, and ungraded offenses, probation, forfeiture and habeas corpus cases. PD offices handle other cases including mental health commitments, protection from abuse hearings, juvenile delinquency and dependency, paternity, guardianship, and civil contempt arising from support decrees.¹⁵² The database provides some detail about each case, including whether the defendant in the case was represented by a PD, court-appointed counsel, other, or unknown.

Data is collected by the Juvenile Court Judges' Commission (JCJC) on juvenile delinquency cases. JCJC provided juvenile delinquency data by county including the number of court dispositions per county and the number of formal juvenile delinquency hearings represented by PDs, court-appointed attorneys, and private attorneys, and hearings in which the defendant waived their right to counsel or the representation was unreported. One court disposition can have multiple cases that are disposed of together.

¹⁵² These were detailed in the survey performed by the Public Defender Association of Pennsylvania (PDAPA) in 2005.

The number of formal juvenile delinquency hearings is actually a count of the number of court dispositions that had at least one formal hearing; if one court disposition had three formal hearings, it would only be counted once in the JCJC data.

The Public Defender Association of Pennsylvania (PDAPA) performed a survey in 2005 that collected data from 41 counties. This survey covered cases, personnel, support staff, budget, computer utilization, eligibility standards and procedures, continuing legal education (CLE), and the county criminal justice system.

The advisory committee concluded that the available statewide data was insufficient and directed Commission staff to survey all the counties. In February 2009 Commission staff sent a survey to the PD, DA and court administrator offices of all counties. The survey was sent to the County Commissioners Association of Pennsylvania (CCAP) for distribution to the county commissioners. The survey comprised three separate sections including sections to be completed by the PD, the DA, and the court administrator, respectively. The original deadline for the survey was March 15, 2009.

The section submitted to the PD offices covered personnel (numbers and salaries), caseloads, budget, CLE, computers, and eligibility for appointment of counsel. The section submitted to the DAs covered personnel (numbers and salaries), caseloads, budgets, computers, and CLE. The section submitted to the court administrators covered caseloads, judicial resources, and outside counsel. Space was provided for comments on the PD system in Pennsylvania. Data was collected for the years 2007, 2008, and 2009.

On March 4, 2009, AOPC advised Commission staff that some information requested on the survey was included in the CPCMS database and would be made available to the staff. Specifically, the AOPC provided the Commission with data for 2007 and 2008 for the following categories of cases: all adult criminal, capital murder, other murder, other felony, misdemeanor, probation and parole revocation, forfeiture, and habeas corpus. In addition to the numbers of total cases, this data included the number of cases assigned to the PD offices and the number of cases assigned to court-appointed counsel.

While the CPCMS data was helpful and uniform across all counties, there were several problems with it. Many counties recorded up to 40 percent of their cases as having “undefined counsel” meaning that the county clerk did not record or did not know what type of representation the defendant had. Non-criminal cases that were processed by PDs were not reflected in this database, including mental health commitments, protection from abuse hearings, juvenile delinquency and dependency hearings, paternity, guardianship, and non-support civil contempt. Finally, discrepancies existed between AOPC and county data because of inconsistent methods of counting cases; some PD offices indicated they had many more (or in a few counties fewer) cases than AOPC reported.

On March 11, 2009, Commission staff requested CCAP to remind members of the impending survey deadline, and CCAP placed a reminder in its monthly newsletter. After the original survey deadline of March 15 passed, staff continued to collect surveys as the response rate on the survey was still very low.

On April 3, 2009, Commission staff contacted JCJC for data on juvenile delinquency and dependency proceedings handled by the PD. JCJC data on delinquency cases uses court dispositions rather than individuals as the unit of count. JCJC provided this information to Commission staff for 2007 and 2008.

On April 24, 2009, the Commission's project director for SR 42 spoke to PDAPA members at its annual meeting to explain the SR 42 study and the importance of the survey to encourage the counties to complete their responses. It was discovered that many PDs did not receive their part of the survey from the county commissioners. PDAPA sent out the PD section of the survey to non-responding PDs. The Pennsylvania Association of Criminal Defense Lawyers (PACDL) also followed up with the PDs to encourage their participation.

Only six counties had completed all three parts of the survey, which is not a sufficient response to enable a comprehensive analysis. Twenty-seven counties had completed the PD part of the survey, a response sufficient to enable a tentative analysis. Seven DAs and 15 court administrators also responded. The spotty response to the survey may be because the counties do not routinely collect the information requested by the survey.

At its meeting of September 15, 2009, the advisory committee noted the disappointing response rate to the survey and directed Commission staff to gather information from a few select counties through direct phone interviews and a new survey asking more open-ended questions. The advisory committee selected eight counties (which make up seven judicial districts), viz., Erie, Tioga, Montgomery, Beaver, Elk, Cameron, Monroe, and York.¹⁵³ The PDs and DAs of these counties were sent the questions before the phone interviews, and the offices were given the option of either returning a written response or arranging a phone interview with Commission staff. Unfortunately after multiple attempts to contact all of these DA offices, staff was able to gather responses from only five DA offices and two PD offices.¹⁵⁴

Despite these assiduous efforts to collect it, the data relating to the determination of caseloads was so inconsistent and incomplete that the advisory committee directed staff to withdraw it from this report. In March 2011, advisory committee member Nathan Schenker, then-president of the PDAPA, did an informal e-mail survey of the PDs to assist the staff in gathering basic data about caseloads. The survey requested data as of 2010 on overall caseload; caseload by category (capital murder, homicide, felonies,

¹⁵³ Elk and Cameron counties make up one judicial district and share a PD, but have separate DAs for each county.

¹⁵⁴ The five responding DA offices were Beaver, Elk, Cameron, Montgomery, and Tioga Counties. The two PD offices responding were Tioga and York Counties.

misdemeanors, and other); caseload by attorney; number of attorneys in the office broken down by full and part time; support staff (investigators, secretaries, social workers, paralegals, etc.); and other information pertinent to workload and resources in narrative form.¹⁵⁵ This data is used in the section of Chapter Five entitled “Excessive Caseloads.”

The lack of consistent, regularly collected data, and the formidable difficulty even official observers meet in collecting comprehensive and usable information support this report’s recommendation that a statewide agency establish a uniform and usable system of data collection for criminal and juvenile delinquency cases handled by the IDS. The draft statute included in this report provides for an administrative structure that can determine what data will be most useful for administering the system and can oversee the collection, dissemination, and analysis of that data.

¹⁵⁵ E-mail from Nathan Schenker to chief public defenders, March 10, 2010.

CHAPTER FIVE

EVALUATION OF PENNSYLVANIA'S INDIGENT DEFENSE SYSTEM

INTRODUCTION

This chapter evaluates the Pennsylvania IDS. In accordance with the direction of the advisory committee, the criteria for evaluation are supplied by the ABA's "Ten Principles of a Public Defense Delivery System,"¹⁵⁶ which have gained wide acceptance as "an excellent blueprint for the fundamental criteria necessary to construct an effective public defense system."¹⁵⁷ They are solidly grounded in U.S. Supreme Court precedent and have come to constitute "the most widely accepted and used version of national standards for public defense systems."¹⁵⁸ The Ten Principles have been endorsed by the Philadelphia Bar Association¹⁵⁹ and the Wilkes-Barre Law and Library Association, which is the bar association of Luzerne County.¹⁶⁰ The reforms in the states that have changed their systems since the Ten Principles were promulgated have taken their bearings from them, as evidenced by the trend toward centralized administration and full state funding that characterizes most of such reforms.¹⁶¹ The U.S. Supreme Court has looked to other ABA standards as evidence of "prevailing norms of practice" that are "guides to determining what is reasonable," although they are "only guides and not inexorable commands."¹⁶²

¹⁵⁶ American Bar Association, "Ten Principles of a Public Defense Delivery System," (ABA, February 2002), <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.

¹⁵⁷ *Justice Denied*, 33; Mary Sue Backus and Paul Marcus, "The Right to Counsel in Criminal Cases, A National Crisis," 57 *Hastings L.J.* 1031, 1123.

¹⁵⁸ David Carroll, Phyllis Mann, and Jon Mosher, "The Judicial Underpinnings of the American Bar Association's *Ten Principles of a Public Defense Delivery System* and Their Use in Defining Non-Representation under *United States v. Cronin*, 466 U.S. 648 (1984)" (NLADA, October 26, 2011), 4, 5-10 http://nlada.net/sites/default/files/na_judicialunderpinningsofabatenprinciples_10262011.pdf.

¹⁵⁹ "Resolution of the Philadelphia Bar Association Adopting and Endorsing the American Bar Association's Ten Principles of a Public Defense Delivery System," June 30, 2011, http://www.philadelphiabar.org/page/ResJune11_2?appNum=4.

¹⁶⁰ "Resolution of the Wilkes-Barre Law and Library Association Endorsing the American Bar Association's Ten Principles of a Public Defense Delivery System," <http://www.pabarcr.org/pdf/Wilkes-Barre%20association%20resolution.pdf>. The resolution was adopted on June 11, 2011.

¹⁶¹ See *Justice Denied*, 54 and 151. One exception is Georgia, which restricted the authority of the state commission and retained predominantly county funding. These policy choices may have contributed to the partial failure of reform in that state. See this report, 27-30.

¹⁶² *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473, 1482 (2010), citing *inter alia Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); and *Bobby v. Van Hook*, 558 U.S. ___, 130 S. Ct. 13 (2009).

The Ten Principles describe the standards that the system as a whole should meet. They are not intended to be used as performance standards to apply to individual lawyers or particular cases; for instance, it would be a misapplication of these standards to seek to overturn a conviction solely on the grounds that the defense attorney was appointed by a judge, even though such an appointment would be contrary to the Ten Principles.

The SR 42 advisory committee observed that the goal of IDS reform is representation of the indigent so as to enable the accused to receive a fair disposition under the applicable law. This principle does not require every case to go to trial. Nontrial resolutions following informed negotiations between prosecution and defense, (including guilty pleas, plea bargains, or alternative dispositions) save resources for both the prosecution and defense (and thus for the taxpayer), yet are perfectly compatible with a fair adversary system, when the IDS is structured and supported so that it can meet the prosecution on a level playing field. However, it is essential that any waivers by the client be knowing, intelligent and voluntary, and that the validity of the waiver be verified by the court on the record.

PROFESSIONAL INDEPENDENCE

Principle 1 of the ABA's Ten Principles addresses the need for the IDS to maintain the professional independence of the attorneys who serve in it:

The public defense function, including the selection, funding and payment of defense counsel, 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. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. 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.¹⁶³

The board or agency overseeing the IDS should be structured so that it is independent from both judicial and political control. The advisory committee stresses the central importance of this standard, as indigent defense can be severely compromised when it is ignored:

¹⁶³ ABA Ten Principles, 2.

When the defense function lacks [professional and political] independence, the integrity of the indigent defense system is compromised. To ensure that the defense function is protected, the establishment of an independent policy board to provide oversight is strongly recommended. Such boards now exist in some states, but there still are parts of the country where indigent defense is plagued by the oversight and interference of governmental funding sources and the courts. This influence, which may be rooted in a desire to control costs, or a preference for certain attorneys known to resolve cases without litigation, often runs contrary to the duties of the defense provider and the interests of defendants. In short, the lack of independence of the defense function threatens the right to counsel.¹⁶⁴

Judicial interference may lead to real or perceived favoritism and the intrusion of extraneous considerations that may hamper professional representation. A report on Michigan's IDS elaborates on how this can affect the right to counsel:

By statute, Michigan's elected judges are authorized to pass out assignments and have discretion to set fee schedules in their jurisdiction. Having judges maintain a key role in the supervision of indigent defense services can create the appearance of partiality—thereby undermining confidence in the bedrock principle that every judge be a scrupulously fair arbitrator. Policy-makers should guarantee to the public that critical decisions regarding whether a case should go to trial, whether motions should be filed on a defendant's behalf, or whether certain witnesses should be cross-examined are based solely on the factual merits of the case and *not* on a PD's desire to please the judge in order to maintain his job.¹⁶⁵

In Pennsylvania, lack of guidelines or oversight permits local judges free reign over the appointment of counsel and the selection of contract counsel. Such judicial authority may result in some cases in the selection of counsel on the basis of political or personal favoritism rather than professional quality. As such counsel owe their positions to the judge, they have an incentive to avoid displeasing him or her, which discourages zealous advocacy. Lack of standards impedes accountability of counsel for quality representation. At the same time, judges fail to monitor for manageable caseloads or provide additional resources when caseload limits are exceeded.¹⁶⁶

“Probably the greatest risk to independence of the defense function is the pressure defenders receive from their funding sources.”¹⁶⁷ Since Pennsylvania's system is funded by the counties, the county commissioners constitute the predominant threat in this regard, as “chief PDs in all counties except Philadelphia are appointed by the county commissioners, and may therefore have obtained their positions through political

¹⁶⁴ *Justice Denied*, 80.

¹⁶⁵ NLADA, *A Race to the Bottom*, 35-36.

¹⁶⁶ *Racial and Gender Bias Report*, 190.

¹⁶⁷ *Justice Denied*, 80.

connections.” The power to appoint and fund the PD allows the county commissioners “to control the PDs’ budgets and sometimes interfere in the operations of their offices.”¹⁶⁸ This is especially troubling because the political incentive at the county level favors the DA as against the PD.¹⁶⁹

INVOLVEMENT OF PRIVATE BAR

Principle 2 identifies the respective roles of the private bar and the PD in the provision of indigent defense services:

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. The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services. The appointment process should never be ad hoc, 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. 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.¹⁷⁰

AOPC has compiled data on the types of defense counsel that handle criminal cases. Table 1 shows the different kinds of counsel handling all criminal cases in the respective counties. Table 2 shows the kinds of counsel handling different kinds of criminal cases statewide.

The data indicate that Pennsylvania probably does meaningfully involve the private bar in the provision of indigent defense, as the “court-appointed” and “other” counsel are private attorneys and an unknown proportion of the “undefined” category is also private. However, few counties systematically select attorneys in a manner assuring that the attorney is genuinely qualified to try the assigned criminal case.¹⁷¹

¹⁶⁸ *Racial and Gender Bias Report*, 190.

¹⁶⁹ *Ibid.*, 191.

¹⁷⁰ ABA Ten Principles, 2.

¹⁷¹ See segment on Selection of Counsel in this report, 78-80.

Table 1

NUMBER OF CRIMINAL CASES HANDLED BY EACH COUNTY BY DEFENSE COUNSEL TYPE (2008)

County	Public defender		Court-appointed counsel		Undefined counsel		Other counsel		Total Number of cases
	Number of cases	Percentage of total cases	Number of cases	Percentage of total cases	Number of cases	Percentage of total cases	Number of cases	Percentage of total cases	
Adams	482	36.2%	71	5.3%	299	22.5%	478	35.9%	1,330
Allegheny	6,195	32.0	727	3.8	7,365	38.1	5,060	26.2	19,347
Armstrong	304	34.9	44	5.1	179	20.6	344	39.5	871
Beaver	1,527	54.2	141	5.0	306	10.9	845	30.0	2,819
Bedford	284	54.4	36	6.9	42	8.0	160	30.7	522
Berks	2,961	50.4	478	8.1	385	6.6	2,051	34.9	5,875
Blair	1,293	45.3	409	14.3	281	9.8	871	30.5	2,854
Bradford	247	39.3	47	7.5	31	4.9	303	48.2	628
Bucks	2,656	29.3	541	6.0	1,545	17.1	4,308	47.6	9,050
Butler	1,017	38.2	166	6.2	888	33.4	590	22.2	2,661
Cambria	1,540	55.9	186	6.7	228	8.3	802	29.1	2,756
Cameron	68	72.3	0	0.0	4	4.3	22	23.4	94
Carbon	280	34.1	87	10.6	208	25.3	247	30.0	822
Centre	909	38.1	141	5.9	277	11.6	1,061	44.4	2,388
Chester	1,911	37.5	271	5.3	497	9.7	2,423	47.5	5,102
Clarion	220	26.8	45	5.5	262	31.9	295	35.9	822
Clearfield	396	38.4	37	3.6	280	27.2	318	30.8	1,031
Clinton	336	62.9	1	0.2	41	7.7	156	29.2	534
Columbia	395	45.8	37	4.3	113	13.1	317	36.8	862
Crawford	224	25.3	35	3.9	317	35.7	311	35.1	887
Cumberland	1,701	53.2	202	6.3	112	3.5	1,184	37.0	3,199
Dauphin	3,095	53.2	218	3.7	546	9.4	1,959	33.7	5,818
Delaware	3,235	37.6	281	3.3	877	10.2	4,205	48.9	8,598
Elk	261	57.4	31	6.8	55	12.1	108	23.7	455
Erie	1,413	46.9	168	5.6	340	11.3	1,093	36.3	3,014
Fayette	869	41.0	80	3.8	309	14.6	860	40.6	2,118
Forest	36	46.2	2	2.6	19	24.4	21	26.9	78
Franklin	1,231	50.8	332	13.7	372	15.4	488	20.1	2,423
Fulton	58	30.7	26	13.8	56	29.6	49	25.9	189
Greene	209	41.8	70	14.0	54	10.8	167	33.4	500
Huntingdon	252	42.2	146	24.5	50	8.4	149	25.0	597
Indiana	478	47.5	13	1.3	94	9.3	421	41.8	1,006
Jefferson	98	14.1	1	0.1	373	53.8	221	31.9	693
Juniata	207	59.7	10	2.9	25	7.2	105	30.3	347
Lackawanna	1,166	40.0	142	4.9	298	10.2	1,310	44.9	2,916
Lancaster	2,050	41.5	414	8.4	370	7.5	2,111	42.7	4,945
Lawrence	746	50.1	140	9.4	175	11.8	428	28.7	1,489
Lebanon	912	41.8	142	6.5	480	22.0	647	29.7	2,181
Lehigh	1,628	33.0	134	2.7	1,580	32.0	1,588	32.2	4,930
Luzerne	542	12.3	42	0.9	2,208	49.9	1,632	36.9	4,424
Lycoming	1,152	57.9	41	2.1	230	11.6	565	28.4	1,988
McKean	222	29.4	48	6.4	315	41.8	169	22.4	754
Mercer	658	49.7	142	10.7	108	8.2	415	31.4	1,323
Mifflin	438	60.9	47	6.5	41	5.7	193	26.8	719
Monroe	735	41.2	69	3.9	288	16.2	690	38.7	1,782
Montgomery	3,745	36.4	84	0.8	1,725	16.8	4,733	46.0	10,287
Montour	5	2.6	2	1.0	178	90.8	11	5.6	196
Northampton	1,047	24.6	137	3.2	1,725	40.6	1,343	31.6	4,252
Northumberland	560	38.6	146	10.1	305	21.0	438	30.2	1,449
Perry	301	54.3	0	0.0	63	11.4	190	34.3	554
Philadelphia	8,624	51.5	3,270	19.5	135	0.8	4,701	28.1	16,730
Philadelphia MC*	43,450	68.7	5,358	8.5	6,975	11.0	7,506	11.9	63,289
Pike	240	47.9	9	1.8	20	4.0	232	46.3	501
Potter	90	38.0	10	4.2	52	21.9	85	35.9	237
Schuylkill	1,022	46.8	157	7.2	312	14.3	691	31.7	2,182
Snyder	130	29.8	29	6.7	90	20.6	187	42.9	436
Somerset	385	45.1	109	12.8	91	10.7	269	31.5	854
Sullivan	34	50.0	11	16.2	8	11.8	15	22.1	68
Susquehanna	211	45.0	55	11.7	21	4.5	182	38.8	469
Tioga	196	47.6	15	3.6	7	1.7	194	47.1	412
Union	121	28.5	45	10.6	80	18.8	179	42.1	425
Venango	369	45.8	36	4.5	74	9.2	327	40.6	806
Warren	276	51.2	55	10.2	54	10.0	154	28.6	539
Washington	849	29.3	80	2.8	1,053	36.3	920	31.7	2,902
Wayne	315	50.2	0	0.0	66	10.5	247	39.3	628
Westmoreland	1,539	29.0	241	4.5	1,626	30.7	1,897	35.8	5,303
Wyoming	189	45.2	59	14.1	44	10.5	126	30.1	418
York	3,188	39.3	743	9.2	1,024	12.6	3,163	39.0	8,118
Statewide total	113,523	47.5	17,092	7.2	38,651	16.2	69,530	29.1	238,796

*Municipal court.

NOTE: The "undefined counsel" category includes records where the representation type was not recorded. This field is not required in reporting data to AOPC because sometimes clerk staff members do not know the representation type. The "other" category includes the following values: cocounsel, conflict counsel, migrated, PCRA counsel, and private counsel. E-mail from Ralph W. Hunsicker, senior projects director, Judicial Automation, AOPC, to Commission staff, Jan. 12, 2011.

SOURCE: CPCMS database, 2008, e-mail from AOPC to JSGC staff, March 13, 2009.

