Halting Assembly Line Justice

PDS: A Model of Client-Centered Representation

EVALUATION

PUBLIC DEFENDER SERVICES FOR THE DISTRICT OF COLUMBIA

Washington, DC
August 2008

National Legal Aid & Defender Association

Evaluation of Public Defender Services for the District of Columbia

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Executive Summary

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court ruled that states must provide counsel to indigent defendants in felony cases – a mandate that has been consistently extended to any case that may result in a potential loss of liberty. Unfortunately, the Court's "obvious truth" that lawyers in criminal cases are "necessities, not luxuries" has been obscured or lost at the hands of state governments in the intervening 43 years. In 2004, an American Bar Association (ABA) report, *Gideon's Broken Promise*, went so far as to declare that indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.

The client-centered Public Defender Services for the District of Columbia (PDS) stands in contradistinction to this national phenomenon. Qualified, well-trained attorneys meet early and often with clients to help them make informed decisions about their pending charges and remain the client's counsel – when feasible – throughout the life of the case. Attorney performance is closely supervised and management systems are in place to limit case intake when an adjustment of workload is necessary to maintain quality representation. Case decisions are based solely on the interests of the client – without undue political or judicial influence. The independence of PDS' non-partisan Board of Trustees has allowed for a long line of superior leadership, assuring that recruitment from America's top law schools continues year after year. PDS' active participation in system-wide criminal justice initiatives and the support and assistance it provides to the courts, appointed attorneys and the community produce benefits far beyond the requirements of individual cases.

The National Legal Aid & Defender Association (NLADA) reached these conclusions after assessing PDS against prevailing national standards and best practices, consistent with the requirements of the Performance Assessment Rating Tool used to rate federal agencies. Chapter I (p. 1) is an overview of our findings and a discussion of NLADA's evaluation methodology and experience.

While no single factor is responsible for PDS' long-term provision of representation of the highest quality, three factors appear pivotal to the agency's success in that regard. First and foremost, PDS' status as an independent agency has allowed it to maintain a singular focus on providing zealous advocacy, as ethical standards require, and to set its policies and programs based upon what that high standard requires. Chapter II (p. 5) discusses PDS' independence in relation to what is experienced in far too many jurisdictions in this country. The composition of the PDS Board of Trustees meets the standards promulgated by both the ABA and NLADA. Formed as an independent agency from the beginning, PDS has been vigilant in its continued compliance with foundational indigent defense standards. Thus, as national standards anticipated and the remainder of this report discusses, the agency's structure has allowed its leadership to confidently set policies and practices to support high quality advocacy, even when such practices are controversial or unpopular.

Second, PDS' independence has allowed the agency to determine and control the work-

load of individual attorneys and the agency as a whole, as discussed in Chapter III (p. 9). An adequate indigent defense program must have binding workload standards for the system to function, because public defenders do not generate their own work. Public defender workload is determined, at the outset, by a convergence of decisions made by other governmental agencies and beyond the control of the indigent defense providers. The legislature may criminalize additional behaviors or increase funding for new police positions that lead to increased arrests. And, as opposed to district attorneys, who can control their own caseload by dismissing marginal cases, diverting cases out of the formal criminal justice setting, or offering better plea deals, public defense attorneys are assigned their caseload by the court and are ethically bound to provide the same uniform-level of service to each of their clients

PDS simply does not accept cases if, in doing so, they would harm a client and/or put an attorney in breach of her ethical duty to provide competent representation due to case overload. To accomplish this goal, the PDS management team starts from the belief that the high number of variables in their system forecloses the possibility of constructing strict numeric caseload standards. Rather, when establishing an appropriate workload for individual attorneys at PDS, supervisors assess the following criteria: quality of representation; parity with opposing counsel; complexity of the litigation; preparation of lawyers to handle complex litigation; local practice rules; speed of turnover of cases; percentage of cases litigated to conclusion; extent of support services available to staff attorneys; court procedures and visiting procedures in custody facilities; and other activities. PDS has established a management infrastructure to closely monitor attorney workload in its various divisions that takes into account all of the above referenced factors as they set appropriate workload levels for each attorney.