Table 2

NUMBER OF CRIMINAL CASES IN PENNSYLVANIA
BY TYPE OF CASE AND DEFENSE COUNSEL TYPE (2008)

County	Public defender		Court-appointed counsel		Undefined counsel		Other counsel		Total Number of cases
	Number of cases	Percentage of total cases	Number of cases	Percentage of total cases	Number of cases	Percentage of total cases	Number of cases	Percentage of total cases	
Capital murder	267	28.3%	337	35.7%	20	2.1%	319	33.8%	943
Other murder	1,001	39.5	526	20.8	167	6.6	838	33.1	2,532
Other felony	51,947	53.7	11,922	12.3	8,902	9.2	24,038	24.8	96,809
Misdemeanor	58,356	43.6	4,052	3.0	27,944	20.9	43,530	32.5	133,882
Ungraded	839	37.5	140	6.3	852	38.1	404	18.1	2,235
County probation	1,103	60.9	111	6.1	247	13.6	349	19.3	1,810
Forfeiture	4	1.0	1	0.3	346	87.4	45	11.4	396
Habeas corpus	6	3.2	3	1.6	173	91.5	7	3.7	189
Statewide total	113,523	47.5	17,092	7.2	38,651	16.2	69,530	29.1	238,796

SOURCE: CPCMS database, 2008, e-mail from AOPC to JSGC staff, March 13, 2009.

STATEWIDE SUPERVISION AND FUNDING

Somewhat hidden in the last sentence of Principle 2 are two of the most essential structural elements of an effective IDS: **“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.”**¹⁷² This topic has unmistakably assumed greater salience in the thinking of observers who wish to reform the nation’s IDSs. As recently as 1992, the ABA’s official standards went only so far as to suggest that “[c]onditions may make it preferable to create a statewide system of defense.”¹⁷³ And statewide organization was not included in the black letter statement of any of the ABA principles, but was included in what appears to be the commentary to the Principle 2, which is more conspicuously about the role of the private bar. However, the comment to the ABA Standard hints that statewide organization has grown in importance:

[Standard 5-1.2(c)] acknowledges the continuing national trend toward the organization of defense services at the state level. Such programs have generally fared better than locally funded programs in resource allocation and quality of service in recent years.¹⁷⁴

Since 2000, eleven states have established a statewide authority over their IDSs, although three of these state bodies have only partial authority.¹⁷⁵

¹⁷² Emphasis added.

¹⁷³ ABA Standards for Criminal Justice: Providing Defense Services, 3 (Standard 5-1.2(c)).

¹⁷⁴ *Ibid.*, 5.

¹⁷⁵ *Justice Denied*, 151. The eleven states referred to are Georgia, Louisiana, Montana, North Carolina, North Dakota, Oregon, South Carolina, Texas, Virginia, Washington, and West Virginia. The states whose central structure has partial authority are Georgia, Texas, and Washington.

Statewide Funding

Pennsylvania is the only state that does not provide for any funding for indigent defense. As of 2008, 28 states fund the IDS entirely or almost entirely at the state level. In another three states, the majority of the funding is borne by the state. In eighteen states the county bears most but not all of the cost.¹⁷⁶ The shift toward state funding reflects a consensus among commentators that a predominance of state funding is necessary to a successful system.

As numerous statewide indigent defense studies have shown, when counties primarily fund indigent defense, there are certain to be inequities among the locally funded systems. Inevitably, urban counties have far more cases than rural counties and are often overburdened. At the same time, a rural county, with fewer resources, may be financially crippled by the need to fund the defense of a single serious homicide case.¹⁷⁷

State funding is superior to local funding “because the financial obligation is more easily borne by the state and central funding avoids inconsistencies in funding levels among counties or other subdivisions.”¹⁷⁸ In these respects, the rationale for a significant contribution from the state for indigent defense is similar to that for state support for public education. As the counties and municipalities are creatures of the Commonwealth and have no independent sovereignty,¹⁷⁹ the responsibility for establishing and overseeing the IDS falls primarily on the state. It is consistent with the U.S. and Pennsylvania Constitutions for the Commonwealth to delegate some of this responsibility to counties, but the Commonwealth must ensure that the service is adequately provided throughout Pennsylvania.¹⁸⁰

Counties that face the double burden of a high crime rate and a poor economy cannot be expected to maintain a viable system. Per capita income by county ranges from \$62,086 in Montgomery County to \$20,097 in Forest County.¹⁸¹ National experience shows that the greater the demand for indigent defense funding, the less county funding is available, because counties with the greatest need for indigent defense commonly face falling property values, increasing unemployment, poor schools, and poor social services.

Nationally, counties with fewer sources of revenue may have to dedicate a far greater portion of their limited budget to defender services than would counties in better economic standing.

¹⁷⁶ Spangenberg Project, “State County and Local Expenditures for Indigent Defense Services Fiscal Year 2008” (ABA, 2010), 5.

¹⁷⁷ *Justice Denied*, 54-55.

¹⁷⁸ ABA/SCLAID, “*Gideon’s Broken Promise*,” 8.

¹⁷⁹ Pa. Const. art. IX, § 1; *Cali v. City of Philadelphia*, 177 A.2d 824 (Pa. 1962).

¹⁸⁰ See NLADA, *Race to the Bottom*, v.

¹⁸¹ U.S. Census Bureau, USA Counties, General Profile, Per Capita Personal Income 2007 <http://censtats.census.gov/cgi-bin/usac/usacomp.pl> (accessed Nov. 15, 2010).

For instance, crime rates tend to increase when there is a high level of unemployment. Thus, at a time when tax revenues may be down due to depressed real estate prices and people leaving the community, the criminal justice system is often expected to increase its workload. A county's revenue base may also be strained during economic downturns because of the need for increased social services, such as indigent medical costs. In addition, counties also must provide the citizenry with other important services, such as public education. The need to balance these responsibilities while maintaining fiscal accountability often leaves county officials in the unenviable position of having to choose between funding needed services and upholding the constitutional commitment to guarantee adequate indigent defense services.¹⁸²

In counties heavily impacted by depressed economies, the safety net that would otherwise support people tempted to turn to crime is ineffective.¹⁸³ In systems that depend primarily on county funding there is often justice by geography: "the measure of justice received by an indigent defendant may depend more on location than the actual merits of the case."¹⁸⁴

Statewide Oversight

Besides more equitable funding, a statewide public defense agency will help assure that PDs face greater accountability to our citizens and taxpayers. A statewide office can develop performance standards and implement them through training and supervision.

National standards have long acknowledged the need for a statewide structure to oversee indigent defense services, ensure uniformity in the quality of services, and provide system accountability. . . . [A] lack of statewide oversight and structure results in a hodgepodge of local indigent defense systems that are unsupervised and vary greatly in their effectiveness. The result is a system in which justice for the poor is unpredictable and subject to local political and budget pressures.¹⁸⁵

For instance, had the system in Luzerne County been required to report regularly on its activities to a statewide office, the county system might have been forced to explain the high proportion of juvenile clients appearing without counsel, which may have brought the Luzerne County "kids for cash" scheme into the open earlier.

¹⁸² David Carroll, "Pennsylvania's Continuing Struggles to Meet *Gideon's* Promise" (NLADA, April 8, 2011) <http://www.nlada.net/jscri/blog/pennsylvania%E2%80%99s-continuing-struggles-meet-gideon%E2%80%99s-promise>.

¹⁸³ Presentation of David J. Carroll, director of Research and Evaluation, Defender Legal Services, National Legal Aid and Defender Association (NLADA).

¹⁸⁴ ABA/SCLAID, "*Gideon's* Broken Promise," 9.

¹⁸⁵ *Ibid.*, 21.

Justice Denied, a study that reflects the consensus of indigent defense reform advocates, recommends a high degree of control for the statewide agency:

While it is always hazardous to generalize, usually, the greater the responsibility of the oversight body for the management of the state's indigent defense services, the better and more consistent is the representation throughout the state.

Oversight bodies with full authority and clear independence are best equipped to have a positive impact on indigent defense. This is especially true when the commission controls most or all of the state's funds for indigent defense. The relationship between state funding and an indigent defense oversight body's level of authority is inextricable and, for the most part, directly proportionate. Without adequate funding, even a well-designed and empowered commission will struggle to keep the indigent defense system afloat.¹⁸⁶

Consistent with a more centralized system with clear accountability, the advisory committee recommends that the statewide agency be granted the authority to promulgate standards through regulation that would govern the provision of services in all the counties except Philadelphia.¹⁸⁷ These standards should apply to all the key elements of service provision, including:

- performance evaluation
- qualifications for attorneys and professional staff
- compensation of attorneys and professional staff
- supervision and training
- attorney caseload and workload
- eligibility of defendants for public counsel
- time of commencement of representation
- data collection

While there should continue to be local PDs, those appointed after the effective date of the legislation instituting the reformed system should be selected by the statewide agency and be subject to dismissal by that office if their performance fails to meet the applicable

¹⁸⁶ *Justice Denied*, 166.

¹⁸⁷ See this report, 64.

standards or for other good cause. (PDs in office at the time the new system is instituted could to retain their positions, but would be subject to dismissal for good cause by the agency.)

DEFENDER ASSOCIATION OF PHILADELPHIA

Indigent defense cases arising in Philadelphia have been assigned to the Defender Association of Philadelphia (DAP) under a long-standing contractual arrangement between DAP and the city government. Because of DAP's unique and outstanding accomplishments, the advisory committee recommends that it should be autonomous in most respects from the statewide office.

Description of Defender Association of Philadelphia

DAP is nationally recognized as one of the best PD offices in the country. It has been honored by the NLADA for its excellence, and it has received other awards for its training programs, its dedication to quality representation of delinquent juveniles and children in abuse and neglect proceedings, its commitment to zealous capital case representation, and its leadership within the Philadelphia, Pennsylvania, and national PD, criminal, and delinquency justice communities.

DAP is guided by the best practices set forth in the Ten Principles and makes every effort to fully comply with them. It is structured to assure independence in its management and law practice and has maintained high standards of ethical, competent, and effective assistance of counsel. These standards of quality legal practice are communicated throughout its supervision process, training programs, and training materials.

Originally founded in 1934, DAP formally became the only PD office for Philadelphia through a perpetual contract originally signed in 1969. The contract provides that DAP is governed by a board of thirty directors representing the city administration as well as DAP itself. The board appoints the chief PD and the first assistant defender and provides policy guidance and oversight. The board fully supports the independence of DAP from political and judicial influences, but does not interfere with the representation of individual clients.

DAP provides state court representation for adults facing criminal prosecutions, and it files and staffs appeals to the Pennsylvania appellate courts and, when appropriate, the U.S. Supreme Court. It represents clients at probation review and parole violation hearings. All representation services are fully supported by staff investigators, social workers, mitigation specialists, administrators, technology staff, and support staff. DAP

attorneys, professional and support staff are full-time employees. Staff comprises approximately 600 full-time employees who work in its state and federal court divisions, units, and administration.

DAP's Juvenile Court Unit (JCU) has received national and state attention for its excellence. JCU represents juveniles in the delinquency court system at adjudication and disposition hearings, probation and other review hearings, habeas corpus filings, civil mental health review proceedings regarding sex offenders, and appellate representation. It participates in formulating policy regarding the delinquency system and in the rule-making process for juvenile court. JCU founded the Juvenile Defenders Association of Pennsylvania, which has become an important voice for juvenile PDs and for the children whom they represent. Members of the unit have contributed to the writing and publication of performance guidelines and other practice materials.

DAP was one of the nation's first defender offices to provide legal representation for children involved in the dependency court system through its Child Advocate Unit. The teams of attorneys and social workers comprising this unit seek to protect infants, children, and youth who have been physically and psychologically harmed. Many of these children may remain clients of CAU until they age out of the foster care system as young adults. The dedication of the CAU's attorney and social worker teams has saved the lives of many clients.

Among DAP's foremost priorities is the training, education, and development of its attorneys. DAP was one of the first PD offices in the country to establish a full-time attorney director of training responsible for the recruitment of outstanding law graduates and the training and supervision of interns and new attorneys. When the Pennsylvania Supreme Court instituted mandatory CLE requirements for all attorneys, DAP was recognized as one of the first accredited CLE providers, based upon its history of quality training programs.

DAP also provides specialized representation for adults and juveniles who have mental retardation or serious mental health conditions. This group of attorneys and social workers provides legal services for civil and criminal mental health hearings and commitment proceedings. They have also been active in discussions pertaining to the establishment of a Philadelphia mental health treatment court and in state and county policy impacting the mentally ill involved in the criminal and delinquency systems.

Finally, DAP serves as the federal community defender office for the Eastern District of Pennsylvania, providing trial and appellate representation in the federal courts. The federal office includes a large capital habeas unit that specializes in representing Pennsylvania inmates who face the death penalty. This unit's litigation has identified ineffective assistance of counsel issues in the training and funding of Pennsylvania's capital litigators, particularly the lack of financial support from the Commonwealth. Litigation by this unit has resulted in rulings in its favor by the Third Circuit and by the U.S. Supreme Court.¹⁸⁸

¹⁸⁸ See *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456 (2005).

Role of DAP in Proposed System

The advisory committee recommends that DAP continue to handle indigent defense representation for cases arising in Philadelphia. Because of the excellent record of DAP in maintaining professional standards, it should not be subject to the professional supervision of the statewide office and should be responsible for formulating and enforcing its own professional standards.

To afford Philadelphia some benefit from the statewide system, the statewide Office of Indigent Defense Services should contract with DAP to remunerate the latter for its handling of appeals (including appeals from capital cases). With respect to capital trials, the statewide office would pay DAP to handle 20% of those cases, as Philadelphia does currently through its contract with the City. The First Judicial District (which comprises the Pennsylvania Unified Judicial System in Philadelphia) should continue to assign the other 80% of the capital cases in Philadelphia to counsel qualified under court rules to represent capital defendants. While it might be fairer for DAP to handle all Philadelphia indigent capital cases, the advisory committee recognizes that the cost of doing so would be overly burdensome to the Commonwealth. Locally assigned counsel would also handle all postconviction litigation. The statute is drafted so as to implement this plan.

The advisory committee urges the City administration and the First Judicial District to adequately fund assigned counsel representing capital defendants.

TIMELY ASSIGNMENT OF COUNSEL

Principle 3 deals with the initiation of the attorney-client relationship:

Clients are screened for eligibility, and defense counsel are assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention, or request, and usually within 24 hours thereafter.¹⁸⁹

For the most part, the PDs that responded to the Commission staff's initial SR 42 Survey reported that they do begin representation of indigent defendants as soon as possible, normally before the preliminary hearing. Several counties reported that they sometimes represent clients as early as the preliminary arraignment. A few PD offices responded that while they technically begin representation before the preliminary hearing, that hearing is often the first time the defendant and counsel actually meet

¹⁸⁹ ABA Ten Principles, 2.

face-to-face. The advisory committee believes that the time of commencement of representation should be governed by statewide standards which should generally direct that defense counsel meet with the defendant prior to the preliminary hearing.

Eligibility Determinations

The SR 42 Survey found that the majority of counties use the Federal Poverty Guidelines (FPG)¹⁹⁰ to determine eligibility for indigent defense services, but the eligibility cutoff varied among the counties. Of the responding counties, 21 either use FPG or guidelines that mirror them for income eligibility. Most of those use a percentage of FPG ranging from 120 to 185 percent. For example, a defendant with a family size of four who is charged with a crime in Cambria County (eligibility standard of 120 percent of FPG) would be eligible for indigent defense services up to an income of \$26,460. In Franklin County (eligibility standard of 185 percent of FPG), a defendant would be eligible for those services up to an income of \$40,793. In several counties eligibility is affected by factors in addition to FPG, such as the grading of the offense, the defendant's assets, and whether the defendant is incarcerated at the time of the application.

The consensus of the advisory committee is that whether a juvenile is represented by counsel in delinquency proceedings should not depend on whether his or her family or guardian has sufficient means to pay for private counsel. The advisory committee therefore applauds the Pennsylvania Supreme Court's amendment to the Rules of Juvenile Court Procedure, which establishes a presumption of indigency for juveniles and requires the court to appoint counsel before the commencement of a hearing if the juvenile appears at the hearing without counsel. The Comment to the Rule further states that the resources of the juvenile's guardian¹⁹¹ are not to be considered in determining the juvenile's indigency.

The advisory committee recommends that the powers of the statewide agency include setting eligibility standards, in order to minimize the "justice by geography" anomalies that arise when each county sets its own, but eligibility standards should be flexible enough to accommodate local variations in the cost of living.

Collection of Fees from Defendants

Some of the indigent defense statutes of other states include various provisions that require persons who have received indigent defense services to make payments to

¹⁹⁰ For FPG amounts, see U.S. Department of Health & Human Services, Centers for Medicare & Medicaid Services. 2010 Poverty Guidelines: All States (except Alaska and Hawaii) and D.C. <http://www.cms.gov/MedicaidEligibility/Downloads/POV10Combo.pdf> (updated January 23, 2009).

¹⁹¹ Pa. R.J.C.P. 151. The term "guardian" includes parents. Pa.R.J.C.P. 120.

reimburse the state for all or part of the cost of their representation.¹⁹² These provisions apply to persons whom a judge determines are capable of paying for representation without undue hardship or those whose financial situation improves within a stated period of time after free counsel is provided. If the client fails to pay the fee, the remedy is usually a civil action against the defendant, with amounts collected payable either to the state's general fund or a fund set aside for indigent defense.

The advisory committee advises against adopting such provisions. A recent report¹⁹³ on the unfairness of user fees charged to defendants by the criminal justice systems in the fifteen states that have the highest number of prisoners¹⁹⁴ recommends that “[p]ublic defender fees should be eliminated, to reduce pressures that can lead to conviction of the innocent, over-incarceration, and violations of the Constitution.” These detriments arise mainly because fees for indigent counsel may discourage the exercise of the right to counsel.¹⁹⁵ Defender and other user fees can accumulate to a debt of hundreds or thousands of dollars and lead to a cycle of debt that indigent defendants cannot extricate themselves from, especially when their cases are referred to private collection agencies, and their fees are added to the underlying debt. Failure to pay may lead to reimprisonment and can hinder the defendant's reentry into society, as when the unpaid debt becomes grounds for suspending driving privileges. Fee collection also diverts probation and parole officers from their functions of promoting public safety and rehabilitation.¹⁹⁶ The PD or other segments of the criminal justice system may become dependent on fees and fines on indigent defendants to maintain their operations, leading to “improper incentives for judges to impose and aggressively collect fines and fees.”¹⁹⁷ More fundamentally, collecting from defendants who have used free counsel undermines the core principle that the accused is entitled to counsel when he or she is unable to afford it. At the same time, applications for free counsel should be subject to criminal penalties for false statements on the same basis as other applications to state authorities.¹⁹⁸

FACILITATING THE ATTORNEY-CLIENT RELATIONSHIP

Principle 4 addresses the facilities necessary to assure open and confidential exchange of information between attorney and client:

¹⁹² See, e.g., Colo. Rev. Stat. §§ 21-1-106, 21-2-106; Conn. Rev. Stat. §§ 51-297, 51-298; Ind. Code §§ 33-40-3-6 — 33-40-3-9; Ky. Rev. Stat. Ann. § 31.211; Mass. Gen. Laws ch. 211D, § 21/2; Minn. Stat. § 611.35; N.M. Stat. § 31-16-7; Or. Rev. Stat. §§ 151.485, 151.487; Va. Code § 19.2-163.4:1; W. Va. Code § 29-21-16; Wis. Stat. §§ 977.06, 977.07, 977.075, 977.076, 977.077. All statutes were retrieved through FindLaw in 2010.

¹⁹³ Alicia Bannon, Mitali Nagrecha, and Rebekah Diller, “Criminal Justice Debt: A Barrier to Reentry” (New York: New York University School of Law, Brennan Center for Justice, 2001).

¹⁹⁴ Pennsylvania and New York do not currently charge public defender fees, but the other thirteen states do. *Ibid.*, 12.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*, 1, 2.

¹⁹⁷ *Ibid.*, 25-28.

¹⁹⁸ See 18 Pa.C.S. §§ 4903 and 4904.

Defense counsel are provided sufficient time and a confidential space within which to meet with the client. Counsel should interview the client as soon as practical before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.¹⁹⁹

Confidentiality between attorney and client is among the most basic principles of legal practice, as noted in the Pennsylvania Rules of Professional Conduct:

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.²⁰⁰

Conditions that facilitate consultation between attorney and client assist the American legal system by enabling the attorney to fully understand the client's view of the underlying facts, thereby enabling the attorney to prepare the most responsive possible defense. The attorney can more readily determine whether the client's guilt is clear or contestable and whether appropriate legal defenses (such as self-defense, diminished capacity, or insanity) may apply, or procedural defects that implicate fundamental rights (such as illegal search and seizure) may render evidence against the client inadmissible. Once a person has been determined eligible for indigent representation, the attorney or other interviewer should obtain the critical information from the client about the facts of the case, any defenses, the names of the witnesses, and all other relevant circumstances. This intake process should be completed before critical proceedings against the defendant take place.