Third, the insistence on controlling workload has meant that the agency has sufficient funding to represent every client competently since it can limit representation to accommodate funding levels. Chapter IV (p. 15) details the extent to which PDS meets – or more likely surpasses – nationally-recognized standards related to guaranteeing consistent quality assurance, fostering effective client/attorney relationships and creating a level playing field between the defense function and the prosecution. For example, close supervision, assiduous oversight and tracking of workload support the matching of case complexity to individual capacity. Able, hard-working attorneys and support staff prepare their cases thoroughly, care about their clients and have high practice standards. There is a thoughtful, progressive movement of attorneys into more complicated and serious work.

Similarly, PDS has made a strong institutional commitment to the training of its staff, and provides them with systemic and comprehensive training, education and development programs. The training for PDS staff includes the following: a one-week training for interns and law clerks; a three-week training for new staff investigators; a one-week training for new appellate attorneys; an eight-week long training for new trial division attorneys; and a one-week training for juvenile section lawyers transferring into adult court; among others.

During the last decade, there has been a notable shift of attitudes and approaches to representation within the criminal defense community across the country. As opposed to prosecutors, who necessarily have to take an adversarial approach to defendants, public defenders have a unique chance to not only address a client's specific criminal charges,

but to use the trauma of a criminal arrest for positive gain by addressing specific life-issues that may have led to the alleged criminal activity. By ensuring that attorneys have the time and independence to effectively advocate for their clients through caseload controls, PDS has been at the forefront of this movement – providing a broad range of legal services to adults and juveniles in a community-based setting. PDS' community work is done in the areas of collateral consequences of criminal convictions, offender re-entry, administrative hearings in the District's juvenile detention facilities and institutional issues facing District of Columbia adult inmates incarcerated in facilities throughout the country. PDS also has a unit dedicated to bringing civil rights and constitutional lawsuits designed to change systemic criminal justice practices through the use of the courts' injunctive relief powers.

PDS is one of the most effective public defender offices in the country. However, quality can be continuously improved. Chapter V (p. 29) highlights issues that PDS leadership may want to consider as it strives to maintain its client-centered approach, including: reducing supervising attorney caseload; formalizing rotations through legal divisions; creating a full-time training director position; creating an assigned counsel coordinator position; and drafting bylaws.

If the nation is ever to overcome its failures to provide equal access to justice in its myriad state and local criminal courts, then the PDS experience is one to be emulated. There is no single "cookie-cutter" delivery model (public defenders, assigned counsel or contract defenders) that *guarantees* adequate representation. What the PDS experience demonstrates, however, is that whatever the model, independent functioning and consistently enforced workload controls are the touchstones of quality representation for people with low incomes who are accused of committing a crime. PDS' history suggests that those two factors inure not only to the benefit of individual clients, but have also allowed PDS to become a strong partner in the administration of justice in the District of Columbia and in the DC community-at-large.

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Introduction

"… [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."

United States Supreme Court Justice Hugo Black, *Gideon v. Wainwright*, 372 U.S. 335 (1963)

CHAPTER 1

The Right to Counsel in America: A System in Crisis

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court ruled that states must provide counsel to indigent defendants in felony cases – a mandate that has been consistently extended to any case that may result in a potential loss of liberty.[1] Unfortunately, the Court's "obvious truth" that lawyers in criminal cases are "necessities, not luxuries"[2] has been obscured or lost at the hands of state governments in the intervening 43 years. State supreme court chief justices,[3] state bar associations[4] and recognized experts[5] have universally decried the failures of the country's indigent defense systems to secure a meaningful right to counsel for those of insufficient means. Litigation over the failure to meet *Gideon's* mandate in state and local jurisdictions is escalating.[6] In 2004, the American Bar Association (ABA) went so far as to declare that "indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction."[7]

The Underlying Cause

There is one primary reason why states have yet to effectively and efficiently implement their constitutional mandate to provide a meaningful right to counsel: *The constituency that is most directly impacted by the failure of government to ensure equal access to justice is the one that is most limited in its ability to affect public discourse.* By definition, people of insufficient means have limited resources to gain access to forums that promote public awareness of their concerns. On top of this, people in need of public defender services frequently are undereducated, inarticulate, mentally ill, developmentally delayed, under-age; and/or suffering from substance abuse. It can be easy for state policy-makers to paint the funding of indigent defense services as "giving money to criminals" without the people most affected by their actions being able to respond effectively. Indeed,

many indigent clients processed through the criminal justice system are, upon conviction, stripped of their ability to participate in the electoral process altogether by state laws that deny the franchise to convicted felons.[8]