While the SR 42 Survey of PDs did not focus on questions pertaining to private space to talk to clients, advisory committee members expressed concern that adequate space was often not available for PDs and court-appointed counsel. *The Racial and Gender Bias Report* noted problems in this regard:

[The Spangenberg Group] observed that defense attorneys had a difficult time meeting professional standards of confidentiality because of a shortage of private spaces in jails, prisons, and courthouses where they

¹⁹⁹ ABA Ten Principles, 2.

²⁰⁰ Pa.R.P.C. 1.6, cmt. [2].

met with clients. In some courthouses, for example, defense attorneys were forced to meet clients in areas where their conversations were fully audible to prosecutors and law enforcement officers.²⁰¹

EXCESSIVE CASELOADS

Principle 5 addresses the key issue of limits on attorney workloads:

Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, 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.²⁰²

Caseloads for PDs and other defenders should be low enough to allow for a quality defense. No lawyer can provide an accused with adequate representation without the time and resources needed to devote to his or her cases.

Principle 5 follows from binding ethical standards for legal practice. Rule 1.3 of the Pennsylvania Rules of Professional Conduct states: "A lawyer shall act with reasonable diligence and promptness in representing a client." Comment [2] adds: "A lawyer's work must be controlled so that each matter can be handled competently." A lawyer who takes so many cases that he or she cannot handle all of them with "reasonable diligence and promptness" commits an ethical violation.²⁰³

A thorough preparation of a criminal defense requires activities well beyond the perusal of a police report. Counsel must participate in the arraignment and the preliminary hearing, because important rights can be lost if they are not asserted early. Counsel must interview the defendant and any witnesses who may know about the circumstances of the alleged offense. The attorney or an investigator on his or her behalf may need to inspect the crime scene and collect and evaluate physical evidence. If the investigation may have violated the constitutional rights of the accused, the defense must move to exclude the evidence produced in consequence of the violation. In complex cases, a competent defense may require consultation with forensic or psychological experts and development of their testimony. In cases that raise novel legal issues, these

²⁰¹ *Racial and Gender Bias Report*, 186.

²⁰² ABA Ten Principles, 2.

²⁰³ See also Pa. R.P.C. 1.1 (requiring and defining competent representation) and 5.1 (defining the responsibility of a supervisory lawyer to ensure that a subordinate lawyer observes ethical practice).

must be researched, briefed, and argued. A trial requires meticulous preparation and makes great demands on the attorney while it is taking place and afterwards, when the attorney is called upon to preserve rights for appeal. How much work is required depends heavily on the facts of each case, but an attorney who attempts to juggle too many cases will be unable to meet the requirements of competent, zealous, and ethical representation in many of those cases.

National Standards

It is impossible to determine with mathematical precision how many cases an individual PD can handle, since cases vary greatly in the time they require to complete. The only study to suggest national maximum caseload numbers for use by defenders was a 1973 study done by the National Advisory Commission (NAC) on Criminal Justice Standards and Goals. In its report, the NAC recommended a maximum annual caseload per attorney in a PD office of 150 felonies, 400 misdemeanors, 200 juvenile court cases, 200 mental health cases, or 25 appeals.²⁰⁴ An ABA Committee studying the criminal justice system proposed reducing the standard for misdemeanors to 300 cases in view of case law extending the right to free counsel to misdemeanors punishable by imprisonment.²⁰⁵ Another ABA report observed that the NAC standards “have proven resilient over time, and provide a rough measure of caseloads.”²⁰⁶

The NLADA-affiliated American Council of Chief Defenders (ACCD) commented that the PD and assigned counsel caseloads should not exceed the NAC recommended levels, but cautioned that the standards should not be applied mechanically.

[NAC] caseload limits reflect the maximum caseloads for full-time defense attorneys, practicing with adequate support staff, who are providing representation in cases of average complexity in each case type specified.

Notwithstanding their general suitability, the NAC standards should be carefully evaluated by individual public defense organizations, and consideration should be given to adjusting the caseload limits to account for the many variables which can affect local practice. The NAC standards, for example, weight all felonies the same, regardless of seriousness. . . . Similarly, the NAC standards do not account for

²⁰⁴ *Justice Denied*, 66. “The standards are disjunctive, so if a PD is assigned to more than one category, the percentage of the maximum caseload for each category should be assessed and the combined total should not exceed 100%.” *Ibid.*, n. 102.

²⁰⁵ ABA Standards for Criminal Justice: Providing Defense Services, 3rd ed. (Washington, D.C.: ABA, 1992), 72; *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

²⁰⁶ ABA Standards: Providing Defense Services, 72.

differences in urban and rural jurisdictions, and instances where attorneys must travel significant distances to and between courts, confinement facilities and clients.²⁰⁷

The ACCD further observed that “in many jurisdictions, maximum caseload levels should be lower than those suggested by the NAC.”²⁰⁸ In agreement with other indigent defense advocates, ACCD noted that criminal defense has become more complicated and cases often take longer to process than in 1973.²⁰⁹

Justice Denied further elaborates on the increasing demands of contemporary criminal practice as they affect attorney workloads:

As a result of the “tough on crime” policy decisions, criminal cases have become more time-consuming and costly to defend. The greater the potential consequences of a conviction, the more time and effort a criminal defense attorney needs to expend to avoid a conviction or to mitigate its consequences. A recent empirical workload study of the Colorado state PD found a significant increase in just the past six years in the time it takes PDs to handle their caseloads due to a variety of factors, such as the creation of new crimes, enhanced penalties, and additional collateral consequences applicable upon conviction.²¹⁰

With the emergence of science and technology and new criminal laws, many cases have become more complex, requiring specialized training and greater time to defend. Consider, for instance, the use of DNA and other forensic evidence, computer- or internet-based crimes, and the creation of sexually violent predator laws. . . . Such complex cases are a significant burden on a defender’s time, requiring not only specialized knowledge but often also the review of thousands of pages of discovery and the use of experts.²¹¹

Leading indigent defense expert Norman Lefstein cites these considerations to argue that the NAC guidelines should not be taken as definitive, particularly emphasizing the lack of empirical support for them and their “troubling” failure to distinguish between different kinds of felonies. Professor Lefstein concluded that the NAC standards were useful only as “an absolutely outer limit on caseloads that defense lawyers for the indigent should be permitted to handle.”²¹² On the other hand, Timothy Clawges, the PD of Cumberland County characterized the NAC guidelines as “about right.”²¹³ As will be

²⁰⁷ American Council of Chief Defenders Statement on Caseloads and Workloads Resolution. (n.p.: NLADA, Aug. 24, 2007), 1, 5 <http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCDCASELOADSTATEMENTsept6.pdf>.

²⁰⁸ *Ibid.*, 6.

²⁰⁹ *Ibid.*, 6-12; *Justice Denied*, 66.

²¹⁰ *Justice Denied*, 71.

²¹¹ *Ibid.*, 76.

²¹² Norman Lefstein, e-mail to Commission staff, November 30, 2010.

²¹³ Telephone conversation with Commission staff, March 18, 2011.

detailed below, in some counties attorney staff is numerically insufficient to handle caseloads under NAC standards, plus the office must handle a substantial number of cases for which recommended workloads have not been formulated, usually because they are types of cases that did not exist when the NAC study was done.

Obligation to Refuse Work

As Principle 5 states, attorneys have an obligation to decline to take additional cases where acceptance of the work “interfere with the rendering of quality representation or lead to the breach of ethical obligations.” The ethical obligations of PDs faced with excessive caseloads were addressed in ABA Formal Opinion 06-441, which has received a great deal of attention in the PD community.²¹⁴ In this opinion, the committee emphasizes that attorneys defending indigent clients are under the same duties of professional ethics that apply to other attorneys. Along with such professional obligations as those mandating that lawyers “keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; communicate effectively on behalf of and with clients; . . . and, if a lawyer is not experienced with or knowledgeable about a specific area of law, either associate with counsel who is knowledgeable in the area or educate herself about the area,” there is also a duty to “control workload so each matter can be handled competently.”²¹⁵

In a PD office setting, the determination of whether an attorney’s workload is reasonable is to be determined in the context of such factors as “case complexity, the availability of support services, the lawyer’s experience and ability, and the lawyer’s nonrepresentational duties” and is to be made, in the first instance, by the supervisor and then by the chief PD. If a PD or other indigent defense attorney is faced with an excessive workload, his or her first recourse is to attempt to get relief or assistance through the attorney’s immediate supervisors until relief or assistance is obtained. This may include transferring the attorney’s cases or nonrepresentational responsibilities to other staff, supporting his or her petition to the court to withdraw from cases, and supplying any available resources to assist him or her. If no relief is forthcoming from within the office’s chain of command or it is not sufficient to bring the caseload down to a level that the lawyer considers reasonable in his or her independent professional judgment, the attorney should petition the court to withdraw from cases, whereupon the court must determine whether the request for reduced workload is reasonable. If the court denies the petition to withdraw, the attorney must obey the order, while taking all reasonable steps to ensure that every “client receives competent and diligent representation.” The supervisor is under a corresponding duty to ensure that the caseload of each lawyer in the staff is reasonable under this standard, and “[i]f the supervisor knows that a subordinate’s workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action . . . , the

²¹⁴ ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-441 (2006).

²¹⁵ *Ibid.*, 3, 4, 6.

supervisor himself is responsible for the subordinate's violation of the Rules of Professional Conduct."²¹⁶ The ABA has adopted guidelines that further elaborate on the duties limned in Formal Opinion 06-441.²¹⁷

In *State ex rel. Missouri Public Defender Commission v. Pratte*,²¹⁸ the Missouri Supreme Court outlined some of the responses that could be used to address a crisis brought about by excessive caseloads. The Missouri statute authorizes a county PD to declare "limited availability" of the system if predetermined caseload limits are exceeded for three consecutive months. At that point, the presiding judge of the court, the PD, and the prosecutor must take measures to respond. The court outlined the following measures available under Missouri law:

- The prosecutor's agreement to limit the cases in which the state seeks incarceration
- Determining cases or categories of cases in which private attorneys are to be appointed
- A determination by the judges not to appoint any counsel in certain cases (which would result in the cases not being available for trial or disposition)
- Absent a resolution through an agreement by prosecutors and the judge, the PD may make the office unavailable for any appointments until the caseload falls below the state commission's standard²¹⁹

The court discussed the possibility of appointing counsel and requiring them to work without pay, but deferred as premature any ruling on whether that remedy could be mandated. A New Hampshire case has held that the state Supreme Court could require the legislature to provide reasonable compensation for court-appointed counsel.²²⁰

Capital Cases

Special burdens are placed on defense attorneys by cases where the death penalty is sought. Defense of capital cases has become a specialized area within criminal practice, and additional experience and training qualifications are required in Pennsylvania²²¹ and other states. The ABA has developed a 136-page set of standards

²¹⁶ *Ibid.*, 4-8.

²¹⁷ ABA/SCLAID, "Eight Guidelines of Public Defense Related to Excessive Workloads" (ABA, August 2009) http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/defender/downloads/eight_guidelines_of_public_defense.authcheckdam.pdf. These guidelines were adopted by the House of Delegates of the ABA on August 3, 2009, and therefore constitute formal ABA policy.

²¹⁸ 298 S.W. 3d 870 (Mo. 2009).

²¹⁹ *Ibid.*, 29, 30. Failure to timely commence the proceeding may result in dismissal of the case due to the defendant's right to a speedy trial. *Ibid.*, n. 36.

²²⁰ *Justice Denied*, 134, citing *Smith v. State of New Hampshire*, 394 A.2d 834 (N.H. 1978).

²²¹ Pa. R.C.P. 801.

governing capital defense that claims to “embody the current consensus about what is required to provide effective defense representation in capital cases.”²²² They embody a stringent view of the responsibilities inherent in capital defense. “[B]ecause of the extraordinary complexity and demands of capital cases, a significantly greater degree of skill and experience on the part of defense counsel is required than in a noncapital case.”²²³ “Due to the extraordinary and irrevocable nature of the penalty, at every stage of the proceedings counsel must make extraordinary efforts on behalf of the accused.”²²⁴ The guidelines reflect the concern that has been expressed by the U.S. Supreme Court and elsewhere in the legal community regarding the poor quality of capital representation and the dramatic effect the quality of representation has on the probability that the defendant will actually be executed, as well as recognition of the instances of wrongful conviction in capital cases.²²⁵

The ABA Standards require a capital case to be handled by at least two attorneys, an investigator and a mitigation specialist. (The mitigation specialist gathers and presents evidence that is relevant to determining whether the death penalty is warranted, particularly the accused’s upbringing and his or her mental condition.) A single capital case exhausted the annual budget of the Venango County PD in three months.

Public Defender Caseloads in Pennsylvania

Pennsylvania’s IDS is unable to generate complete and reliable data, and this failure hampers policy analysis of the system’s overall performance. The determination of caseload is simple in principle: count the number of cases and divide that number by the number of attorneys that handle the cases. But there are problems affecting both the numerator and the denominator.

There are wide differences in how PD offices count cases. Different cases require widely different time requirements; a capital murder case may require thousands of hours of attorney time, while a summary offense may be resolved in less than an hour. It is therefore necessary to enumerate cases in different categories. Where a given offense gives rise to felony and misdemeanor charges, different offices categorize the case in different ways. In Pennsylvania, first degree misdemeanors can carry a sentence of up to five years and second degree misdemeanors up to two. Imprisonment for one year is the line of differentiation between felonies and misdemeanors in most states and the federal government.²²⁶ Some offices therefore count first and second degree misdemeanors as

²²² ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (revised February 2003), 2. ABA guidelines are “evidence of what reasonably diligent attorneys would do,” but are not “inexorable commands with which all defense attorneys must fully comply.” *Bobby v. Van Hook*, 558 U.S. ___, 130 S.Ct. 13, 17 (2009) (internal quotations omitted).

²²³ ABA Death Penalty Guidelines, 2.

²²⁴ *Ibid.*, 4.

²²⁵ *Ibid.*, 8, 9, 13. The Death Penalty Information Center claims that since 1971, 138 American defendants who were sentenced to death were later exonerated. DPIC, The Innocence List <http://www.deathpenalty.info.org/innocence-list-those-freed-death-row> (last modified October 28, 2010).

²²⁶ E-mail from Wieslaw Niemoczynski to Nathan Schenker, March 15, 2011.

felonies. A juvenile delinquency case may involve a series of different hearings and incidents relating to one minor. If there is a major incident perpetrated by a minor already adjudicated delinquent, does that give rise to a new case or is it added to the minor's existing case? Does a probation or parole violation by a convicted person begin a new case or is it the same case as the underlying offense?

There are also substantial problems with arriving at a count of the denominator, the number of attorneys. Those responsible for forwarding caseload statistics may not know whether the attorney in a given matter is a PD, an assigned counsel, or a private attorney, especially when a part-time PD represents the defendant. There is no consistent way of counting part-time attorneys. Some attorneys are counted as part-time even though they put in 40 hours per week on PD work. The office may count all part-time attorneys at 0.5 FTE, while others may attempt a more exact enumeration based on hours worked. Some offices attempt to break down the proportion of attorney time devoted to different kinds of cases, while others do not.

Many county PD offices across Pennsylvania have caseloads high enough that even experienced defense lawyers would have difficulty in providing an adequate and ethically compliant defense for all clients.

Defense counsel for indigents in Pennsylvania struggle with heavy caseloads, partly because county criminal case filings have increased without commensurate increases in staffing. In Bucks County, for example, the PD's caseload in 1980 was 4,173 cases. In 2000, the same number of attorneys handled an estimated 8,000 cases. Similarly, in Monroe County, [Michael] Muth [(then chief PD of Monroe County)] testified at the Wilkes-Barre public hearing that the PD office's caseload rose from 1,984 cases in 1998 to 2,782 in 2000, a 39 percent increase in three years. During that period, the staff size remained the same.²²⁷

These staggering caseloads create numerous difficulties for counsel, which can lead to inadequate representation of some clients. The *Racial and Gender Bias Report* notes that such overcommitment may result in:

- Poor attorney-client contact, as attorneys fail to meet personally with their clients to receive and communicate vital information;
- Inadequate preparation, as attorneys, for example, fail to conduct interviews or investigations, file no motions or file the same boilerplate motions in every case, fail to act in a timely manner on important information, fail to pursue issues, or "cut corners" in their work . . .²²⁸

The advisory committee notes that these difficulties may increase the number of meritorious claims of ineffectiveness of counsel.

²²⁷ *Racial and Gender Bias Report*, 188.

²²⁸ *Ibid.*

Excessive Caseloads in Particular Counties

Commission staff performed two surveys to determine caseloads in the reporting counties. However, much of the data proved unusable because of the many kinds of cases that are not reported, varying definitions of what constitutes a case, and lack of standardization for differentiating full- from part-time attorneys. As Chapter Four recounts, the advisory committee and staff did a basic caseload survey in March 2011, which provided the data used in this section.

The numerical data from the various responses indicated that some PD offices throughout the Commonwealth struggle with clearly excessive workloads. Table 3 applies the NAC caseload caps to reported cases from the county to determine the number of attorneys needed to handle the cases in those categories where caseload caps have been formulated. The right hand column lists the cases in categories where NAC caps do not apply. In the counties listed in Table 3, the data indicate that the number of attorneys is not sufficient to provide adequate representation for NAC cases, plus the workload includes hundreds or thousands of other cases, and the responsibility for representing defendants in those cases must be considered in determining a reasonable complement.

Echoing the view expressed by Michael Muth above, Timothy L. Clawges, the PD of Cumberland County, observed that over the last 20 years, “there has been an unrelenting and consistent trend toward increasing the day to day workload of PDs” and that the system seems oblivious to this trend. He cited the following examples:

- Increased volume and complexity of legislation. For instance, Megan’s Law cases require attorneys to deal with new issues ranging from residency to the psychiatric condition of the client.
- Increasing alternative outcomes of cases. A DUI defendant may qualify for disposition under ARD, treatment court, recidivism risk reduction incentive, or other intermediate treatment alternatives, which requires attorneys to master the prerequisites for each alternative and to counsel clients about which alternative they wish to pursue.
- Collateral consequences counseling. Since the U.S. Supreme Court held in *Padilla v. Kentucky*²²⁹ that failure to counsel a client on the effect of a guilty plea on the client’s immigration status may constitute ineffective assistance, attorneys have had to familiarize themselves with immigration law and

²²⁹ ___ U.S. ___, 130 S. Ct. 1473 (2010). The reach of an attorney’s professional obligations under *Padilla* is unclear. Collateral consequences that may require disclosure may include adoption and child custody rights, eligibility for a professional license or a driver’s license, and voting rights. Thomas Esparza, “Defense Counsel’s Duty to Warn about . . . Everything? ‘Padilla’ Ruling by U.S. Supreme Court Extending Far beyond Deportation,” Lawyer’s Weekly USA, Nov. 8, 2010, available at <http://www.tomesparza.com/2010/11/15/defense-counsels-duty-to-warn-about-everything-padilla-rulingby-u-s-supreme-court-extending-far-beyond-deportation-cases/>.

Table 3

CASES AND ATTORNEY WORKFORCE IN SELECTED COUNTIES (2010)

County	Number of staff attorneys (FTE equivalent)	Attorneys required for cases under NAC standards ¹	Number of homicides	Number of cases not covered by NAC standards
Centre	7	10.1		532: county probation and parole (287); state parole (57); child support (35); child custody or guardian (62); protection from abuse (PFA) (29); other contempt (51); extradition (11)
Clinton	1.5	1.8		581: domestic relations contempt (225); probation and parole (278); summary offenses (78)
Cumberland	7	13.3	3 capital	1191: child support (799); state parole (128); county probation or parole (264)
Dauphin	23	28.9	3 capital; 20 non-capital	1260: county probation and parole (1000); state parole (100); PFA contempt (100); dependency (60)
Lancaster	23.5	29.7	1 non-capital ²	2577: probation or parole (1718); PFA (259); other summary, bench warrant, extradition, fugitive, fines and costs (600)
Luzerne	16.5	25.0	2 capital, 1 non-capital	1308: contempt (34); extradition (41); PFA (102); probation (1070); state parole (26); summary appeal (6); termination of parental rights (19); Megan's Law (3); misc. (7)
Monroe	7.5	9.7	2	1517: juvenile dependency (389); fugitive (41); summary (47); support contempt (258); PFA (782)
Montgomery	29.5	36.1	8 non-capital	5377: county probation and parole (4238); state parole (802); indirect criminal contempt (85); non-support contempt (252)

1. The standards recommend a cap of 150 cases per year per attorney for felonies, 300 for misdemeanors, 200 for juvenile matters, 200 for mental health cases, and 25 for appeals. There are no NAC standards for other cases. Thus an office with a caseload of 600 felony cases, 900 misdemeanors, 600 juvenile cases, 400 mental health cases, and 100 appeals would require an FTE of 16 attorneys (viz., $4 + 3 + 3 + 2 + 4$).

2. The 2010 number was unusually low from 2004 through 2010, the Lancaster County PD represented homicide defendants in 33 cases of which 15 were capital. E-mail from James Karl, Chief PD, Lancaster County, to Commission staff, June 9, 2011.