Public Defender Services for the District of Columbia: A Beacon of Hope

The client-centered Public Defender Services for the District of Columbia (PDS)[9] stands in contradistinction to this national phenomenon – it is the voice of the voiceless in the criminal courts of our nation's capital. Qualified, well-trained attorneys meet early and often with clients to help them make informed decisions about their pending charges and remain the client's counsel – when feasible – throughout the life of the case. Attorney performance is closely supervised and management systems are in place to limit case intake when adjustment of workload is necessary to maintain quality representation. Case decisions are based solely on the interests of the client – without undue political or judicial influence. The independence of PDS' non-partisan Board of Trustees has allowed for a long line of superior leadership, assuring that recruitment from America's top law schools continues year after year. PDS' active participation in system-wide criminal justice initiatives and the support and assistance it provides to the courts, appointed attorneys and the community produce benefits far beyond the requirements of individual cases.

Like other effective agencies, PDS has embraced independent assessment as a means of objectively reviewing its operations and continually improving. PDS retained the services of the National Legal Aid & Defender Association (NLADA)[10] to conduct the current assessment against prevailing national standards and best practices with four main objectives: 1) to assist in determining the success of the growth and change-management strategies it had adopted; 2) to help in the implementation of its performance and strategic plans; 3) to support the PDS budget submission plan; and 4) to be consistent with the requirements of the Performance Assessment Rating Tool used to rate federal agencies.

Evaluation Methodology

NLADA's Justice Standards, Evaluation & Research Initiative (JSERI) is a research project with a discrete national capacity for public defense data collection, research, standards-based evaluation; and technical assistance. With proper evaluation procedures, standards help to assure professionals' compliance with national norms of quality in areas where the government policy-makers themselves may lack expertise. In the field of indigent defense, standards-based assessments have become the recognized norm for guaranteeing the adequacy of criminal defense services provided to the poor. NLADA standards-based assessments utilize a modified version of the Pieczenik *Evaluation Design for Public Defender Offices*, which has been used since 1976 by NLADA and other organizations, such as the Criminal Courts Technical Assistance Project of the American University Justice Programs Office. The design incorporates reviewing budgetary, caseload and organizational information from a jurisdiction in addition to site visits to perform court observations and conduct interviews of stakeholders.

JSERI has become the standard-bearer in helping to assure local compliance with

national indigent defense norms of quality.[11] The current NLADA site assessment methodology employs the national standards as an objective measurement of an individual organization's mechanisms for effectuating key requirements of an indigent defense system including: independence, accountability, training, supervision, effective management, fiscal controls, competent representation; and workload. The NLADA team reviewed the PDS self-evaluation and prepared for an on-site visit. Individually and during conference calls, the NLADA team used the self-evaluation to determine what areas of the assessment protocol required specific on-site work. The categories into which these areas were divided were: no response provided, incomplete response provided, unclear response; and insufficient verification provided. In turn, work during the site visit was based on the NLADA team's determination that it needed to "verify," "clarify," or "further investigate" particular elements of the assessment protocol.

All divisions of PDS received some level of on-site scrutiny determined by the needs the NLADA team had previously identified. Administrative and support staff members from virtually all divisions were interviewed. In addition, the NLADA team spoke with members of the PDS Board of Trustees; representatives of the District of Columbia Mayor and City Council offices; staff members for Congress; representatives of the prosecutors; members of the U.S. Parole Commission; a representative of the Metropolitan Police Department; and prominent members of the bench before whom the PDS lawyers practice. Finally, the NLADA team visited the offices of PDS, observed supervisors at work, spoke with PDS staff members; and observed some of the PDS attorneys representing clients. Additional documentation was reviewed on-site or in some instances after the site visit, as necessary to complete the evaluation. The NLADA team met at least daily during the site visit to share insights and adjust its work.

After the site visit, the NLADA team met in conference calls and reviewed its collective writing. The NLADA team and the JSERI director, prior to submission for review of a "final draft" to the director of PDS, repeatedly refined drafts of this report. Minor changes, not affecting the substance of the NLADA team's assessment or recommendations, were made and this assessment report was submitted to PDS. The completion of the report was delayed due to a number of factors, including, but not limited to, health issues affecting the two principle authors.

Evaluation Findings

In 1973, the United States Department of Justice, Law Enforcement Assistance Administration (DOJ/LEAA) designated PDS to be an "exemplary project" – the only public defender agency in the country to receive such recognition.[12] NLADA finds that the high quality services identified in the 1973 DOJ/LEAA report not only have continued but have improved during the past three and a half decades. PDS is a model provider of indigent defense services, meeting or exceeding all recognized national standards for the delivery of indigent defense services – including those promulgated by the American Bar Association.

While no single factor is responsible for PDS' long-term provision of representation of the highest quality, three factors appear pivotal to the agency's success in that regard. First and foremost, PDS' status as an independent agency has allowed it to maintain a singular focus on providing zealous advocacy, as ethical standards require, and to set its policies and programs based upon what that high standard requires. Second, from its in-

ception, PDS' independence has allowed PDS to determine and control the workload of individual attorneys and the agency as a whole. Finally, the insistence on controlling workload has meant that the agency has sufficient funding to represent every client competently since it can limit representation to accommodate funding levels. PDS handles only as many cases as they effectively can, given the number and experience level of their attorneys at any given time.

Conclusion: The Importance of Standards to Client-Centered Representation

If the nation is ever to overcome its failures to provide equal access to justice in its myriad state and local criminal courts, then the PDS experience is one to be emulated. There is no single "cookie-cutter" delivery model (public defenders, assigned counsel, or contract defenders) that *guarantees* adequate representation.[13] What the PDS experience demonstrates, however, is that whatever the model, independent functioning and consistently enforced workload controls are the touchstones of quality representation for people with low incomes who are accused of committing a crime. Moreover, PDS' history suggests that those two factors inure not only to the benefit of individual clients, but have also allowed PDS to become a strong partner in the administration of justice in the District of Columbia and in the DC community-at-large.

Independence: The Lynchpin for Controlling Workload

CHAPTER II

Political & Judicial Interference: Muting the Right to Counsel for Poor People

In far too many regions of the United States, judges either contract directly with attorneys to provide defense services or are given complete authority to assign attorneys to cases without regard as to whether the lawyer is qualified to render competent representation. Defense attorneys (especially those who have practiced in front of the same judiciary for long periods of time) instinctively understand that their personal income is tied to "keeping the judge happy," rather than zealously advocating for their clients. And, in jurisdictions that place a high emphasis on celerity of case processing, the defense attorneys simply understand they are not to do anything that will slow down the pace of the disposing of cases, or risk the pay that a judge has been able to secure for them. Attorneys learn that filing of motions increases the life of cases – and the judge's displeasure – which in turn leads to fewer appointments or out-right termination of a contract. Through time, the defense attorney is indoctrinated into the culture of the judge's courtroom that triages the responsibilities all lawyers owe their clients.[14] Without regard to the necessary parameters of ethical representation, the caseload creeps higher and higher.[15] The attorney is in no position to refuse the dictates of the judge.

This phenomenon is most blatant in states that do not provide 100 percent state funding for indigent defense services. *Gideon* obligates states to furnish the resources necessary to provide counsel when appropriately requested.[16] And, though a handful of states funded public defender services – both before and after *Gideon* – the majority of states simply passed on this responsibility to their cities and counties as unfunded mandates.[17] Without adequate state financial support, counties with poor economic forecasts are hard-pressed to provide adequate services because they tend to have higher crime rates, a higher percentage of people qualifying for services and less resources to spend on competent representation than counties of more affluence.[18] As a result, many poor counties have turned to low-bid contract systems in which an attorney takes all of the indigent defense cases in a jurisdiction for a fixed fee. Such flat-fee contracts create a financial disincentive for the attorneys to provide adequate representation, since the attorney must pay for all case-related services (investigation, expert witnesses, etc.)[19] out of the lump sum she receives, and has no ability to limit the number of clients she will be appointed to represent. For attorneys wanting to practice

criminal law in these jurisdictions, refusing to take every case for a single flat fee effectively precludes them from practicing their chosen vocation in the area in which they live.

The answer to this crisis is to develop independence through the promulgation of standards.