SOURCE: March 2011 Basic Caseload Survey.

determine the citizenship status of their clients. Other “collateral consequences” that give rise to similar obligations include eligibility for public housing and other public assistance and firearm privileges.

- Increase in forms required of PDs. The guilty plea colloquy form in Cumberland County is two pages long, and the attorney must review it with each client line by line. This takes between five and ten minutes for each client, and up to 25 clients may be pled in a given day.
- Police officers are hired at a greater rate than PDs, prosecutors or other legal professionals (including probation officers and support staff). Since arrests seem to be proportional to the number of police, the caseload for professionals rises.

The problem is not that these requirements are undesirable in themselves, but that they are simply piled on top of the existing workload with no provision for increasing staff and other resources to meet them.²³⁰

Pennsylvania caseloads may be more demanding than those of other states because of the heavy punishments prescribed for misdemeanors. Traditionally, a misdemeanor was defined as an offense that carried a term of imprisonment of one year or less.²³¹ Under this terminology, the grading system prescribed by 18 Pa.C.S. § 1104 properly labels only misdemeanors of the third degree; misdemeanors of the first and second degree are then actually felonies, and some PDs classify them as such.

NAC standards further assume that PD offices have adequate staff support.²³² Some PD offices operate with minimal assistance. Another stress on the PD office is the requirement for attorneys to appear at different hearings. In Monroe County, PDs appear before six trial judges, ten magisterial district judges, two juvenile masters, a children and youth master, and mental health hearing officers. The county’s chief PD reports that “at any given time, the PD office is overrun with obligations due to the caseload. Triage is more often the norm than the exception.”²³³

Two chief PDs said they disposed of high caseloads through a cooperative arrangement with the DA. While such a system assures rapid disposition of cases and minimal immediate costs, there is a high risk that factually innocent defendants will be convicted, legally established defenses will be ignored, and substantive constitutional rights will be violated. At the same time, it seems unfair to blame county PDs for failure to provide zealous representation when resources and staff are only sufficient to support a practice of plea bargaining almost every case.

²³⁰ Timothy L. Clawges, telephone conversation with Commission staff, March 24, 2011.

²³¹ Bryan A. Garner, ed., *Black’s Law Dictionary*, 8th ed., s.v., “Misdemeanor.”

²³² Staff support would include staff in positions such as investigators, social workers, administrators, secretaries, paralegals, law clerks, etc.

²³³ Wieslaw T. Niemoczynski, e-mail to Commission staff, March 15, 2011.

Court-Appointed Counsel Caseloads

Ethical standards require the use of conflict counsel when the PD office has a conflict, as when there are two or more codefendants, each of whom is likely to mitigate his or her punishment by implicating another codefendant. Since an attorney who would attempt to represent more than one codefendant would likely have to argue inconsistent accounts of the underlying events and would be pressured into preferring one client at the expense of others, representing multiple codefendants constitutes a conflict of interest. For this reason such representation is prohibited by Rule 1.7 of the Pennsylvania Rules of Professional Conduct.²³⁴ Counsel may also be appointed for highly specialized cases or when the PD office does not have sufficient resources to handle the case. Several counties rely heavily on court-appointed counsel in juvenile delinquency cases, capital murder, and other cases requiring special expertise.

Staff also attempted to collect data on the numbers of cases handled by court-appointed counsel, but abandoned the attempt because the data was unreliable. Court clerks responsible for entering data from the counties did not know what kind of attorney handled a particular case. This is especially difficult where a part-time PD represents a client, because the clerk will often be unaware of whether the attorney is appearing in his or her capacity as a PD or a private attorney. Staff was unable to find data on the number of court-appointed and conflict counsel handling those cases. Neither is there any data currently available on the number of private cases court-appointed and conflict counsel handle in addition to their indigent defense cases.

SELECTION OF COUNSEL

Principle 6 defines the standard for assigning defenders to cases:

Defense counsel’s ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that

²³⁴ Pa.R.P.C. 1.7 (a) provides as follows:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Paragraph (b), which provides for client waivers of conflicts of interest, does not apply because waiver is prohibited when the representation involves “the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.” Pa.R.P.C. 1.7 (b)(3). Pa.R.P.C. 1.7, cmt. [23] notes that “the potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant.”

counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.²³⁵

This principle echoes the ABA Criminal Justice Standards:

Lawyers licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts should be encouraged to submit their names for inclusion on the roster of attorneys from which assignments are made. Each jurisdiction should adopt specific qualification standards for attorney eligibility, and the private bar should be encouraged to become qualified pursuant to such standards.²³⁶

In view of the complexity of criminal law, its practice requires skills beyond those required for licensure as an attorney, including “familiarity with the practice and procedure of the criminal courts and knowledge of the art of criminal defense.”²³⁷ Inexperienced attorneys wishing to become assigned counsel can become qualified to represent clients by participating in a structured program that may include serving an apprenticeship with experienced criminal attorneys, observing a variety of proceedings, conducting proceedings under the mentor’s supervision, attending training sessions, and beginning full participation with minor misdemeanor cases.²³⁸ Highly professional PD offices conduct similarly structured programs to develop the professional skills of the attorneys they employ. More stringent eligibility standards apply to representing the accused in a capital case. Attorneys who are assigned cases that they are not qualified to handle have “an absolute duty to decline” the appointment.²³⁹

In Pennsylvania counsel are often not matched by competence to cases, and the structure of the assignment systems creates perverse incentives that undermine effective representation.

[The Spangenberg Group (TSG)] found that all counties except Philadelphia lacked a formal screening process for making court appointments. In most of the counties visited by TSG, appointments were made through an informal word-of-mouth network among judges and court administrators. TSG observed other problems that compounded this deficiency, including the absence of minimum standards of experience and performance; allegations of favoritism in the appointment process; and inadequate supervision and training of assigned counsel. Most counties pay assigned counsel a flat fee (per year in most counties and per case in

²³⁵ ABA Ten Principles, 3.

²³⁶ ABA Standards for Criminal Justice: Providing Defense Services, 3rd ed. (Washington, D.C.: ABA, 1992), Standard 5-2.2 (Eligibility to serve), 32.

²³⁷ *Ibid.*, 34.

²³⁸ *Ibid.*, 35.

²³⁹ *Ibid.*

Philadelphia), creating a disincentive for counsel to devote time to a particular case. As a result, attorneys are not taking the time to visit clients in jail, file motions, conduct effective investigations, or respond to mail from clients.²⁴⁰

The SR 42 Survey shows that Pennsylvania counties use a variety of systems for appointing counsel. The 13 counties responding to the relevant questions in the survey reported that the responsibility for appointing counsel is spread among judges, court administrators and the PD. In five counties, a judge is solely responsible for appointing counsel; in four counties a judge appoints counsel upon the recommendation of the court administrator; in three the court administrator appoints counsel; and in one the appointment process is handled by the PD office. With varying systems of appointing counsel, it is difficult to ensure that adequate, let alone effective, assistance of counsel is being provided to all indigent defendants. The appointment of counsel by judges does not follow Standard 5-1.3 of the ABA's *Criminal Justice Standards*, which directs that "[t]he selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by administrators or the defender or assigned counsel programs."²⁴¹ This aspect of a proper IDS structure is thus closely related to the principle of independence from improper outside influence (Principle 1).

The survey revealed some problematic responses from counties with regard to the training and other eligibility requirements for selection as assigned counsel. Most counties responded that the attorney need only hold a license to practice law or membership in the local bar. Some mentioned the need for experience without specifying more, and some stated they require qualification under Pa. R. Crim. P. 801 for capital cases. One county reported having no such requirements. In counties without such requirements or with minimal requirements, there is no assurance that the attorney has any substantial background in criminal law and practice. Even an experienced and skilled attorney whose practice has consisted almost entirely of conveying real property or minimizing the tax consequences of business transactions may be of limited assistance in a criminal trial.

CONTINUITY OF REPRESENTATION

Principle 7 prescribes that only one attorney should represent a client in any one matter:

The same attorney continuously represents the client until completion of the case. Often referred to as "vertical representation," [sic] the same attorney should continuously represent the client from

²⁴⁰ *Racial and Gender Bias Report*, 189.

²⁴¹ Spangenberg Group, "A Statewide Evaluation of Public Defender Services in Pennsylvania," 62.

initial assignment through the trial and sentencing. The attorney assigned for the direct appeal should represent the client throughout the direct appeal.²⁴²

This principle reflects the importance to effective representation that clients be represented by the same PD through the entire proceeding, from arraignment through trial and sentencing. (The principle is similar to continuity of care in the medical setting.) Otherwise, the client and attorney will fail to develop a “close and confidential attorney client relationship” that is characteristic of privately retained clients.²⁴³ Trust between client and attorney, so vitally important in criminal representation, is impeded when a client is passed along from one attorney to another. Because appellate practice requires a significantly different skill set from trial practice, it is generally not detrimental to the client’s interests if a lawyer other than the trial counsel handles the appeal.

The principle of continuity is widely ignored in Pennsylvania:

In many counties that [the Spangenberg Group] visited, PDs employ a horizontal or zone representation system for cases other than homicides. Under this system, attorneys are assigned to courtrooms first and clients second. Therefore, an individual client may be represented by several different PDs before a case is resolved. This system has several disadvantages, all of which adversely affect the quality of representation: it hinders the development of attorney-client rapport; it creates gaps in representation that could leave a client without assistance of counsel at critical stages in a case; it allows attorneys to avoid responsibility for case preparation and planning; it creates the potential for important information to be lost as a case passes from one attorney to the next; it results in the loss of investigation time; and it undermines clients’ respect for and trust in both the attorneys and the system as their cases are rotated among different counsel at various stages.²⁴⁴

Despite these disadvantages, horizontal representation is still widely used by PD offices in Pennsylvania. A statewide office could mandate, or at least encourage, the use of vertical representation, depending on its feasibility.

RESOURCES

Principle 8 of the ABA Principles deals with the resources available to the IDS, both absolutely and in comparison to prosecutors:

²⁴² ABA Ten Principles, 3.

²⁴³ “*Gideon’s Broken Promise*,” 18.

²⁴⁴ *Racial and Gender Bias Report*, 189.

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. Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. 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, and separately fund expert, investigative, and other litigation support services. 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. 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.²⁴⁵

Pennsylvania's IDS fails to meet this standard:

In Pennsylvania . . . the rapidly increasing caseload for PDs has not been accompanied by a corresponding increase in resources for indigent defense. As a result, PDs have had neither the material resources nor the time to prepare cases adequately with the assistance of support services. Although many PDs are zealous advocates for their clients, there is a wide disparity from county to county in the resources they have available to them. Significantly, there is a marked difference between the resources available to the prosecution and to indigent defense attorneys in terms of salaries, technology, support staff, investigators, and other critical resources.²⁴⁶

Statewide Resources

The Pennsylvania District Attorneys Association (PDAA) has vastly greater resources than PDAPA, its counterpart for the PDs. For its fiscal year July 1, 2009 through June 30, 2010, PDAPA had revenues of \$35,728 and ended the FY with assets valued at \$31,054. For calendar year 2008, the PDAA reported revenues of \$446,253 and net assets valued at \$908,279, including a stately headquarters building on Front Street in

²⁴⁵ ABA Ten Principles, 3.

²⁴⁶ *Racial and Gender Bias Report*, 185.

Harrisburg.²⁴⁷ (The “headquarters” of PDAPA is the post office box of its current president.) The greater resources of the DAs permit them to lobby for their interests with the General Assembly more effectively than the PDs can.²⁴⁸

Current Spending Levels

Again, as there is no statewide office charged with the ongoing responsibility of collecting comprehensive information, data on current spending for indigent defense is incomplete. The only numbers that are somewhat reliable are those for the expenditures by PD offices; there is virtually no data on spending for indigent representation outside the PD offices.²⁴⁹ Consequently, no reliable estimate can be made for the total amount local taxpayers across the Commonwealth pay for indigent representation.

Virtually all indigent defense outlays²⁵⁰ take place at the county level, making the task of determining overall indigent defense spending in the Commonwealth exceedingly difficult. To make matters more complicated, not all indigent defense expenses within each county come from a single office budget such as county PD offices. Indigent defense spending is comprised of two primary segments: county PD office and assigned counsel expenditures.²⁵¹ The latter usually falls within the county court administrator budget, but in several counties, some of the assigned counsel expenditures are included in the PD office budget.²⁵² The SR 42 Survey did not ask for overall expenses for assigned counsel, and AOPC does not collect information on the compensation paid to them.²⁵³ The only data readily available to this study was expenditures by the various PD offices in 23 responding counties for 2008. Table 4 shows the county populations, PD actual expenditures and expenses per capita for those counties.

Per capita spending for PD offices expenditures ranges from \$2.74 in Columbia County to \$24.63 in Philadelphia. On average, counties with larger population tend to spend more per capita on indigent defense than smaller counties. For purposes of this cost

²⁴⁷ In addition, the educational arm of the PDAA, the Pennsylvania District Attorneys Institute, is a tax exempt § 501(c)(3) organization that received \$1,767,117 in contributions and grants in calendar year 2009. The PDAPA spent \$62,124 from its own funds for educational expenses in FY 2009-10 and suffered a loss of \$27,844 over that period.

²⁴⁸ Remarks by Harry J. Cancelmi and Wieslaw T. Niemoczynski at SR 42 advisory committee meeting, October 12, 2011. Monetary amounts are from Federal income tax forms of the respective organizations supplied by Mr. Niemoczynski.

²⁴⁹ See Table 1, 57, which shows that many indigent defense cases are handled outside the PD offices.

²⁵⁰ Of the 23 counties that provided budget data for 2008, twelve reported that all funding originated from the county. Another nine reported that over 95 percent of their funding was county based with the remaining funds originating from other sources such as state grants, state DPW reimbursements (since terminated), federal grants, or other funding. The remaining two counties reported 92.5 percent and 93.3 percent of their funding from the county, with the remaining amount from unspecified other sources.

²⁵¹ Assigned counsel includes court appointed and conflict counsel.

²⁵² Counties where some assigned counsel expenditures are included in the PD budget include Columbia, Dauphin, Elk, Huntingdon, Jefferson, Lawrence, Pike, Potter, and Tioga. This may be true of other counties as well.

²⁵³ Phone call with Richard Pierce, Judicial Programs Administrator, AOPC, January 4, 2011.

Table 4

AVAILABLE COUNTY PD BUDGET AND
SPENDING-PER-CAPITA IN PENNSYLVANIA (2008)

County	County population ¹	PD expenditures (in thousands of dollars)	PD expenses per capita (dollars)
Philadelphia	1,447,395	\$35,654	\$24.63
Large counties (population greater than 200,000) not including Philadelphia:			
Allegheny	1,215,103	7,204	5.93
Berks	403,595	2,801	6.94
Chester	491,489	3,219	6.55
Cumberland	229,361	897	3.91
Dauphin	256,562	2,996	11.68
Erie	279,175	1,286	4.61
Lancaster	502,370	3,089	6.15
Lehigh	339,989	1,360	4.00
York	424,583	1,599	3.77
Washington	206,407	681	3.30
Average large counties	434,863	2,513	5.78
Small counties (population less than or equal to 200,000)			
Cambria	144,319	480	3.32
Columbia	65,004	178	2.74
Elk	32,268	119	3.40
Franklin	143,495	648	4.51
Huntingdon	45,543	293	6.43
Jefferson	45,105	250	5.54
Lawrence	90,272	506	5.60
Lycoming	116,670	523	4.48
Pike	59,664	410	6.87
Potter	16,720	145	8.67
Somerset	77,454	240	3.10
Tioga	40,574	155	3.82
Average small counties	73,091	328	4.49

1. Population data is from the United State Census Bureau's 2008 population estimate.

SOURCE: SR 42 Survey, 2009 and United States Census Bureau, QuickFacts from the US Census Bureau, <http://quickfacts.census.gov/qfd/states/42000.html> (accessed April 19, 2010).

estimate, the counties were divided into those with populations greater than 200,000 (large counties) and those with less (small counties). Since Philadelphia's per capita spending was over twice as much as that of the next highest spending county (Dauphin), it was treated as a separate class. Not including Philadelphia, the average per capita spending for large counties was \$5.78 for the large counties and \$4.49 for the small counties.

To approximate the PD expenditures in the 44 counties that did not provide budget data, those counties were also divided into large counties and small counties. The estimated 2008 total population of the seven large non-reporting counties (3,131,077) was multiplied by \$5.78 and the population of the 37 small non-reporting counties (2,643,085) was multiplied by \$4.49. The two resulting products, \$18.1 million and \$11.9 million, respectively, were added to obtain an estimated cost of \$30.0 million for PD services in the 44 non-reporting counties. Adding this amount to the expenditures reported by the 23 reporting counties in Table 4, Pennsylvania PD offices spent about \$94.7 million for PD services in 2008.

Since no recent statewide expenditure data on assigned counsel exists, this report uses the figures in the *Racial and Gender Bias Report*,²⁵⁴ adjusted for inflation, to estimate assigned counsel expenditures for 2008. According to that report, in 2000 Pennsylvania spent about \$16.9 million on assigned counsel at an estimated cost of \$0.85 per person in the counties other than Philadelphia, and \$5.15 in Philadelphia.²⁵⁵ Adjusting for inflation, in 2009 Pennsylvania spent about \$21.7 million on assigned counsel with an estimated cost of \$1.06 per person in counties other than Philadelphia, and \$6.42 in Philadelphia.²⁵⁶ The per capita cost for assigned counsel outside Philadelphia may be low, perhaps drastically so. Given the lack of collected data, it is not possible to determine to what extent the assigned counsel cost is below the PD amount because assigned counsel may perform a relatively small proportion of indigent defense services,²⁵⁷ or because amounts paid to non-PD counsel are not reported, or because some of these legal services are donated.

Table 5 summarizes the estimated cost of indigent defense in Pennsylvania in 2008, arriving at a total of \$115.9 million (or \$117.4 million in 2010 dollars).

²⁵⁴ *Racial and Gender Bias Report*, 173, 178-79. The figures in that report are as of 2000.

²⁵⁵ It is assumed that all assigned counsel expenses utilized in the *Racial and Gender Bias Report* for its estimation of statewide assigned counsel expenditures occurred outside of the county PD budgets. Several of the JGSC surveys noted that some court appointed, conflict or outside counsel compensation was included within the county PD budget.

²⁵⁶ Between 2000 and 2008, the Consumer Price Index, a common measure of inflation, increased roughly 25.0 percent. SOURCE: United States Department of Labor. Bureau of Labor Statistics. "Inflation Calculator." <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=100&year1=2002&year2=2009> (accessed January 5, 2011).

²⁵⁷ But see Table 1, which indicates that the proportion of indigent defense service provided by PDs may be as low as 47.5%.

Table 5

ESTIMATED COST OF INDIGENT DEFENSE IN PENNSYLVANIA 2008¹

	County PD offices	Assigned counsel	Total
Expenditures (millions of dollars)			
All counties (except Philadelphia)	\$59.1	\$11.7	\$70.5
Philadelphia	35.6	9.9	45.4
All counties	94.7	21.6	115.9
Cost-per-capita			
All counties (excluding Philadelphia)	5.37	1.06	6.43
Philadelphia	24.63	6.42	31.05
All counties	7.61	1.72	9.33

1. All figures within this table are estimates. The PD office figures are approximated using only SR 42 Survey data from 23 of the 67 counties. The assigned counsel data are inflation adjusted estimated values found in the *Racial and Gender Bias Report*, 173, 181. That Report's estimates of assigned counsel expenditures were based on 2000 data from 30 counties.

SOURCE: SR 42 Survey, 2009; United States Census Bureau, QuickFacts from the US Census Bureau, accessed April 19, 2010, <http://quickfacts.census.gov/qfd/states/42000.html>; and United States Department of Labor, Bureau of Labor Statistics, Inflation Calculator, accessed January 5, 2011, <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=100&year1=2002&year2=2009>.

The *Racial and Gender Bias Report* estimated total indigent defense expenditures in 2000 at over \$79 million, or \$6.44 per person.²⁵⁸ Adjusting the per capita amount for population and inflation, the latter amount is roughly equivalent to \$103.5 million as of 2010.²⁵⁹ The Spangenberg Group estimated Pennsylvania's total spending on indigent defense as of 2008 at slightly over \$95.4 million, or \$7.66 per person as of 2008 corresponding to \$98.5 million as of 2010.²⁶⁰ (TSG's expenditure report for 2005 estimated indigent defense expenditures for Pennsylvania at over \$100.7 million, or \$8.12 per person.)²⁶¹

The Spangenberg Group estimated the national expenditure at \$5.337 billion as of 2008.²⁶² Adjusted for inflation and using the 2010 total U.S. Census enumeration (308.7 million) the national per capita expenditure is \$17.51 per person, which would correspond to \$222.4 million for Pennsylvania.

Comparison of PD and DA Budgets

Comparing the budget of prosecutors against that of PDs is plainly a necessary step in determining the resource allocation between them. A representative of the DAs on the advisory committee cautioned that the two offices have such different objectives that a simple equivalence is misleading. The majority of the advisory committee agreed that the goal should not be to increase the PD's budget so that it is as large as the DA's, because the DA has responsibility for the entire criminal docket. The DA handles cases that do not affect the PD, such as those where no defendant is charged or the defendant retains private counsel. On the other hand, PDs handle civil matters outside the DA's purview, but the DA will normally have a larger caseload than the PD. Furthermore, the disclosure of investigative material mandated by *Brady v. Maryland* assures that the PD will have access to much of the important product of the DA's investigation. But if the DA's budget is disproportionately larger than the PD's, the PD office may not have sufficient resources to fairly negotiate dispositions with the DA or confront the DA in court.

Due to the way each PD and DA submitted budget data to Commission staff, it was very difficult to directly compare budgets within a particular county. In the few counties where a direct comparison could be made, most DA office budgets were roughly

²⁵⁸ *Racial and Gender Bias Report*, 182.

²⁵⁹ The current population of Pennsylvania is 12.7 million, and \$6.44 in 2000 is equivalent to \$8.15 in 2010, applying the CPI Inflation Calculator provided by the Bureau of Labor Statistics. See <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=100.00&year1=2008&year2=2009>.

²⁶⁰ Spangenberg Project, "State, County and Local Expenditures for Indigent Defense Services, Fiscal Year 2008" (ABA, Nov. 2010). \$7.66 (2008) \approx \$7.76 (2010) x 12.7 million.

²⁶¹ Spangenberg Group, "State and County Expenditures for Indigent Defense Services in Fiscal Year 2005" (SG, Dec. 2006), 27, [36]. This paper extrapolated the 2005 estimate from the 2000 estimated expenditure (published in 2002) by assuming an annual increase of 5%. *Ibid.*, [38].

²⁶² Spangenberg Project, "Expenditures FY 2008," 7.

two to three times greater than the PD office budgets in the county. Advisory committee members believe that the PD budget should be more nearly equivalent to the DA budget to provide resource equality between defense counsel and the prosecution.

Nationally, funding and resources for indigent defense “lags well behind that provided for prosecutors.” A survey of comparative resources in Tennessee conducted by The Spangenberg Group found that prosecutors received well over twice as much funding as indigent defense. A commission in California found that indigent defense was underfunded by \$300 million in that state, and the disparity between prosecution and indigent defense increased by over 20% between FY 2003-04 and FY 2006-07.²⁶³

Access to Research

Defense attorneys must have access to legal research resources, especially information on changes to the law, to enable them to provide their clients with quality representation.

Every defender office should be located in a place convenient to the courts and be furnished in a manner appropriate to the dignity of the legal profession. A library of sufficient size, considering the needs of the office and the accessibility of other libraries, and other necessary facilities and equipment should be provided.²⁶⁴

The *Racial and Gender Bias Report* noted serious deficiencies in this regard:

Most counties in the sample suffer from inadequate legal research facilities. Not surprisingly, PDs in those counties engage in very little or no legal research. Few PD offices have their own law libraries; if there is a library, its holdings are generally meager and outdated. Except in Philadelphia, PDs and assigned counsel generally have no access to new developments in the law. The lack of adequate computer resources exacerbates difficulties in conducting research.²⁶⁵

Salaries

Public Defenders

In order to attract and retain quality defense attorneys, PD offices must be able to offer salaries competitive with those earned by prosecutors. While there was vigorous debate in the advisory committee over how comparable the prosecutorial and the public

²⁶³ *Justice Denied*, 61.

²⁶⁴ ABA Standards: Providing Defense Services (Standard 5-4.3), 58.

²⁶⁵ *Racial and Gender Bias Report*, 187.

defense functions are, both positions require broadly similar skills. Both must have familiarity with court procedures and practice, a solid grasp of Pennsylvania and federal statutes and precedents, and skills in advocacy and negotiation.

Nationally, prosecutors receive considerably more pay than indigent defense lawyers.

[T]hroughout the country, PD salaries are often significantly below those of prosecutors. For instance, when salaries were frozen in Virginia in 2006, over 27% of the attorneys in the PD system resigned, and many turned to higher paying jobs at prosecutor offices or to private law practice. . . . In Westchester County, New York, . . . DAs' salaries were approximately \$6,000 to \$21,000 higher than PDs' salaries. In Missouri, the salaries of PD trial attorneys in 2005 ranged between approximately \$34,000 and \$54,000. In contrast, prosecutors' salaries were reported to range from \$40,000 to up to \$100,000 or more. PD salaries are so low that some attorneys are forced to work second jobs, and the cumulative turnover of PDs between 2001 and 2005 was an astounding 100%! Although Missouri's assistant PDs have since received a four percent salary increase, most have large law school debts and are still struggling. As one PD put it, "[i]f you want to raise a family, buy a house and a car, that's not going to happen."²⁶⁶

The situation in Pennsylvania is similar.

Salaries for PDs are seriously inadequate, especially when contrasted with the salaries of lawyers in DA's offices. In Centre County, for example, the DA makes \$116,000 per year and the chief PD makes \$57,000. Even in counties where starting attorneys in the two offices begin at the same salary, severe salary disparities are evident as DAs and PDs move into more senior ranks. PDs find it difficult to pay back their student loans; that fact, coupled with the general inadequacy of resources, has a demoralizing effect upon many young PDs. They leave their jobs as a result, creating a serious attrition problem for most PD offices, including Philadelphia's.²⁶⁷

Chief DA salaries are set by The County Code at \$1,000 below that of a judge of the court of common pleas in the same judicial district. As of 2008, a full-time chief DA earns between \$150,000 and \$160,000 in 2008 under this provision.²⁶⁸ Of the PDs who responded to the survey, 16 were full-time and earned an average salary of \$77,676

²⁶⁶ *Justice Denied*, 63.

²⁶⁷ *Racial and Gender Bias Report*, 187.

²⁶⁸ The act of August 9, 1955 (P.L. 323, No 130), (The County Code), § 1401(j); 16 P.S. § 1401(j). This provision was amended by the act of July 14, 2005 (P.L. 312, No. 57). According the data provided via e-mail on May 17, 2010, to the Commission by the AOPC, judges of the Court of Common Pleas across the state earned between \$161,850 and \$165,105 in 2009.

annually with a salary range of \$54,000 to \$117,000. Ten of the eleven part-time chief PDs made an average of \$57,300 with a range of \$37,940 to \$85,761. The average full-time chief DA earns roughly 40% more than a full-time PD.

The salary differences do not end with the chief PDs and DAs. Of the nine counties²⁶⁹ for which DA salary data was reported, four had one or more supervisory DAs. These counties had 22 supervisory DAs earning an average of \$82,767, with a range of \$69,800 to \$92,279. Comparing the PD salaries for the same nine counties, four of the counties reported they had a total of 15 supervisory PDs, earning an average of \$69,215, with a range of \$51,997 to \$102,234. Supervisory DAs in this survey on average earn about 19.7 percent more than supervisory PDs.²⁷⁰ However, assistant PD and assistant DA salaries were similar in these nine counties.²⁷¹

The limited data comparing DA and PD salaries indicates that chief and supervisory PDs have significantly lower salaries than prosecutors at corresponding grades. This discrepancy can hinder county PD offices from retaining qualified, experienced upper level PDs.

Contract and Court-Appointed Counsel

Of the 15 court administrators who responded to the relevant portion the SR 42 Survey, five reported that they have contract counsel on salary to handle cases the PD cannot handle, mostly due to conflicts of interest. The salaries for these positions ranged from \$20,000 to around \$35,000. Only one county indicated that it provided these attorneys with a stipend for other staff.²⁷²

Most of the responding court administrators reported that court-appointed counsel are generally paid at a rate of \$50 to \$100 per hour. Some responders reported that the rate of pay depends on the type of case, while others use a single rate. This pay includes money to help defray overhead expenses, but in some counties, the rates paid may not adequately cover such expenses.

Because of the low response rate to the court administrator surveys, it is not possible to ascertain if these salaries and hourly rates are representative of all counties that use contract counsel.

²⁶⁹ Chester, Dauphin, Elk, Erie, Lawrence, McKean, Potter, Tioga, and York.

²⁷⁰ SR 42 Survey.

²⁷¹ It was difficult to compare part-time assistant PD and part-time assistant DA salaries in the nine counties because most counties did not provide estimates on annual salaries of part-time attorneys, so no such comparison was completed. For the nine counties that reported DA salaries, there were 49 full-time assistant DAs earning an average of \$49,892 versus 57 full-time assistant PDs making an average of \$50,889, which indicates a salary difference of \$997 in favor of the PDs. This may reflect a real salary differential, but could arise from factors not included in the survey results, such as experience.

²⁷² The Berks County court administrator stated that conflict counsel and independent contractors are paid \$30,900 annually (without health benefits) and receive a secretarial stipend of \$583.33 per month.

Support

Comprehensive preparation for criminal defense requires access to social workers, independent investigators, and secretarial staff. Both nationally and in Pennsylvania, many indigent defense lawyers must make do without sufficient—or in some cases any—assistance from such staff. Only 14 of the 27 PDs responding to the SR 42 Survey had any investigators in 2008, only three had any social workers, and only 11 had a paralegal, law clerk or both.²⁷³ Three of the counties did not have any staff besides chief and assistant PDs.²⁷⁴

Investigators

Among the most important requisites for a professional criminal defense is investigative staff to assist defense counsel in gathering the facts about the alleged crime. “Adequate investigation is the most basic of criminal defense requirements, and often the key to effective representation.”²⁷⁵

Indigent defense attorneys often do not have the time or ability to track down witnesses, travel to distant locations, interview difficult witnesses, or survey crime scenes. Further, if attorneys perform their own investigations, they risk needing to become witnesses in their clients’ cases in order to either introduce evidence or impeach the testimony of others.²⁷⁶

In Pennsylvania, indigent defense is hampered by the lack of adequate investigative assistance.

Most court-assigned lawyers and many PDs do not make use of investigators and therefore do not conduct independent investigations of cases. In counties that do employ investigators, they may spend most of their time on such matters as indigency screening and serving subpoenas. Exacerbating the defense attorney’s inability to prepare an adequate defense without independent investigation is the ability of DAs to draw upon such resources.²⁷⁷

²⁷³ Of the three counties reporting a social worker on the PD’s staff, Philadelphia had 70 social workers, and Allegheny and Franklin each had one social worker.

²⁷⁴ Columbia County indicated that it only had a chief PD and two assistant PDs on staff; Huntingdon County reported one chief PD and one assistant PD; and Elk County had only one PD, who worked part-time.

²⁷⁵ Backus and Marcus, “Right to Counsel,” 1097.

²⁷⁶ *Justice Denied*, 93-94. The roles of witness and advocate are generally incompatible. For instance, a jury would be understandably skeptical of the impartiality of the testimony of a witness who is simultaneously representing a party to the case, and the client’s interests may be injured if the attorney’s truthful testimony is rejected by the jury for that reason. See Pa.R.P.C. 3.8 and Comments thereto.

²⁷⁷ *Racial and Gender Bias Report*, 185-186.

Fourteen of the 27 responding PD offices have at least one investigator on staff, but many counties with investigators reported that their investigative staff is not sufficient. For counties reporting investigators on staff, the average annual caseload per investigator was 1,731, of which 1,144 consisted of felonies, misdemeanors, and juvenile delinquency cases. Such highly excessive caseloads preclude the investigators from offering meaningful assistance in a majority of the cases.

Experts

Access to experts can be essential to effective legal representation of the accused. “National standards also have long recognized that indigent defense counsel must be provided with necessary resources such as . . . forensic services and experts.”²⁷⁸ “The outcome of a criminal case can hinge on retaining an appropriate expert or conducting a thorough fact investigation.”²⁷⁹

Defenders who seek the assistance of experts in defending their clients face many of the same hurdles they do in securing help with investigation. While the prosecution frequently has at its disposal an assortment of government personnel such as crime investigation and laboratory professionals, psychiatrists, scientists, and doctors, defenders must rely on the state’s witnesses or seek funds to compensate an independent expert of their own. Reliance on the state’s expert witnesses raises questions of independence.²⁸⁰

In some Pennsylvania counties, indigent defenders may forego the use of experts due to budgetary pressures:

The lack of resources also prevents defense counsel from hiring experts. [The Spangenberg Group] cited cases illustrating the dearth of expert assistance: ‘In Warren County, an attorney could recall only one case in which he had an expert witness. A lawyer in one county told us that as a pharmacist’s son he felt competent to testify on pathology. In Erie County we were informed that a case that might require a psychologist and forensic expert might exhaust the whole budget. . . . In Clarion County, in the prior six months, a total of one expert had been used.’²⁸¹

Social Workers and Administrative Staff

Secretaries and social workers required for effective performance of PD functions are often not afforded PDs in Pennsylvania, due to inadequate funding:

²⁷⁸ “*Gideon’s Broken Promise*,” 10.

²⁷⁹ *Justice Denied*, 93.

²⁸⁰ Backus and Marcus, “Right to Counsel,” 1099.

²⁸¹ *Racial and Gender Bias Report*, 185.

Aside from Philadelphia, PD offices in the sample counties suffered from inadequate support services from social workers and secretarial staff. Some rural counties did not have access to even a part-time social worker. The lack of sufficient secretarial assistance is a serious impediment to legal representation, because attorneys must devote their time to administrative and clerical tasks rather than legal work, and they may also “cut corners” by, for example, cutting down on motion practice.²⁸²

Only three of the PDs responding to the SR 42 Survey reported social workers on staff.²⁸³

Technology

Technology assists PD offices in such important functions as communication, legal research, and case management, including determination of conflicts of interest. PD offices are generally found to be trailing prosecutors’ offices in the use, knowledge, and upgrading of technologies.²⁸⁴

Inadequacy of technology in defender offices is a national problem.

Some PD offices . . . do not have sufficient management information systems and technical support, leaving them unable to compile relevant statistical data regarding their caseloads. While the inability to collect and report on caseloads and cost data is undoubtedly due to underfunding, it also becomes a cause of under-funding. Without accurate empirical data, the programs cannot demonstrate to governmental funding sources its [sic] cost-efficiency and need for additional appropriations.²⁸⁵

As recently as 2003, widespread use of information technology had yet to become the norm across much of our Commonwealth:

Technological shortcomings plagued PD offices in all of the sample counties except Centre County. Nearly all the counties reported having no computers, or few computers; PDs in the remaining counties often had out-of-date computers that in some cases had been donated by DA’s offices. Most counties did not have computerized case management or tracking systems, despite having unwieldy caseloads and using

²⁸² Ibid., 186.

²⁸³ The counties that indicated they had PD social workers include Philadelphia with 70 social workers, and Allegheny and Franklin Counties having one social worker each.

²⁸⁴ Backus and Marcus, “Right to Counsel,” 1101-02.

²⁸⁵ *Justice Denied*, 97-98.

horizontal representation systems that make proper file tracking and management critical. PDs had to rely on paper filing systems that were both labor-intensive and difficult to maintain.²⁸⁶

There is a “lack of systematic methods for reporting, collecting, and maintaining data on indigent defense systems. Information on caseloads is particularly inadequate; many smaller counties do not even estimate PD caseloads, and other counties are not able to categorize the data that is gathered according to the type of case.”²⁸⁷

Of the counties that responded to the SR 42 Survey, only 44 percent use a computer for scheduling, 56 percent for accounting, 59 percent for caseload management, 74 percent for case tracking, and 78 percent to record client information. A PD on the advisory committee reported that his office computers were hand-me-downs from the DA’s office.

Overuse of Plea Bargaining

In Pennsylvania, as elsewhere in the United States, many cases are pled out before they reach the trial stage. When the prosecution and defense agree on the facts in the case, a full trial is usually unnecessary, and even where the facts may be less clear cut, a plea bargain may be mutually advantageous. The defendant benefits by receiving a lesser sentence than if the case had gone to trial, while the public sees at least rough justice done without the heavy expense of a trial. Where defenders have competent and well-supported attorneys, investigators, and forensic experts to investigate the facts surrounding the real or alleged offense, plea bargaining can thus comport with the adversary system and yield just results. However, when the plea bargain is entered into largely because the defender lacks the staff or other resources to mount a defense, despite inconsistent evidence regarding the commission of the offense, the applicability of possibly meritorious defenses, or evidence tainted by unconstitutional police practices, the avoidance of a trial may be contrary to sound public policy and substantial justice.

Staff spoke with both the DA and PD in one rural county in separate phone calls. The PD office’s only staff is a part-time chief PD and one part-time assistant (who doubles as paralegal and secretary). The PD office is run out of the chief PD’s private office, and the paralegal is the only staff person for the private practice and the PD office. According to AOPC data for 2008, this PD office handled 196 criminal cases including 64 non-murder felonies, 131 misdemeanors, and one ungraded case. The response to the SR 42 Survey from the county for that year reported an additional estimated 30 probation and parole revocation cases, five protection from abuse hearings, five appeals, and 140 other cases. In total, this part-time PD handled about 376 cases in 2008 with help from only a part-time assistant.

²⁸⁶ *Racial and Gender Bias Report*, 186.

²⁸⁷ “*Gideon’s Broken Promise*,” 28 (citing testimony by SR 42 advisory committee member Lisette McCormick).

In that county, both the DA and PD have been in their positions for many years and each spoke highly of the other. The PD and DA said that they both perform their jobs adequately and are committed to seeking justice for the accused and the victims. They arrive at plea arrangements for virtually every indigent defense case. The PD observed that he could not remember the last time he had a case go to trial. All plea bargains had to be approved by the president judge, whose entire legal career had taken place within the county.

The major cause of the overuse of plea bargains is generally the unavailability of the resources and support structure needed to implement an adequate criminal defense system, not the shortcomings of individual lawyers. While a collaborative system assures rapid disposition of cases and minimal immediate costs, there is a high risk that factually innocent defendants will be convicted, legally established defenses will be ignored, and substantive constitutional rights will be violated.

TRAINING

The legal profession, like other professional fields, requires that practitioners attend continuing education classes in order to maintain their licenses. While state bar associations recognize the importance of continual training and require members to attend classes, training for PDs is often neglected in Pennsylvania counties. The advisory committee discussed several instances where newly hired assistant PDs were not adequately prepared to provide criminal defense. Experienced general practice attorneys who are court-appointed to represent indigent defendants, but lack criminal defense training or experience, are likewise at a loss when faced with a criminal case.

Without proper training, indigent defense lawyers cannot provide effective defense. “Criminal justice is not a static field; it continually evolves and requires continual training.”²⁸⁸ The effects of lack of training can be most acute in rural PD offices where relatively few lawyers have criminal defense experience.

Accordingly, Principle 9 deals with training requirements:

Defense counsel are 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.²⁸⁹

²⁸⁸ David Carroll, director of research and evaluation, NLADA, presentation to SR 42 advisory committee, September 15, 2009.

²⁸⁹ ABA Ten Principles, 3.

Training is another area where the Pennsylvania IDS has been sorely lacking:

Few offices . . . offered significant legal training opportunities to attorneys. Aside from Philadelphia, which has a rigorous training program for new attorneys and provides regular training to senior attorneys, none of the county PD offices visited by the Spangenberg Group has a formal training or mentoring program. Further, most offices other than Philadelphia also lack formal evaluation and supervision procedures. Aside from mandatory CLE requirements, indigent defense counsel generally do not participate in professional development courses, and when they do they often must pay all or part of the cost themselves. Given the lack of training and supervision, attorneys often perform inadequately or “burn out” and move on to other, more lucrative practices.²⁹⁰

Instituting a permanent training program in a PD office as a core function is only the first part of the task. Training programs must transmit management’s policies, so that the PD office can serve its function effectively and efficiently. It is through a consistent and well developed training system that the leadership of a PD office can change its culture to instill the values and practices needed to conduct effective indigent defense. Training provides the support and the development to enable the staff to produce genuinely professional representation.²⁹¹

SUPERVISION AND ACCOUNTABILITY

Supervision and accountability are essential to the successful functioning of a PD office. Attorneys need to know how well their job performance meets courtroom expectations and also how effectively they are meeting professional standards. Principle 10 prescribes practices to institutionalize accountability:

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.²⁹²

Accountability infrastructure is especially necessary given all of the pressures that push the system toward laxity in professional standards.

²⁹⁰ *Racial and Gender Bias Report*, 186.

²⁹¹ Phyllis Subin, presentation to SR 42 advisory committee, September 15, 2009.

²⁹² ABA Ten Principles, 4.