A Brief Word on Prevailing National Standards of Justice

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

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

The American Bar Association's *Ten Principles of a Public Defense Delivery System* presents the most widely accepted and used version of national standards for indigent defense. Adopted in February 2002, the ABA *Ten Principles* distill the existing voluminous ABA standards for indigent defense systems to their most basic elements, which officials and policy-makers can readily review and apply.[20] In the words of the ABA Standing Committee on Legal Aid and Indigent Defendants, the *Ten Principles* "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney."[21]

The Case for Independence: American Bar Association Principle #1

All pertinent national standards call for the independence of the defense function.[22] The first of the ABA's *Ten Principles* explicitly limits judicial oversight and calls for the establishment of an independent oversight board whose members are appointed by diverse authorities, so that no single official or political party has unchecked power over the indigent defense function.

> 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.

As stated in the U.S. Department of Justice, Office of Justice Programs report, *Improving Criminal Justice Through Expanded Strategies and Innovative Collaborations: A Report of the National Symposium on Indigent Defense*: "The ethical imperative of providing quality representation to clients should not be compromised by outside interference or political attacks."[23] Courts should have no greater oversight role over lawyers representing indigent defendants than they do for attorneys representing paying clients. The courts should also have no greater oversight of indigent defense practitioners than they do over prosecutors. As far back as 1976, the National Study Commission on Defense Services concluded that: "The mediator between two adversaries cannot be permitted to make policy for one of the adversaries."[24]

To help jurisdictions in the establishment of such independent boards or commissions, NLADA has promulgated guidelines. NLADA's *Guidelines for Legal Defense Services* (Guideline 2.10) states: "A special Defender Commission should be established for every defender system, whether public or private. The Commission should consist of from nine to 13 members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented."

By way of contrast, a lack of independence negatively affects indigent defense systems in a variety of ways, depending on the type of system. For public defender offices, independence is necessary to address the concerns associated with vesting the hiring and firing of the chief executive with an official whose interests at times will invariably be at odds with the principles of "zealous advocacy," which defenders are ethically bound to provide. For example, in the case of the judiciary there is a tension between the ever present pressure to "move cases" along on the docket and the dictates of "zealous advocacy" that include adequate time to investigate and otherwise prepare for trial. If a judicial authority is also the appointing authority for the public defender, the court can remove the chief executive if it is not satisfied with the agency's performance in case processing and simply appoint an executive more apt to do the court's bidding.

PDS' Independent Board Structure

By statute,[25] the "powers of the Service" rest exclusively with an 11 member board.[26] A panel composed of: the chief judge of the District of Columbia Court of Appeals; the chief judge of the U.S. District Court, District of Columbia; the chief judge of the Superior Court of the District of Columbia; and the mayor of the District of Columbia;

appoints the board members. Board members serve staggered three-year terms and may serve no more than two consecutive terms. The PDS statute explicitly prohibits judges from serving on the board. The board alone appoints the director and deputy director of the agency.

National Standards Assessment

The composition of the PDS Board of Trustees meets the standards promulgated by both the ABA and NLADA. Formed as an independent agency from the beginning,[27] PDS has been vigilant in its continued compliance with the foundational indigent defense standard. Thus, as national standards anticipated and the remainder of this report discusses, the agency's structure has allowed its leadership to confidently set policies and practices to support high quality advocacy, even when such practices are controversial or unpopular. As the following example from PDS' history illustrates, nowhere is the relationship between independence and quality representation demonstrated more vividly than in the area of workload controls.

Despite the fact that the ABA and others have repeatedly stressed the need for caseload controls – through promulgating standards as well as ethical rules and opinions – public defenders across the country continue to accept new assignments that force them to triage professional services to their clients because of work overload. In most instances the reason for this is that the act of challenging the court or county administration over high caseloads would result in a public defender's termination of employment. In the early 1970s, PDS' independence allowed then-director Norman Lefstein to preserve caseload control, when initially challenged, without fear of risk to his livelihood or professional reputation.

During the first half of the 1970's, court appointed counsel in the District of Columbia went on strike (due to a lack of appropriations, which prevented the court from paying all of the assigned counsel vouchers). When the private attorneys declared unavailability *en masse*, the chief judge immediately asked PDS to increase its caseload. Lefstein drafted a letter that was signed by the board to the chief judge, announcing that PDS would control its availability to take cases and detailing how the assignment process would work – including enforcing vertical representation.