The challenges facing defenders, including overwhelming caseloads, lack of supervision and training, inadequate compensation and resources, and political pressure, all raise significant ethical issues for defense attorneys, prosecutors, and judges. Although professional standards for defenders are clear, systemic deficiencies push defenders to compromise their efforts on behalf of clients. These questionable compromises undermine ethical standards and, in turn, contribute to the denigration of the legal profession and the criminal justice system. Judges, prosecutors, lawyer disciplinary bodies, and defenders themselves are loathe to call attention to these ethical failings.²⁹³

Supervision and accountability are the first defense against lapses in ethics, and they also are the first bulwarks of effective assistance. Phyllis Subin pointed out how accountability procedures can clarify expectations and contribute to employee morale. “To those who are doing top-notch work, you’re saying, ‘That’s top-notch work and we’re recognizing it by putting it into standards.’ To those who aren’t doing top-notch work, ‘You’ve got to step up to the table because we’re changing the culture and the expectations.’”²⁹⁴ Even when attorney qualifications are matched to case assignments, monitoring and evaluation are necessary to ensure a high quality of representation.²⁹⁵

In Pennsylvania the system’s inability to provide supervision and accountability “has resulted in a deterioration of professional standards for indigent representation.”²⁹⁶

Pennsylvania’s indigent defense system is characterized by a lack of state standards, supervision, and accountability. The Commonwealth maintains no binding workload standards for indigent defense providers; no uniform standards for representation of indigent defendants; no written indigency guidelines; no standards for eligibility and compensation of assigned counsel; and no guidelines for approving requests for investigators and psychologists.²⁹⁷

In a number of Pennsylvania counties, the PD office is staffed by a single attorney who has no direct supervisor and no accountability to standards. For those offices, only a statewide accountability structure can give genuine assurance that professional standards will be maintained.

The problems that can arise from inadequate supervision and accountability are known to attorneys working in indigent defense. Conflict attorneys interviewed for an evaluation report “universally” complained about the number of ineffective assistance of counsel claims. Complaints noted by conflict attorneys were that:

²⁹³ Backus and Marcus, “Right to Counsel,” 1080.

²⁹⁴ Phyllis Subin, presentation to SR42 advisory committee, September 15, 2009.

²⁹⁵ Backus and Marcus, “Right to Counsel,” 1091.

²⁹⁶ *Racial and Gender Bias Report*, 184

²⁹⁷ *Ibid.*

- Two-thirds of one attorney’s caseload was in the area of ineffective assistance of counsel
- Many PD offices did little to no pretrial litigation
- Potential alibi witnesses were not contacted
- There was little trial preparation
- No jail contact was made with incarcerated clients.²⁹⁸

PART-TIME PUBLIC DEFENDERS

The Ten Principles do not address whether PD offices should employ part-time attorneys, but in its standards relating to PDs and other defender organizations, the ABA has advocated an entirely full-time attorney staff.

Standard 5-4.2. Restrictions on Private Practice

Defense organizations should be staffed with full-time attorneys. All such attorneys should be prohibited from engaging in the private practice of law.²⁹⁹

The work of defenders is exceedingly demanding, normally requiring that they devote as much effort to their cases as time permits. Where part-time law practice is permitted, defenders are tempted to increase their total income by devoting their energies to private practice at the expense of their nonpaying clients. Even more important, the expertise required of defense counsel is less likely to be developed if an attorney maintains a private practice involving civil cases. A prohibition of private practice by full-time personnel also assists in countering any tendency for those responsible for financing to maintain low salary structures on the assumption that defenders can supplement their salaries through private practice. Where part-time defenders continue to be used, clear and uniform standards should exist for the scope and performance of duties, limits on private practice, and the avoidance of conflicts of interest.³⁰⁰

²⁹⁸ Spangenberg Group, A Statewide Evaluation of Public Defender Services in Pennsylvania, 61.

²⁹⁹ ABA Standards for Criminal Justice: Providing Defense Services, 3d ed. 1992, 56.

³⁰⁰ *Ibid.*, 57. The National Right to Counsel Committee recommends employing full-time staff “whenever practicable.” *Justice Denied*, 194-95.

These standards further recommend regionalization of defense services in rural areas with low caseloads, since that is preferable to using part-time attorneys.³⁰¹ “The trend in recent years, particularly in jurisdictions with statewide defender systems, has been toward requiring full-time attorneys who are precluded from the private practice of law.”³⁰²

In Pennsylvania, the use of part-time PDs continues outside the large metropolitan areas.

[I]n several mid-sized and rural counties, both the chief PD and some assistant PDs work part-time while maintaining private law practices. This situation, at a minimum, creates the appearance that the part-time defenders attend more closely to paying, private cases than to the cases of indigent defendants.³⁰³

Because part-time attorneys are tempted to devote their time and energy to paying clients, the advisory committee recommends that the IDS employ full-time attorneys to the greatest practicable extent. The executive director and the attorneys employed by the office of indigent defense should be required to be full-time employees. Chief PDs should also be required to be full-time employees, unless the statewide office determines that it is not feasible to require a full-time commitment in the particular county. Assistant PDs should be full-time to the maximum extent feasible as determined by the statewide office. Full-time PDs should be prohibited from engaging in private practice, but that restriction should not apply to assigned counsel and contract counsel.

FAILURE OF THE LUZERNE COUNTY JUDICIAL SYSTEM

Nowhere is the lack of resources, personnel, and funding available to meet the needs of indigent defense felt more keenly than in juvenile justice. Like other indigent defense, the defense of indigent juveniles receives no funding from the Commonwealth. The Luzerne County judicial scandal, popularly known as “Kids for Cash,” brought the deficiencies of the juvenile justice system of that county into sharp relief, and some of those shortcomings actually or potentially affect indigent defense more generally.

Most obviously, the scandal illustrated the baneful effects of judicial interference in indigent defense. Luzerne County President Judge Michael Conahan, one of the perpetrators of the criminal scheme, “ran the courthouse as a personal sovereignty” and

³⁰¹ ABA Standards, 57-58. “[I]n some jurisdictions, there may be especially rural areas in which full-time defenders may not make much sense.” *Justice Denied*, 195.

³⁰² *Ibid.*, 58.

³⁰³ *Racial and Gender Bias Report*, 190.

“personally assign[ed] cases.”³⁰⁴ As the Interbranch Commission formed to report on the scandal observed, “Where judges appoint counsel that appear before them on a specific case there is an inherent potential conflict between the financial interests of the attorney in obtaining future appointments and the zealous representation of the juvenile.”³⁰⁵ (Of course, the same consideration applies to counsel representing an adult defendant.)

In September 2009, Luzerne County President Judge Mark A. Ciavarella, Jr. and Senior Judge Michael T. Conahan were indicted as a result of what could be the most egregious case of judicial misconduct in Pennsylvania history. The 48-count indictment filed by the U.S. Attorney stemmed from an investigation into the judges’ actions over five years. The indictment included charges of racketeering, fraud, money laundering, extortion, bribery, and federal tax violations.

Judge Ciavarella was accused of sentencing hundreds of juvenile defendants to two privately owned residential detention facilities, Pennsylvania Child Care and Western Pennsylvania Child Care, in exchange for payments to Judge Conahan and Judge Ciavarella from the operators of the facilities. Former President Judge Conahan was accused of using his budget power as president judge to stifle investment in the county owned juvenile center to benefit the development of the two facilities. The indictment stated that the scheme resulted in more than \$2.8 million paid to the judges as kickbacks from the operators of the juvenile detention centers.³⁰⁶ In exchange for these kickbacks, Conahan signed an agreement in January 2002 for the county to pay \$1.3 million annually to the detention centers and to guarantee that juveniles would be assigned to placement there. The county detention center was closed, while a contract worth \$58 million was awarded to Pennsylvania Child Care in 2004.³⁰⁷

Children and youth with no history of criminal violations were churned through Ciavarella’s courtroom with frightening speed. His “zero-tolerance” policy toward juvenile delinquency was expressed through harsh penalties doled out with seeming disregard for the seriousness of the crime the youths were charged with.³⁰⁸ A youth who posted a fake MySpace page about a school principal was sentenced to 90 days of out-of-home placement. The detention centers served as a “Dickensian debtors’ prison” when an eleven year old boy was sentenced to placement for failing to pay several hundred dollars in fines and restitution.³⁰⁹ Judge Ciavarella’s strict sentencing policy was lauded by community leaders, school officials, and some parents.³¹⁰

The scheme came to light because the Juvenile Law Center (JLC) investigated allegations of judicial misconduct in 2007. Data uncovered by JLC showed that between

³⁰⁴ Interbranch Commission on Juvenile Justice, Report (Interbranch Commission Report) (ICJJ: Philadelphia, May 2010), 13.

³⁰⁵ *Ibid.*, 51.

³⁰⁶ United States v. Conahan, Indictment (M.D. Pa. Case No. 09-CR-272, filed Sept. 9, 2009) <http://media.theweekender.com/documents/INDICTMENT.pdf>.

³⁰⁷ Interbranch Commission Report, 9.

³⁰⁸ *Ibid.*, 33.

³⁰⁹ *Ibid.*, 37.

³¹⁰ *Ibid.*, 35.

2005 and 2008, approximately 50 percent of juveniles appearing before Judge Ciavarella did so without legal representation, and 60 percent of these youths were remanded to out-of-home placements. In 2005 and 2006, approximately 500 youths appeared without counsel and 250 were sent to out-of-home placements.³¹¹ At 24.5 percent, the Luzerne County rate of juveniles remanded to placement was more than double the corresponding rate for the Commonwealth. Based in part on this discrepancy, in April 2008 JLC petitioned the Pennsylvania Supreme Court on behalf of 2,500 youths who had been adjudicated before Judge Ciavarella.³¹² The petition alleged that Judge Ciavarella failed to advise the juvenile defendants of their right to legal representation and allowed them to waive legal representation without a colloquy to establish on the record that the waiver was “knowing, intelligent, and voluntary.”³¹³

Sixteen days after the filing of the federal indictment, the Pennsylvania Supreme Court granted JLC’s petition and assumed jurisdiction over the matter under its King’s Bench power.³¹⁴ The Court appointed Senior Judge Arthur E. Grim of Berks County as special master to review all of Ciavarella’s cases where unrepresented juveniles had been committed to the two juvenile detention facilities, in order to “determine whether the alleged travesty of juvenile justice in Luzerne County occurred, and if it did, to identify the affected juveniles and rectify the situation as fairly and swiftly as possible.”³¹⁵ Judge Grim’s investigation, concluded 120 days after his appointment, identified 1,866 cases in which juveniles appeared without counsel before Ciavarella between 2003 and 2008.³¹⁶ On October 29, 2009, the Supreme Court accepted Judge Grim’s recommendations and directed that the charges against all juveniles appearing before Ciavarella while the kickback scheme was in operation be vacated and their records expunged.³¹⁷

Judge Ciavarella was found guilty in U.S. District Court of racketeering and conspiracy charges on February 19, 2011.³¹⁸ On August 12, 2011, he was sentenced by Judge Edwin Kosik to 28 years in prison.³¹⁹ Judge Conahan plead guilty to racketeering charges on April 30, 2011, and was sentenced to 17½ years in Federal prison.³²⁰

³¹¹ Terrie Morgan-Besecker, “How Juvie Scandal Was Uncovered,” *Times Leader* (Wilkes-Barre/Scranton), October 31, 2009, http://www.timesleader.com/news/How_juvie_scandal_was_uncovered_10-31-2009.html, accessed through Juvenile Law Center, “Luzerne County ‘Kids for Cash’ Scandal: News Center,” Feb. 11, 2011, http://jlc.org/luzerne_news_center/.

³¹² <http://jlc.org/news/25/luzernelawsuit/>

³¹³ Interbranch Commission Report, 8.

³¹⁴ *Ibid.*, 10.

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*, 12.

³¹⁸ Dave Janoski and Michael R. Sisak, “Ciavarella Guilty of Racketeering,” *Citizensvoice.com*, February 19, 2011, <http://citizensvoice.com/news/ciavarella-guilty-of-racketeering-1.1107236?localLinksEnabled=false#axzz1bQ2oWLOo>.

³¹⁹ “Ciavarella Sentenced to 28 Years in Prison,” *Times-Leader* (Wilkes-Barre/Scranton), August 12, 2011, <http://www.timesleader.com/news/Ciavarella-sentencing-long-line-long-wait.html>

³²⁰ Jennifer Learn-Andes, “Officials, Victims Are at Ease over Conahan’s Guilty Plea,” *Times Leader* (Wilkes-Barre/Scranton), April 30, 2011, http://www.timesleader.com/news/Officials__victims_are_at_ease_over_Conahan_rsquo_s_guilty_plea_04-29-2010.html.

The JLC described the full nature and extent of the scandal:

The conspiracy lasted from 2003 to 2008, involving as many as 6,500 juvenile cases and as many as 4,000 individual children. Over 50% of the children who appeared before Ciavarella did not have an attorney and 50 to 60% of these unrepresented children were placed outside their homes. Many of these children were sent to one or both of the two facilities involved in the alleged kickback scheme. The vast majority of children were charged with low-level misdemeanor offenses.³²¹

In the wake of these developments, Act 32 of 2009 established the Interbranch Commission on Juvenile Justice and mandated that it conduct a non-criminal review of the juvenile justice system in Luzerne County. Through a series of meetings and public hearings, the Commission investigated and analyzed the practices, procedures, and rules regarding the judges, attorneys, and public officials involved with the county's juvenile justice system, including the appointment of defense counsel representing juvenile defendants. The Commission issued its report on May 27, 2010.

The Interbranch Commission found that the acquiescence to Judge Ciavarella's unconstitutional courtroom practices evidenced a broad institutional failure:

Whether because of intimidation, incompetence, inexperience, indifference, or corruption, every source of check and balance on this abuse of power failed to one degree or another, some more than others: the Board of Judges, prosecutors and defense attorneys, probation officers, police, school officials, the Judicial Conduct Board, the Disciplinary Board, community leadership, the electoral process, court administration, county government, the procedural protections afforded by statute and rules of court, and appellate review.³²²

Examples of this institutional failure were that two assistant district attorneys testified that they and other assistant prosecutors assumed that Judge Ciavarella's use of written, pre-signed waiver forms in lieu of on-the-record colloquies was "acceptable."³²³ (The failure to hold a colloquy was a clear violation of Pennsylvania Rule of Juvenile Court Procedure 152.) On the public defender's side, the retired chief PD said that because of lack of time and resources, he deemphasized representation of juvenile defendants. He added that when Judge Ciavarella was hearing juvenile delinquency cases, it took "approximately no more than four hours a week" of one assistant public defender's time to cover juvenile court.³²⁴

³²¹ Juvenile Law Center, "Luzerne County 'Kids-for-Cash' Juvenile Court Scandal," <http://jlc.org/luzerne/> (accessed Feb. 8, 2011).

³²² Interbranch Commission Report, 60.

³²³ *Ibid.*, 32.

³²⁴ *Ibid.*, 34.

The Commission found that excessive caseloads and inadequate funding, training, and supervision of assistant PDs allowed the scandal to continue. PDs, and court-appointed and private counsel ignored their ethical obligation to report violations of children's rights. One assistant PD voiced concern, but no further action was taken by the chief PD until after the scandal became public. Even after Ciarvarella and Conahan were replaced in juvenile courts and early attempts at reform were made, a full time attorney assigned to juvenile cases in Luzerne County was responsible for 800 to 1,000 cases per year, far in excess of the American Council of Chief Defenders' standard of 200, or indeed of any reasonable amount.³²⁵

The report made 43 recommendations in 20 different policy areas that cover the scope of the juvenile justice system across the Commonwealth, including six affecting juvenile defense practice. The Commission recommended a state-based funding stream for juvenile indigent defense. The Commission also supported a training and resource unit to be known as the Pennsylvania Center for Juvenile Defense Excellence to support appellate services for juveniles, training, and the development of clinical programs. Finally, the report suggested four reforms to ensure access by juveniles to defense counsel: deeming all juveniles as indigent for purposes of appointment of counsel; restricting the right of juveniles to waive counsel and requiring stand-by counsel in cases of valid waiver; implementing an appointment system that avoids the appearance of impropriety; and establishing performance guidelines that encourage competent and effective representation of juveniles.³²⁶

Many of the factors uncovered by the Interbranch Commission apply to indigent defense in general, especially where the two systems overlap and the PD is called upon to defend the children of needy families. While the culture of corruption that developed under Judge Conahan and Judge Ciavarella is not at all representative of Pennsylvania's courts of common pleas or its juvenile justice system,³²⁷ the Kids for Cash scandal showed how failure to maintain professional independence of defense attorneys from interference by the judiciary can create systemic injustice. It also showed that Pennsylvania's overly localized IDS can lead to inadequate supervision and training, which in turn can lead to a shocking deterioration in professional standards.

³²⁵ Ibid., 48, 49.

³²⁶ Ibid., 48-51.

³²⁷ Ibid., 7.

CHAPTER SIX CONCLUSION

The experience of the advisory committee members with responsibility for providing indigent defense, the data from the surveys done pursuant to this study and data on Pennsylvania's IDS gathered in the course of national studies indicate that the Pennsylvania IDS fails to meet most of the criteria defined in the Ten Principles. Little has changed in that regard since the Supreme Court's *Racial and Gender Bias Report* made similar findings in 2003.

*. . . Pennsylvania is generally not fulfilling its obligation to provide adequate, independent defense counsel to indigent persons. Contributing factors include the Commonwealth's failure to provide sufficient funding and other resources, along with a lack of statewide professional standards and oversight. In addition, efforts to improve the indigent defense system have been impeded by the lack of reliable, uniform statewide data collection.*³²⁸ [Emphasis added]

The research director of the NLADA agrees that many of Pennsylvania's county IDSs suffer from a wide range of deficiencies:

Across much of [Pennsylvania], defendants count themselves among one of several hundred who are all vying for the attention of a single lawyer—a lawyer who lacks the time or resources to adequately advocate on their behalf. Pennsylvania neglects to provide any type of meaningful supervision or accountability for the work of these public defense lawyers and refuse [sic] to make available on-going training to keep attorneys abreast of ever-evolving criminal justice sciences. And, public attorneys are often beholden to the trial judge and/or the county administration for their pay check, creating a direct conflict between the lawyer's own personal financial well-being and his ethical duty to advocate solely on behalf of his client.

People in need of defender services have little ability to redress such constitutional violations alone. Often in Pennsylvania, it is the same overwhelmed, untrained, unqualified and financially-conflicted lawyer who failed to adequately advocate for a client at trial who is also appointed to represent that same client on direct appeal (the court procedure to review the fairness of the trial and raise issue with—among other things—whether or not the trial lawyer did a good job). Chances are

³²⁸ *Racial and Gender Bias Report*, 164-65.

low that such lawyers will raise concerns about the quality of their own law work or conflicted financial interests. Unfortunately, the next opportunity to question the attorney’s effectiveness occurs during what is known as a post-conviction proceeding—a court procedure in which a defendant no longer has a constitutional right to the assistance of counsel.³²⁹

Measured Pennsylvania’s IDS against the Ten Principles, the advisory committee for this study reaches the following evaluation:

ABA PRINCIPLE	PENNSYLVANIA IDS PERFORMANCE
1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.	In many counties, the IDS is subject to interference from the judiciary, the county commissioners, or both.
2A. Where the caseload is sufficiently high, the IDS consists of both a defender office and the active participation of the public bar.	The private bar is meaningfully involved in the provision of indigent defense, but the quality of representation is not monitored and attorneys are significantly underpaid.
2B. There should be state funding and a statewide structure responsible for ensuring uniform quality statewide.	There is no direct state funding, nor is there a statewide administrative structure for ensuring uniform quality of representation or reasonably consistent eligibility standards.
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.	In some counties, representation begins before the preliminary hearing (as it should), but in other counties, that hearing is the first time the attorney meets with the client.
4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.	Compliance unknown, due to lack of data. However, in some counties problems with providing adequate space have been identified.

³²⁹ David Carroll, et al. “Judicial Underpinnings,” 1, 2.

ABA PRINCIPLE	PENNSYLVANIA IDS PERFORMANCE
5. Defense counsel's workload is controlled to permit rendering of quality representation.	In many if not most counties, attorney workloads substantially exceed recommended limits, which do not include several types of cases that did not exist when those limits were formulated.
6. Defense counsel's ability, training, and experience match the complexity of the case.	Counties use a variety of systems for assigning counsel to cases. In many counties, an attorney license and membership in the county bar are the only requirements for a noncapital case.
7. The same attorney continuously represents the client until the completion of the case.	In many counties, PDs are assigned to courtrooms rather than clients, and it is common for several attorneys to handle a case throughout the entire criminal process.
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.	In most counties, the resources available to the DA are much greater than those of the PD and the DA has more political influence than the defense bar.
9. Defense counsel is provided with and required to attend continuing legal education.	Aside from mandatory CLE requirements, indigent defense counsel generally do not participate in professional development courses, and when they do they often must pay all or part of the cost themselves.
10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.	The system's inability to provide supervision and accountability has resulted in a deterioration of professional standards.

In general, the Defender Association of Philadelphia measures up to these standards much better than IDSs elsewhere in the Commonwealth. There is a considerable variation in the performance of the other county IDSs in Pennsylvania, but the Commonwealth as a whole meets only one of these principles in part: meaningful involvement of the private bar (Principle 2). (Continuing legal education (Principle 9) is “required,” but often is “provided” only at the attorney’s expense.) The advisory committee therefore is constrained to conclude that Pennsylvania still fails to fulfill its obligation to provide adequate, independent defense counsel to indigent persons.