As may have been expected, the chief judge was less than pleased to receive such a decree. Nevertheless, with the backing of an independent board, the director stood firm in his declaration of unavailability for cases in excess of the agency's self-imposed caseload limits. The chief judge backed down, as he was unwilling to erode the tradition of excellence demonstrated by PDS throughout its early existence.[28] The DOJ/LEAA report notes that the actions of the independent PDS board and its director through its adoption of caseload controls assure that PDS provides quality services. As set forth in the next chapter, the NLADA assessment team concurs.

Workload Limitations: The Touchstone of Effective Representation

CHAPTER II

The Case for Workload Controls: American Bar Association Principle #5

If it were possible to evaluate the overall health of a jurisdiction's indigent defense system by a single criterion, the establishment of reasonable workload controls might well be the most important benchmark of an effective system. An adequate indigent defense program must have binding workload standards for the system to function, because public defenders do not generate their own work. Public defender workload is determined, at the outset, by a convergence of decisions made by other governmental agencies and beyond the control of the indigent defense providers. The legislature may criminalize additional behaviors or increase funding for new police positions that lead to increased arrests. And, as opposed to district attorneys, who can control their own caseload by dismissing marginal cases, diverting cases out of the formal criminal justice setting, or offering better plea deals, public defense attorneys are assigned their caseload by the court and are ethically bound to provide the same uniform-level of service to each of their clients.[29]

Workload controls allow public defenders to spend a reasonable amount of time fulfilling the parameters of adequate attorney performance,[30] including: meeting and interviewing a client; preparing and filing necessary motions;[31] receiving and reviewing the response to motions; conducting factual investigation, including locating and interviewing witnesses, locating and obtaining documents, locating and examining physical evidence; performing legal research; conducting motion hearings; engaging in plea negotiations with the state; conducting status conferences with the judge and prosecutor; preparing for and conducting trials; and sentencing preparation in cases where there is a guilty plea or conviction after trial.

Restricting the number of cases an attorney can reasonably handle has benefits beyond the impact on an individual client's life. For example, the overwhelming percentage of criminal cases in this country requires public defenders.[32] Therefore, the failure to adequately control workload will result in too few lawyers handling too many cases in almost every criminal court jurisdiction – leading to a burgeoning backlog of unresolved cases. The growing backlog means that people waiting for their day in court fill local jails at taxpayers' expense. Forcing public defenders to handle too many cases often leads to lapses in necessary legal preparations. Failing to do the trial right the first time results in endless appeals on the back end – delay-

ing justice to victims and defendants alike – and ever-increasing criminal justice expenditures. And, when an innocent person is sent to jail as a result of public defenders not having the time, tools, or training to effectively advocate for their clients, the true perpetrator of the crime remains free to victimize others and put public safety in jeopardy.

For all these reasons, ABA's *Principle #5* states unequivocally that defense counsel's workload must be "controlled to permit the rendering of quality representation" and that "counsel is obligated to decline appointments" when caseload limitations are breached.[33] In May 2006, the ABA's Standing Committee on Ethics and Professional Responsibility further reinforced this imperative with its *Formal Opinion 06-441*. The ABA ethics opinion observes: "[a]ll lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently."[34] Both the trial advocate and the supervising attorney with managerial control over an advocate's workload are equally bound by the ethical responsibility to refuse any new clients if the trial advocate's ability to provide competent and diligent representation to each and every one of her clients would be compromised by the additional work. Should the problem of an excessive workload not be resolved by refusing to accept new clients, *Formal Opinion 06-441* requires the attorney to move "to withdraw as counsel in existing cases to the extent necessary to bring the workload down to a manageable level, while at all times attempting to limit the prejudice to any client from whose case the lawyer has withdrawn."[35]

Determining Appropriate Workload Measures

Regulating an attorney's workload through the strict adherence to numeric caseload limits is perhaps the simplest, most common and direct safeguard against overloaded public defense attorneys and deficient defense representation for low-income people facing criminal charges. Though most prevailing national standards,[36] including the ABA *Ten Principles*, cite numeric caseload limits established in 1973 by the United States Department of Justice, National Advisory Commission (NAC) on Criminal Justice Standards and Goals[37] as a ceiling that "should in no event be exceeded," national standards are also quite explicit that jurisdictional data and practices must be taken into account when determining appropriate local standards, including, but not limited to: case complexity; prosecutorial and judicial processing practices; trial rates; sentencing practices; extent and quality of supervision; availability of investigative, social work and support staff;[38] visiting procedures in custody facilities and other activities; and attorneys' duties in addition to direct representation of clients (including training and community relations).[39]

For example, public defense practice in serious felony cases has become far more complex over the past three decades, thus significantly lowering the number of cases an attorney can handle competently. Developments in forensic evidence require significant efforts to understand, defend against and present scientific evidence and testimony of expert witnesses. New and severe sentencing schemes have developed, resulting in many mandatory minimum sentences, more "life-in-prison" sentences and complex sentencing practices that require significant legal and factual research time to prepare and present sentencing recommendations. The prosecution of sex offenders is one such area that has become more comprehensive and the sentences for sex offenses have increased dramati-

cally in severity and in their collateral consequences. Even technological advances, such as computers that allow for online legal research, motions and brief banks, and automated client contact letters, that presumably make attorney time more efficient have created heightened expectations that motions can be filed on a more expeditious time table than in the past, which places an additional burden on attorney preparation time for court hearings.[40]

By requirement of its authorizing statute, PDS may not represent more than 60 percent of individuals eligible for its services and may not represent individuals facing less than six months of incarceration.[41] Almost all misdemeanor offenses in the District of Columbia carry a maximum sentence of 180 days. Misdemeanors represent about 70 percent of the criminal docket in the District of Columbia. Under its policy directives on representation, PDS is assigned predominantly the more complex cases in every category of case that it accepts. As a result, PDS handles approximately 80 percent of the Felony I cases (e.g. homicide, rape) and the majority of those offenses with mandatory sentences and possible life sentences (e.g. armed carjacking, armed kidnapping, armed robbery). This skews the comparative use of caseloads standards that may be valid elsewhere, because the felony caseload standards anticipate more of a range in case severity than is true of the PDS caseload. This dynamic is further apparent in programs – like PDS – that are focused not only on the legal outcomes of the pending criminal charges but also on the life outcomes of their clients. While such a focus benefits the community and individual clients through reducing the risk of recidivism, it also increases staff workload. Moreover, the last 30 plus years have seen a significant increase in the collateral consequences attendant to criminal felony convictions, including the loss of eligibility for public housing and SSI benefits, leading to a correlative increase in the work that defense attorneys must devote to their cases. Among the most pressing changes in collateral consequences are those in the area of immigration consequences of criminal convictions.[42]

The complex nature of PDS cases extends to its juvenile delinquency division. Research developments in recent years have raised significant questions about adolescent brain development that require increased work by defenders who represent children. Greater understanding of family dynamics, mental illness and cultural differences has led to recognition that lawyers representing clients in delinquency cases must devote many hours to learning about their clients and presenting evidence about their history in court.

The necessary attorney hours per case in serious adult and juvenile delinquency cases must also take into account the unique nature of criminal law practice in the District of Columbia. PDS faces two potential adversaries and a multitude of local and federal law enforcement agencies that support each prosecuting authority. Juvenile cases and involuntary commitments are prosecuted by the Office of the Attorney General for the District of Columbia. Parole and supervised release violations are prosecuted by the federally-funded Court Services and Offender Supervision Agency and heard by the U.S. Parole Commission. Adult criminal cases are prosecuted by the United States Attorney's Office for the District of Columbia. Forensic work in the District of Columbia is handled by the Metropolitan Police Department, the Federal Bureau of Investigation, the Drug Enforcement Agency and the Alcohol, Tobacco and Firearms Agency.

Public defense in our nation's capital varies from that in most comparable urban systems, in that even relatively trivial elements of the practice are subject to legal formality and adversarial litigation. A good example of this is the acquisition of basic discovery material. Overwhelmingly, in comparable systems across the country, the prosecution routinely pro-

vides to the defense matters of basic discovery such as police reports. Typically, this is done early during the criminal proceeding to speed the criminal process and avoid unnecessary litigation. In the District of Columbia system, however, law enforcement agencies routinely resist providing these reports at a stage early enough to permit meaningful case preparation by the defense. The need to expend investigative resources and/or to formally seek discovery through such proceedings in court delays case preparation and requires significant time. The appropriateness of national caseload standards as a performance measure is marginal given the following factors: 1) the seriousness of cases handled; 2) the holistic client-centered practices; and, 3) the caseloads, discovery practices and resources of the prosecution.