The SR 42 advisory committee emphasizes that the responsibility for providing an adequate indigent criminal defense system is not discretionary, but is mandated by the U.S. Constitution and the Constitution of Pennsylvania. It is also mandated by the norms of civilization itself. No polity can consider itself truly compassionate and respectful of human rights if it casually allows its citizens to suffer lengthy prison sentences based largely on the poverty of the accused as measured by his or her inability to afford a private attorney. But that is what Pennsylvania does by its failure to provide any state support to indigent defense. An accused defendant or juvenile delinquent who is either not provided with counsel at all or with a lawyer who is too overburdened by a high caseload to pay significant attention to a particular case will be unable to establish innocence or a legally valid defense to the charges. Not only does our unbalanced criminal justice system increase the likelihood that the indigent defendant or alleged delinquent will be penalized despite his or her innocence, but there is a greater risk that the actual perpetrator will be free to commit other offenses.

The consequence of a more balanced adversary system will be dispositions that more accurately reflect the facts of the incident in question and the law applicable to those facts. This is likely to result in a net reduction in jail time, but even if the need for harsh sentences is granted, society does not benefit if the disposition is based on an account of the facts and the law that may be distorted by shortchanging the resources available to the defense. The Commonwealth pays for this, both in the enormous costs of inappropriately excessive prison sentences and in the consequences to the families of defendants serving unjust or excessive jail sentences.

The advisory committee is fully mindful of the dire fiscal situation facing the Commonwealth. But every other state in the Nation has funded some support for its IDS, and it would appear that Pennsylvania can find a way to do likewise.

DRAFT INDIGENT DEFENSE STATUTE

FEATURES OF PROPOSAL

The draft statute presented here represents what the advisory committee considers the most advanced ideas on structuring a state indigent defense system, adapted to longstanding Pennsylvania practice. This proposal establishes a central Office of Indigent Defense with broad powers to establish standards that county PD offices are required to follow and which will help assure that Pennsylvania's indigent defense system meets professional standards. This office, through its executive director, carries out policies established by a State Board of Indigent Defense that includes a diverse representation of the affected stakeholders. The Office of Indigent Defense is an independent agency within the executive branch. The day to day operations of the office are managed by an executive director appointed by the board.

To ensure adequate compensation, the statewide office is empowered to set compensation standards for county PDs. The office is also tasked with developing workload standards to assure that indigent defense staff can provide effective representation. Several divisions and officers within the Office of Indigent Defense are mandated in order to ensure that the most vital functions are carried out efficiently: a capital case division, under a director; an appellate and postconviction review division, under a director; a director of juvenile defense services; an information management and technology officer; and a director of training and professional development.

County PDs retain many of their local responsibilities, as under the current system. In order to ensure maximum independence from local political pressure, the chief PD is appointed by the statewide office and paid by the Commonwealth. The rest of the PD staff remain county employees. Besides the cost of the chief PD, the cost of appeals, PCRA proceedings, and capital cases is shifted from the counties to the Commonwealth. The proposed statute provides for participation by contract counsel and assigned counsel and the assignment of such counsel to cases by the PD under state guidelines. Representation for Philadelphia cases is provided for in accordance with the plan described on page 64.

OFFICE STRUCTURE

The draft statute provides for an independent board to provide broad policy advice (like a non-profit board of directors) and an executive director to manage the operations of the Office of Indigent Defense. The office will establish a statewide communications system to work with and supervise the chief county defenders, and resource and information centers and libraries to support the office's execution of its duties relating to legal representation, training, and policy advocacy.

The office's statutorily mandated structure establishes clear areas of representation and office work responsibilities through the following divisions, which will operate under the executive director's management authority:

- Capital case division, under a director
- Appellate and postconviction review division, under a director
- Director of juvenile defense services
- Information management and technology officer
- Director of training and professional development

Across the country division director positions that are not mandated by statute are disappearing under the impact of severe budget cuts, prohibitions against filling empty positions, mandatory furloughs, and low bid contracts that contract out operations to moneymaking, unsupervised, contract law firms providing low quality legal representation on the cheap. Mandating these positions in the statute, as they have under reform legislation in Louisiana and Montana,³³⁰ will to some degree insulate these positions from such threats.

The divisions so established need well qualified, efficient leadership to manage and supervise their responsibilities. As this report argues, capital case and appellate representation require skills somewhat different from regular trial practice, and postconviction representation can be better administered from the central office to avoid potential conflicts of interest. The proposed director of juvenile defense services follows the Louisiana reform statute³³¹ and the joint recommendation of NLADA and the National Juvenile Defender Center (NJDC) in recognizing the representation of children as a specialized area of law "different from, but equally as important as, the

³³⁰ La. Rev. Stat. §§ 15:153 (director of training), 15:154 (director of juvenile defender services), and 15:156 (information management and technology officer); Mont. Code § 47-1-201(3).

³³¹ La. Rev. Stat. § 15:154.

representation of adults in criminal proceedings.”³³² In addition, the IDS must have effective technological support for its statewide data collection, communications operations, and resource and information centers. Technology support is particularly important because of the severe and fundamental shortcomings Pennsylvania’s IDS faces in data collection. Finally, the position of director of training and professional development is mandated because it is these functions that build the foundation for effective representation.

COSTS AND IMPLEMENTATION PLAN

To forecast the impact of the institution of a statewide Office of Indigent Defense Services, it will be necessary to distinguish new costs, costs presently borne by the counties that will be assumed by the state, and those that will remain with the counties. Under this plan, the Commonwealth will pay for the meeting expenses of a volunteer board, the staff of the OIDS, the salaries of the chief PD in all counties except Philadelphia, capital representation, and appellate representation for criminal cases.

Because of the severe fiscal situation facing the Commonwealth, it not be feasible to institute the Office of Indigent Defense all at once, but rather in stages over four or more fiscal years. The list of the operational budget categories attendant on a possible implementation plan is included as Appendix B. Preparation of a budget proved to be beyond the abilities and expertise of the staff and the advisory committee, but it is hoped that Appendix B would serve as a foundation upon which the Office’s budget could be developed. Presumably the board and the executive director will exercise their managerial authority to tailor the program to fit within the resources available to them.

³³² NJDC and NLADA, “Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems” (2nd ed.) (Washington, D.C.: NJDC and NLADA, July 2008).

DRAFT INDIGENT DEFENSE STATUTE

TITLE 42: JUDICIARY AND JUDICIAL PROCEDURE

CHAPTER 88 DEFENSE OF THE INDIGENT

SUBCHAPTER A GENERAL PROVISIONS

§ 8801. Short title of chapter.

This subchapter shall be known and may be cited as the Indigent Defense Act.

§ 8802. Purposes of chapter.

The purposes of this chapter are as follows:

(1) To provide a statewide administrative structure that will enable provision of effective assistance of counsel to indigent criminal defendants and children charged with delinquent conduct who are entitled to assistance of counsel at public expense under the Sixth or Fourteenth Amendments to the United States Constitution and section 9 of Article I of the Constitution of Pennsylvania.

(2) To ensure that the indigent defense system is free from undue political interference and conflicts of interest.

(3) To provide that indigent defense services are delivered by qualified and competent attorneys in a manner that meets constitutional standards for representation and is consistent throughout this Commonwealth.

(4) To maintain the operational independence of the provider of indigent defense services in a city of the first class.

§ 8803. Definitions.

The following words and phrases when used in this chapter shall have the meanings given to them by this section unless the context clearly indicates otherwise:

“Assigned counsel.” An attorney who provides indigent defense services by appointment to represent a particular defendant or child. The term does not include a public defender or other employee of the office of indigent defense or a county public defender office.

“Assistant public defender.” A public defender other than the chief public defender.

“Board.” The state board of indigent defense established by section 8812 (relating to state board of indigent defense).

“Chief public defender.” The public defender who is responsible for supervising a county public defender office.

“Conflict counsel.” Assigned counsel or contract counsel who are retained to provide indigent defense to avoid a conflict of interest.

“Contract counsel.” An attorney who provides indigent defense services under a periodic contract other than an employment contract. The term does not include a public defender.

“County.” For a county in a judicial district comprising two counties using the same public defender, the term refers to the judicial district.

“County public defender office.” A county office established to provide indigent defense.

“Eligible matter.” Any of the following:

(1) A proceeding under a criminal charge which may result in incarceration.

(2) A juvenile delinquency proceeding.

(3) A state habeas corpus proceeding.

(4) A criminal extradition proceeding.

(5) A probation or parole proceeding, including a revocation proceeding.

(6) A commitment proceeding under the act of October 20, 1966 (3rd Sp. Sess., P.L.96, No.6), known as the Mental Health and Mental Retardation Act of 1966.

(7) A civil or criminal contempt proceeding which may result in the deprivation of liberty.

(8) Any proceeding where indigent defense is required under the United States Constitution, the Pennsylvania Constitution or other law.

“Executive director.” The executive director of the office of indigent defense.

“Guideline.” A rule established by the office of indigent defense with the approval of the board.

“Indigent.” Unable to afford a private attorney without undue hardship.

“Indigent defendant.” An individual against whom an eligible matter has been commenced who appears without an attorney in the eligible matter and is determined under section 8834 (relating to determination of eligibility) to be indigent.

“Indigent defense.” Legal representation of an indigent individual at the public expense under this chapter.

“Indigent defense attorney.” An attorney who provides or manages the provision of indigent defense. The term includes all of the following:

(1) Attorneys employed by the office of indigent defense.

(2) Public defenders.

(3) Assigned counsel.

(4) Contract counsel.

“Indigent defense services.” Indigent defense provided pursuant to a contract or other agreement between an attorney and the office of indigent defense, a county government, the county public defender office or a person or entity other than an indigent individual.

“Indigent defense system.” The system for providing indigent defense in this Commonwealth as implemented by the office of indigent defense, the county public defender offices, and attorneys and staff who provide indigent defense services.

“Office of indigent defense” or **“office.”** The office of indigent defense established by section 8813 (relating to office of indigent defense).

“Postconviction proceedings.” Proceedings under 42 Pa.C.S. Ch. 95, Subch. B, (relating to post conviction relief) and appeals from such proceedings.

“Private indigent defense attorney.” An indigent defense attorney who is not under an employment contract with the office of indigent defense or the public defender.

“Public defender.” An attorney who provides indigent defense or manages the provision of indigent defense as the chief public defender or an employee of a county public defender office.

“Regulation.” A regulation promulgated by the office of indigent defense under the act of July 31, 1968 (P.L.769, No.240), referred to as the Commonwealth Documents Law, and the act of June 25, 1982, (P.L.633, No.181), known as the Regulatory Review Act.

§ 8804. Rights and remedies.

This chapter does not affect rights or remedies otherwise available to persons other than the indigent defendant and the attorney representing the indigent defendant.

SUBCHAPTER B
ADMINISTRATION OF INDIGENT DEFENSE

§ 8811. Administrative structure.

(a) **Office of indigent defense.**—The office of indigent defense is established as an independent agency within the executive branch.

(b) **State board of indigent defense.**—The state board of indigent defense is established and shall have the powers and duties provided in section 8812(d) (relating to state board of indigent defense).

Comment: Subsection (a)—“Independent agency” is defined in 42 Pa.C.S. § 102.

§ 8812. State board of indigent defense.

(a) **Structure and membership.**—There shall be a state board of indigent defense. The board shall consist of thirteen members selected as follows:

(1) The Chief Justice of the Pennsylvania Supreme Court shall appoint three members, at least one of whom must be a former member of the judiciary of this Commonwealth.

(2) The Governor shall appoint three members, comprising the following:

(i) one representative of the public defenders, appointed from a list of three qualified individuals recommended by the Public Defenders Association of Pennsylvania.

(ii) one advocate for current and former prison inmates, appointed from a list of three qualified individuals recommended by the Pennsylvania Prison Society.

(iii) one representative of county government, appointed from a list of three qualified individuals recommended by the County Commissioners Association of Pennsylvania.

(3) The President Pro Tempore of the Senate shall appoint three members, including the following:

(i) one criminal defense attorney, appointed from a list of three qualified individuals recommended by the Pennsylvania Association of Criminal Defense Lawyers.

(ii) one attorney with experience defending juveniles in delinquency proceedings, appointed from a list of three qualified individuals recommended by the Juvenile Defender Association of Pennsylvania.

(4) The Speaker of the House of Representatives shall appoint three members, including the following:

(i) one representative of the public defenders, appointed from a list of three qualified individuals recommended by the Public Defenders Association of Pennsylvania.

(ii) one criminal defense attorney, appointed from a list of three qualified individuals recommended by the Pennsylvania Association of Criminal Defense Lawyers.

(5) The members appointed under this subsection shall select a member as the chair.

(b) Qualifications.—Members of the board must be residents of this Commonwealth and must have demonstrated an interest in maintaining a high quality, independent indigent defense system. The composition of the board must include representation from both genders and reflect the racial and ethnic diversity of the Commonwealth. A member of the board must not be any of the following:

(1) an active member of the judiciary or a member of the judiciary on senior status;

(2) the Attorney General or an employee of the Office of the Attorney General;

(3) a district attorney or an employee of the office of a district attorney.

(c) Term of service.—

(1) Members shall serve for a term of four years, except that the initial members shall serve terms of two, three, or four years as designated by their respective appointing authorities, unless designated as chair under subsection (a)(6), in which case the member shall serve a term of four years. The appointing authority may reappoint a member but not more than once.

(2) If any member fails to complete his or her term, the appointing authority for that member shall, as soon as possible, appoint a replacement to complete that member's term. Appointees under this paragraph may be reappointed, but not more than once.

(d) Powers and duties.—The board shall direct the office of indigent defense in the performance of its powers and duties under this chapter. Standards, procedures, rules and regulations must be approved by the board in order to become effective. The board shall appoint an executive director, who shall exercise the powers and duties provided by section 8814(c) (relating to executive director).

Comment: Subsection (a)—Patterned after section 4(b) of the Health Care Cost Containment Act (July 8, 1986 (P.L.408, No.89); 35 P.S. § 449.4(b).

Subsection (b)—The prohibitions on appointing active members of the judiciary and prosecutors and their staffs are intended to ensure that members of the board will not have a conflict of interests.

§ 8813. Office of indigent defense.

(a) **Powers and duties.**—Except as provided in section 8821 (relating to cities of the first class), the office of indigent defense shall have the following powers and duties, in addition to any other powers and duties provided by this chapter or other law:

(1) To ensure the delivery of competent and effective indigent defense in accordance with the established principles for administering an effective indigent defense system and to receive funds from the Commonwealth for that purpose.

(2) To contract with county public defender offices, non-profit defender agencies, and private indigent defense attorneys for local indigent defense. Contracts between contract counsel and a public defender for indigent defense services must comply with guidelines established by the office.

(3) To set and implement statewide performance standards and procedures for indigent defense attorneys.

(4) To set qualification standards for indigent defense attorneys and their professional staffs and for their supervision and training. The board shall establish qualifications that require indigent defense attorneys to receive the necessary legal training, and that require that the experience level of attorneys match the cases assigned to them.

(5) To establish caseload and workload standards for public defenders and standards limiting the number of cases delegated to assigned counsel or contract counsel. The office shall draft the standards so as to be consistent with the provision of ethical services as defined by the Rules of Professional Conduct and to take into account administrative responsibilities as well as direct client representation.

(6) To monitor professional and managerial performance and to enforce compliance by indigent defense attorneys with the standards and requirements adopted under this section.

(7) To investigate county public defender offices that are suspected of deficient performance, to assist such offices to improve their performance, and, if necessary, to issue a public report including the findings and recommendations arising from the investigation.

(8) To establish standards requiring that sufficient support services and resources for indigent defense be provided, including access to independent experts, investigators, social workers, paralegals, secretaries, technology, research resources and training.

(9) To establish standards for eligibility for indigent defense and for prompt assignment of indigent defense attorneys to indigent defendants. However, the office, the board and the executive director are not required to determine the eligibility of any applicant for indigent defense.

(10) To establish and implement standards and procedures ensuring the independent, competent and efficient representation of clients whose cases present conflicts of interest, in both trial and appellate courts.

(11) To establish a uniform and usable system of data collection to effectively and accurately track and manage criminal and juvenile delinquency proceedings.

(12) To develop statewide courses of instruction and practical training programs for indigent defense attorneys, including preservice training for newly hired indigent defense attorneys.

(13) To collect and disseminate resources for improving legal and administrative practices for county public defender offices.

(14) To provide indigent defense for appeals and for postconviction proceedings through the review division established under section 8816 (relating to appellate and postconviction review division).

(15) To provide indigent defense in trials, appeals and postconviction proceedings for capital cases.

(16) To review research and perform studies regarding improvements in the operation of the indigent defense system and to implement or encourage improvements based on the findings of the research and studies.

(17) To encourage and facilitate sustained media attention to the advantages of a well-functioning indigent defense system and to recognize effective local indigent defense attorneys and offices.

(18) To advocate for improvements in indigent defense to the public and the General Assembly, including adult criminal and juvenile defense representation and to advocate for adequate funding for the indigent defense system.

(19) To actively seek and receive gifts, grants and donations that may be available through the federal government or other sources to help fund the indigent defense system.

(20) To maintain records and statistical data that reflect the operation and administration of the office.

(21) To submit an annual report covering the operation of the office together with recommendations to the Governor, the Attorney General and the General Assembly for improvement of the indigent defense system in this Commonwealth, including statistics regarding the delivery of indigent defense.

(22) To submit the office's annual budget request for appropriations from the Commonwealth. The request must be approved by the board

(23) To adopt rules and regulations and establish guidelines as necessary to carry out the purposes of this chapter.

(b) Individual cases.—The office may not interfere with the discretion, judgment or advocacy of a public defender or any other attorney in their handling of an individual case, except as necessary to enforce compliance with qualification and caseload standards.

§ 8814. Executive director.

(a) Appointment.—The board shall appoint the executive director of the office of indigent defense. The executive director shall serve at the pleasure of the board.

(b) Qualifications.—The individual appointed as executive director must be an attorney licensed to practice law in the United States with at least ten years experience as

a criminal defense attorney. If the individual is licensed as an attorney in a state other than this Commonwealth, the individual must become licensed as an attorney in this Commonwealth within one year of being employed by the board.

(c) **Powers and duties.**—The executive director shall be the head of the office, hire the staff of the office and manage and oversee its day-to-day operations so as to carry out the purposes of this chapter.

§ 8815. Capital case division.

(a) **Establishment.**—The executive director shall establish a capital case division within the office and appoint the director of the division.

(b) **Duties of division.**—The capital case division shall have the following powers and duties:

(1) To provide representation or assign counsel for indigent individuals accepted for representation by a public defender office for pretrial proceedings, trials, appeals, and postconviction proceedings for cases where the individual may be subject to the death penalty.

(2) To assist the office in performing its powers and duties under this chapter as they pertain to cases where an indigent individual may be subject to the death penalty.

(c) **Qualifications.**—The director of the capital case division must meet the qualifications required by general rules of court for serving as retained counsel on a capital case.

(d) **Duties of director.**—The director of the capital case division shall oversee and manage the capital case division under the executive director in the performance of its duties and shall perform such other duties as are assigned by the executive director.

§ 8816. Appellate and postconviction review division.

(a) **Establishment.**—The executive director shall establish an appellate and postconviction review division within the office and appoint the director of the division.

(b) **Duties of division.**—The appellate and postconviction review division shall have the following powers and duties:

(1) To provide representation or assign counsel for indigent individuals in appeals and postconviction proceedings.

(2) To assist the office in performing its powers and duties under this chapter as they pertain to appeals and postconviction proceedings.

(c) **Duties of director.**—The director of the appellate division shall oversee and manage the capital case division under the executive director in the performance of its duties and shall perform such other duties as are assigned by the executive director.

§ 8817. Director of juvenile defense services.

(a) **Appointment.**—The executive director shall appoint a director of juvenile defense services.

(b) **Duties of director.**—The director of juvenile defense services shall have the following powers and duties:

(1) To collect and disseminate materials and provide and participate in training programs relating to the defense of juvenile delinquency proceedings.

(2) To assist the office in performing its powers and duties under this chapter as they pertain to the defense of juvenile delinquency proceedings.

(3) To perform such other duties as are assigned by the executive director.

§ 8818. Information management and technology officer.

(a) **Appointment.**—The executive director shall appoint an information management and technology officer.

(b) **Duties of officer.**—The information management and technology officer shall have the following powers and duties:

(1) To oversee and manage the office of indigent defense, under the executive director, with respect to information management and the use of technology.

(2) To assist the executive director in establishing and supervising data collection for the indigent defense system.

(3) To perform such other duties as are assigned by the executive director.

§ 8819. Director of training and professional development.

(a) **Appointment.**—The executive director shall appoint a director of training and professional development.

(b) **Duties of director.**—The director of training and professional development shall have the following powers and duties:

(1) To oversee and manage, under the executive director, the provision of such training and professional development to indigent defense attorneys, the staff of the office of indigent defense and such other persons as will assist them in providing indigent defense services or in otherwise advancing the purposes of this chapter.

(2) To perform such other duties as are assigned by the executive director.

§ 8820. Public defenders.

(a) **Chief public defender.**—The chief public defender shall administer the operation of the county public defender office within the county where he or she resides, under the supervision and control of the office of indigent defense and in compliance with this chapter.

(b) **Appointment and tenure.**—A chief public defender commencing service after the effective date of this chapter must be selected by the board. The board may remove the chief public defender, but only for cause.

(c) **Duties.**—For cases adjudicated in the courts of the county, the county public defender office shall represent or provide for the representation of individuals entitled to indigent defense under subchapter C (relating to indigent defense), with such exceptions and under such procedures as the office of indigent defense may establish. The duties of the county public defender office with respect to contract counsel shall be performed under guidelines established by the office of indigent defense.

§ 8821. Cities of the first class.

(a) **Representation.**—For cases arising in a city of the first class, the provider shall represent or provide for the representation of individuals entitled to indigent defense under subchapter C (relating to indigent defense). Notwithstanding any other provision in this chapter, the standards governing the professional and managerial performance of the provider shall be established by the provider in accordance with its indigent defense service contract with the city.

(b) **Capital cases.**—The provider shall provide indigent defense services for not more than 20 percent of the cases arising in the city of the first class in which the individual is charged with murder of the first degree and the prosecution has demanded that the sentence of death be imposed.

(c) **Powers of office.**—The provider shall have the following powers and duties, with respect to the office of indigent defense:

(1) To enter into a contract with the office authorizing the office to pay the provider to provide appellate representation for indigent defendants in cases arising in the city of the first class.

(2) To establish standards for eligibility for indigent defense and for prompt assignment of indigent defense attorneys to indigent defendants. However, the office, the board and the executive director are not required to determine the eligibility of any applicant for indigent defense.

(3) To assist the office in developing courses of instruction and practical training programs for indigent defense attorneys, including preservice training for newly hired indigent defense attorneys and to avail itself of such training and programs developed by the office or developed jointly by the provider and the office.

(4) To cooperate with and assist the office in furthering the purposes of this chapter.

(5) To provide indigent defense for postconviction proceedings through the appellate and postconviction review division established under section 8816 (relating to appellate and postconviction review division).

(6) To review research and perform studies regarding improvements in the operation of the indigent defense system and to implement or encourage improvements based on the findings of the research and studies.

(7) To advocate for improvements in indigent defense to the public and the General Assembly, including adult criminal and juvenile defense representation and to advocate for adequate funding for the indigent defense system.

(8) To actively seek and receive gifts, grants and donations that may be available through the federal government or other sources to help fund the indigent defense system.

(9) To maintain records and statistical data that reflect the operation and administration of the office.

(10) To submit an annual report covering the operation of the provider together with recommendations to the Governor, the Attorney General and the General Assembly for improvement of the indigent defense system in this Commonwealth, including statistics regarding the delivery of indigent defense in the city of the first class.

(11) To submit the provider's annual budget request for appropriations from the Commonwealth. The request must be approved by the board.

(d) Definition.—As used in this section, the term “provider” means the person with whom the governing authority of a city of the first class contracts to provide indigent defense services to indigent defendants for cases arising in a city of the first class.

§ 8822. Compensation and full-time status.

(a) Compensation.—An indigent defense attorneys shall receive compensation in accordance with standards established by the office of indigent defense or in accordance with a contract made either between the attorney and the office of indigent defense, or between the attorney and the county public defender office. A contract under this section must provide for compensation in accordance with professional experience and equivalent to the compensation paid to prosecuting attorneys. The office of indigent defense shall pay the salaries of the chief public defenders.

(b) Full-time employees.—

(1) The executive director and the attorneys employed by the office of indigent defense shall be full-time employees and may not engage in the private practice of law.

(2) Chief public defenders shall be full-time employees, unless the office of indigent defense determines that it is not feasible to require a full-time commitment in the county. Assistant public defenders shall be hired on a full-time basis to the maximum extent feasible as determined by the office of indigent defense. A full-time public defender may not engage in the private practice of law.

(3) Assigned counsel and contract counsel may engage in the private practice of law.

SUBCHAPTER C INDIGENT DEFENSE

§ 8831. Right to representation.

(a) General rule—An indigent defendant who appears without an attorney is entitled to be represented by an attorney to the same extent as an individual having his or her own attorney.

(b) Services.—An indigent defendant is entitled to the following services with respect to an eligible matter:

(1) Legal advice and defense beginning at the earliest time when an individual providing his or her own attorney would be entitled to be represented by an attorney, and no later than the time of his or her initial appearance before a court.

(2) Legal advice and defense continuing throughout all critical stages, including all of the following:

- (i) A pretrial identification procedure.
- (ii) Preliminary hearing.
- (iii) Proceedings on a plea of guilty or nolo contendere.
- (iv) Any other proceeding where absence of legal representation might derogate from an indigent defendant's right to a fair trial.
- (v) Trial, including a hearing on a pretrial or posttrial motion.
- (vi) An appellate proceeding before the Pennsylvania Supreme Court or the Superior Court.

(3) The necessary services and facilities for effective representation, including a confidential space where the indigent defendant can meet with the indigent defense attorney.

(4) Defrayal of the costs associated with criminal defense litigation.

(c) Postconviction proceedings.—An indigent defendant shall be represented in a postconviction proceeding that the indigent defendant considers appropriate, unless the court permits the public defender to withdraw from representing him or her on the grounds that the claim for postconviction relief is without merit.

(d) Prior conduct.—An indigent defendant's rights under this section are not affected by having obtained similar services at his or her own expense, or by having waived them, at an earlier stage of a proceeding.

(e) Duty of public defender.—The county public defender office shall represent every indigent individual entitled to representation under this subchapter who is otherwise not represented by an attorney. If the county public defender office cannot provide effective representation due to excessive workload, as defined by the caseload standards established by the office of indigent defense under section 8813(b)(5) (relating to office of indigent defense), or due to a conflict of interest, the county public defender office may designate cases to be handled by private indigent defense attorneys pursuant to guidelines established by the office of indigent defense.

§ 8832. Representation before charge.

(a) Felonies.—The chief public defender or his or her designee may authorize the representation of an indigent individual who is without an attorney if he or she is under investigation for murder or a felony.

(b) Detainees.—A public defender may confer with any individual who is not represented by an attorney and who is detained by a law enforcement officer.

§ 8833. Waiver of right to counsel.

An individual who has been informed of his or her right to indigent defense may waive that right only in a transcribed proceeding. In order for the waiver to be valid, the court must find that the waiver is intelligent, knowing and voluntary. In considering the validity of the waiver, the court shall consider the individual's age, education and familiarity with English, the complexity of the crime, potential collateral consequences of the waiver and any other relevant circumstances.

§ 8834. Determination of eligibility.

(a) **Application.**—An individual who claims to be entitled to indigent defense must apply to the county public defender office.

(b) **Responsibility.**—Eligibility for indigent defense shall be determined by the county public defender office or by another designated agency, with the approval of and under standards set by the office of indigent defense.

(c) **Time of determination.**—The determination of whether an individual covered by section 8831 (relating to right to representation) is indigent shall take place as soon as possible after he or she is detained by a law enforcement officer or is formally charged with having committed a serious crime.

(d) **Factors considered.**—In determining whether an individual is indigent, the county public defender office shall consider his or her income, property owned, the cost of defending the charge, outstanding obligations and the number and ages of dependents, and any other relevant factors. Release on bail does not necessarily prevent an individual from qualifying as indigent. In each case, the individual shall, subject to the penalties for perjury, certify in writing or by other record material factors relating to his or her ability to pay, in such manner as the board shall prescribe.

(e) **Minors.**—A minor who is charged with an eligible matter is eligible for indigent defense, regardless of whether the minor or any relative of the minor is indigent.

§ 8835. Payment of costs, expenses and attorney fees.

(a) **Expenses of the office.**—Expenses incurred by the office of indigent defense under this subchapter shall be defrayed from funds appropriated for this purpose from the general fund, including expenses incurred under section 8815 (relating to capital case division), section 8816 (relating to appellate and postconviction review division) and the salaries of the chief public defenders.

(b) **Attorney fees.**—Except as otherwise provided under subsection (a), the expenses of indigent defense services shall be defrayed by the county governments.

(c) **Regulations.**—The office of indigent defense shall establish standards prescribing the allocation of expenses under this section.

GLOSSARY OF ACRONYMS

The following is a list of acronyms or initialisms that appear at various places in this report. Those that appear in only a limited segment of the report are omitted.

ABA	American Bar Association
ACLU	American Civil Liberties Union
AOPC	Administrative Office of Pennsylvania Courts
CCAP	County Commissioners Association of Pennsylvania
CPCMS	Common Pleas Court Management System
DA	District attorney
DAP	Defender Association of Philadelphia
FTE	Full-time equivalent
IDS	Indigent defense system
JCJC	Juvenile Court Judges' Commission
NAC	National Advisory Commission on Criminal Justice Standards and Goals
NACDL	National Association of Criminal Defense Lawyers
NLADA	National Legal Aid and Defender Association
PACDL	Pennsylvania Association of Criminal Defense Lawyers
PCRA	Post Conviction Relief Act
PD	Public defender
PDAA	Pennsylvania District Attorneys Association
PDAPA	Public Defender Association of Pennsylvania
SCLAID	Standing Committee on Legal Aid and Indigent Defense (ABA)

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APPENDIX A
SENATE RESOLUTION NO. 42 OF 2007
(PRINTER'S NO. 150)

THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE RESOLUTION

No. 42

Session of
2007

INTRODUCED BY BROWNE, BOSCOLA, FONTANA, ERICKSON, FERLO, EARLL,
COSTA AND O'PAKE, MARCH 5, 2007

REFERRED TO JUDICIARY, MARCH 5, 2007

A RESOLUTION

1 Establishing a task force to study the current system for
2 providing services to indigent criminal defendants, to review
3 how other states provide these services and to make
4 recommendations to the Senate.

5 WHEREAS, In 1963 the United States Supreme Court decided the
6 landmark case of Gideon v. Wainwright, holding, as a matter of
7 constitutional law, that states must provide attorneys to
8 persons who are accused of felony crimes and cannot afford to
9 hire their own counsel; and

10 WHEREAS, The United States Supreme Court, in its opinion in
11 Gideon v. Wainwright, said that: "[R]eason and reflection
12 require us to recognize that in our adversary system of criminal
13 justice, any person haled into court, who is too poor to hire a
14 lawyer, cannot be assured a fair trial unless counsel is
15 provided for him"; and

16 WHEREAS, In 1972 the United States Supreme Court further
17 held, in the case of Argersinger v. Hamlin, that indigent
18 criminal defendants are entitled to counsel for any criminal

1 charge which could result in a term of imprisonment, whether the
2 charge is a felony or misdemeanor; and

3 WHEREAS, The Constitution of Pennsylvania guarantees to an
4 accused in all criminal prosecutions the "right to be heard by
5 himself and his counsel," a constitutional provision which has
6 been interpreted to provide an independent State constitutional
7 right to counsel for indigent criminal defendants; and

8 WHEREAS, In Pennsylvania, funding for indigent criminal
9 defense is provided exclusively at the county level; and

10 WHEREAS, The Pennsylvania Supreme Court Committee in 2003
11 published its Final Report on Racial and Gender Bias in the
12 Justice System, devoting an entire chapter to the issue of
13 indigent defense in Pennsylvania; and

14 WHEREAS, The Pennsylvania Supreme Court Committee found that
15 Pennsylvania was one of only three states that provide no State
16 funds to ensure adequate defense services for indigent criminal
17 defendants and that Pennsylvania does not provide any Statewide
18 oversight of the systems for providing services to indigent
19 criminal defendants; and

20 WHEREAS, The Pennsylvania Supreme Court Committee on Racial
21 and Gender Bias in the Justice System relied on a study
22 completed by the Spangenberg Group, a nationally recognized
23 research and consulting organization with experience and
24 expertise in evaluating indigent criminal defense services,
25 which study found serious deficiencies in the indigent criminal
26 defense system in many Pennsylvania counties; and

27 WHEREAS, Attorneys who represent indigent criminal defendants
28 face extraordinarily large caseloads, leaving them little time
29 to provide individualized investigation and representation of
30 their clients; and

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1 WHEREAS, The study completed by the Spangenberg Group found
2 that staggering caseloads create poor attorney-client contact,
3 inadequate preparation by attorneys and late assignment or
4 appointment of counsel; and

5 WHEREAS, Attorneys who represent indigent criminal defendants
6 are unable to reasonably and effectively use investigators,
7 social workers and expert witnesses due to inadequate funding;
8 and

9 WHEREAS, Many counties in Pennsylvania are facing significant
10 budgetary problems due to increasing costs related to the
11 operation of the courts, including the costs related to indigent
12 criminal defense services; and

13 WHEREAS, Litigation against Allegheny County was instituted
14 challenging the adequacy of the services provided to indigent
15 criminal defendants, and other counties are also facing
16 litigation over this issue; and

17 WHEREAS, The American Bar Association recommends that in
18 order to comply with the spirit of Gideon and to maintain a
19 system that provides for effective, ethical and conflict-free
20 legal representation to criminal defendants who are unable to
21 hire an attorney, states must meet the following Ten Principles
22 of a Public Defense Delivery System:

23 (1) The public defense function, including the
24 selection, funding and payment of defense counsel, is
25 independent.

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

29 (3) Clients are screened for eligibility, and defense
30 counsel is assigned and notified of appointment as soon as

1 feasible after clients' arrest, detention or request for
2 counsel.

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

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

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

9 (7) The same attorney continuously represents the client
10 until completion of the case.

11 (8) There is parity between defense counsel and the
12 prosecution with respect to resources, and defense counsel is
13 included as an equal partner in the justice system.

14 (9) Defense counsel is provided with and required to
15 attend continuing legal education.

16 (10) Defense counsel is supervised and systematically
17 reviewed for quality and efficiency according to nationally
18 and locally adopted standards;

19 and

20 WHEREAS, The states of Georgia, North Carolina, Oregon,
21 Vermont and Virginia have recently reviewed their indigent
22 criminal defense systems to ensure that adequate representation
23 is being provided to all indigent defendants; and

24 WHEREAS, The interests of all Pennsylvanians are served when
25 Pennsylvania's indigent criminal defense system operates in an
26 effective, ethical and cost-efficient manner; and

27 WHEREAS, If counsel for the indigent cannot effectively
28 represent their clients, there is an increased possibility for
29 the wrongful conviction and incarceration of innocent persons as
30 well as the continuing risk posed by the failure to convict the

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1 actual perpetrators; and

2 WHEREAS, Incompetent representation of indigent criminal
3 defendants further results in an increased number of claims of
4 ineffective assistance of counsel and new trials being granted
5 on account of ineffective assistance of counsel; and

6 WHEREAS, The criminal judicial process functions most
7 effectively and fairly when both the Commonwealth and each
8 individual defendant are competently represented; and

9 WHEREAS, The Senate should be knowledgeable about the
10 provision of indigent criminal defense services in this
11 Commonwealth; therefore be it

12 RESOLVED, That the Senate direct the Joint State Government
13 Commission to establish a bipartisan task force consisting of
14 two members appointed by the President pro tempore of the Senate
15 and two members appointed by the Minority Leader of the Senate;
16 and be it further

17 RESOLVED, That the task force create an advisory committee
18 composed of representatives of the Administrative Office of
19 Pennsylvania Courts, the Secretary of Budget and Administration,
20 the Attorney General, the Auditor General, the County
21 Commissions Association of Pennsylvania, the Pennsylvania Public
22 Defenders Association, the Pennsylvania District Attorneys
23 Association, attorneys with significant experience in the
24 defense of criminal cases, individuals with expertise in the
25 area of quality representation of indigent criminal defendants
26 and additional members as the task force deems appropriate; and
27 be it further

28 RESOLVED, That the task force study the existing system for
29 providing services to indigent criminal defendants, review how
30 other states provide such services and make recommendations to

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1 the Senate regarding the funding of such services and the
2 creation of an entity to guarantee compliance with the
3 Constitution of the United States and the Constitution of
4 Pennsylvania in the delivery of such services.

APPENDIX B

OPERATIONAL COST CATEGORIES FOR OFFICE OF INDIGENT DEFENSE SERVICES

The following is a tentative list of the operational budget categories that the advisory committee recommends be funded to establish an effective statewide Office of Indigent Defense Services:

FISCAL YEAR 1³³³

ESTABLISHMENT OF STATE BOARD OF INDIGENT DEFENSE

- Appointment of 13 board members
- In-state travel and meeting attendance costs
- Interview and selection of executive director and executive staff

STAFFING (Salary, benefits³³⁴ and travel)

- Executive director
- Office executive staff
 - Director of training and development
 - Director of appellate and postconviction review
 - Director of capital case litigation
 - Director of juvenile defense services
 - Technology and information systems officer
- Other staff
 - Administrative assistant to executive director
 - Training staff coordinator (handles training program logistics and qualification, reporting, and compliance management for the CLE office)
 - Human resources and office manager
 - Budget and contracts manager
 - Accounting and finance manager
 - Accounting staff (2)
 - Administrative assistant for appeals and postconviction review
 - Administrative assistant for capital case representation
 - Administrative assistant for juvenile defense services
 - LAN administrators (2)

³³³ Because of the time needed to begin operations, expenses for FY1 will be paid for only part of the year.

³³⁴ For all eligible personnel, benefits include retirement under the State Employee Retirement System.

- Information technology analyst
- Standards compliance officer for eastern, middle and western districts (3)
(These may be hired at the end of FY1 or at the beginning of FY2.)

EXECUTIVE OFFICE COSTS

- Office setup
 - Rent
 - Configuration and design
 - Furniture, furnishings, and supplies
 - Conference and meeting room
- Electronics
 - Computers and Internet
 - Landline and cell phones
- Training equipment
 - Training rooms
 - Visual aids (easels, whiteboards, PowerPoint)
 - Recorders
 - Microphones

FISCAL YEAR 2

RECURRING COSTS

- State Board
- Staff salary, benefits and travel
- Recurring office expenses

COUNTY CHIEF PUBLIC DEFENDERS

- Salary and benefits for full- or part-time positions³³⁵
- Computers and technology to communicate with state office and executive staff

NONCAPITAL APPELLATE AND POSTCONVICTION REPRESENTATION

- Contracts with existing public defender office appellate units (funding sufficient to cover salary and benefits, paid through the local defender offices)
- Contracts with appellate specialists (on a per case fee basis for no more than 25 cases per attorney per year)
- Office staff (salary, benefits, and operational support)
 - Three appellate lawyers
 - Three juvenile appellate specialists

³³⁵ The Office shall determine whether a chief public defender shall be full-time or part-time during FY1, and fund the position in FY2 pursuant to that decision.

(The most complicated, serious cases require appointment of a staff attorney under the supervision of the division director, who should carry a reduced caseload.)

CAPITAL CASE APPELLATE REPRESENTATION³³⁶

- Contracts with existing public defender office to support qualified capital appellate public defenders and staff (funding sufficient to cover salary and benefits, paid through the local defender offices)
- Contracts with capital appellate specialists
- Office staff: four capital appellate attorneys (under supervision of the capital case division director or serve as lead counsel with a contract capital appellate attorney)

TRAINING, EDUCATION, AND DEVELOPMENT PROGRAMS

- In-state training programs (lodging, CLE fees, honorariums for presenters, and program materials)
- Out-of-state training programs (lodging, registration, and travel)

DEVELOPMENT OF TECHNOLOGY AND REFERENCES

- Software for data collection and report generation and interpretation
- Software for online activities (registration for training programs, billing for contractors, CLE credits)
- Office website (building, securing, maintaining, and updating)
- Online library of reference and training materials
 - model briefs, writs, petitions, and motions
 - law review and other periodical articles

FISCAL YEAR 3

TRIAL AND POSTCONVICTION CAPITAL CASE REPRESENTATION

- Case requirements
 - Capital-qualified attorneys
 - Expert witnesses
 - Investigators
 - Travel costs for witnesses and staff
 - Transcription and copying costs
- Contracts with public defender offices (salary and benefits for staff capital attorneys, mitigation specialists, and capital investigators)
- Individual capital attorney, mitigation specialist, capital investigator contracts

³³⁶ Under applicable standards, all capital cases require two capital-qualified attorneys.

- Office staff³³⁷
 - Capital trial attorneys (4)
 - Trial mitigation specialists (2)
 - Trial investigators (2)
 - Postconviction attorneys (6)
 - Postconviction mitigation specialists (2)
 - Postconviction investigators (2)

CONTINUING COSTS

- Board members
- Executive, professional and support staff
- Recurring operational costs
- Training and professional development
- Unanticipated needs (e.g., repairs to office space due to water sprinklers going off with a false alarm)

³³⁷These professionals (18 FTEs) may be designated a statewide capital representation team, or the attorneys may serve as lead counsel with a local individual attorney capital trial or postconviction contractor. Mitigation and investigation may also be covered by contracting to expand the number statewide of capital representation teams.