PDS Workload Standards

PDS simply does not accept cases if in doing so they would harm a client and/or put an attorney in breach of her ethical duty to provide competent representation due to case overload. To accomplish this goal, the PDS management team starts from the belief that the high number of variables in their system forecloses the possibility of constructing strict numeric caseload standards. In short, when establishing an appropriate workload for individual attorneys at PDS, supervisors assess the following criteria: quality of representation; parity with opposing counsel; complexity of the litigation; preparation of lawyers to handle complex litigation; local practice rules; speed of turnover of cases; percentage of cases litigated to conclusion; extent of support services available to staff attorneys; court procedures and visiting procedures in custody facilities; and other activities. PDS has established a management infrastructure to closely monitor attorney workload in its various divisions[43] that takes into account all of the above referenced factors as they set appropriate workload levels for each attorney.

For example, workload in the adult criminal courts is overseen – and as necessary adjusted – by the chief of the trial division. The trial chief accomplishes this through observation of the attorneys themselves and by frequent monitoring of case-related activity on the case management database.[44] Twelve line supervisors support the trial chief, each having responsibility for workload oversight for three to four trial attorneys. PDS relies on supervisors to recognize the criteria that affect workload and to manage their legal divisions accordingly. The trial chief meets bi-weekly with all of the trial division supervisors and, based on agency goals and the assessments of the supervisors, adjusts workload through the case-assignment process,[45] including, if necessary, notifying the court of non-availability of PDS lawyers for appointment to cases.

PDS's least experienced lawyers who are in their first year of practice are expected to reach and remain at ten cases during their first year. These cases are typically "felony" delinquency matters and are subject to a 30-day speedy trial right because most of their juvenile clients are detained or placed in shelter houses.[46] In the event of an adverse outcome or a plea, disposition is supposed to occur within 15 days. Thus investigation, trial preparation and motions practice and mitigation work must all be completed within a very short time period.[47]

The general felony practice is the next level for attorneys in their second year of practice at PDS. To ensure quality representation, the target caseload for these lawyers is 20 to 30 pre-trial cases. PDS requires extensive preparation of these cases, in large part to

prepare these lawyers for the next two practice levels. The Accelerated Felony Trial Calendar (AFTC) practice involves life offenses (e.g., carjacking, armed robbery, kidnapping and clients who are detained pre-trial; these cases are subject to a 100-day speedy trial right, but the government is not required to indict until the 90th day and discovery is not required until indictment.) To ensure quality representation and parity with the caseloads of the Assistant United States Attorneys (AUSA) assigned to these cases, caseloads are not to exceed 25 pre-trial cases at this practice level. These cases typically involve civilian witnesses and forensic evidence. Given the limited discovery provided in the District of Columbia, these cases require intensive investigation to first identify and then locate witnesses.

The Felony One practice is the final practice level and involves offenses that typically are subject to the death penalty in other jurisdictions. In the District of Columbia, these offenses are often subject to sentences of life without parole. To ensure quality representation and parity with the caseloads of the AUSAs assigned to these cases, caseloads are not to exceed 20 pre-trial cases at this practice level. These cases typically involve civilian witnesses, cooperating witnesses, forensic evidence and scientific evidence. Again, given the limited discovery provided in the District of Columbia, these cases require intensive investigation to identify and locate witnesses. In addition, these cases typically involve the identification of, and consultation with, forensic experts, scientists, mental health experts and mitigation specialists.

National Standards Assessment

The PDS workload standards have withstood the test of time. The 1973 DOJ/LEAA report assessing PDS as "exemplary" noted that a caseload of 20 active felony cases suggests that a lawyer handling adult felony cases would close "between 110-120 [cases] annually." Similarly, an attorney handling delinquency cases could potentially close approximately 180 cases in a year. NLADA confirmed that PDS attorneys continue to adhere to these annual workload projections today. These disposition numbers are within the national numeric caseload standards referenced in ABA *Principle #5* and reflect appropriate variances given the seriousness of the PDS caseload and local criminal law practice in the District of Columbia.

> *"A common and well-recognized problem faced by many public defender offices is the failure to restrict the caseloads of its attorneys to a number of cases that allows each lawyer to furnish quality legal representation. This situation has developed in other jurisdictions because of a lack of independence of public defender offices…"*
>
> **U. S. Department of Justice, Law Enforcement Assistance Administration**
> ***The D.C. Public Defender Service: An Exemplary Project, 1973***

Public Defender Services' Best Practices: The Offspring of Independence & Caseload Controls

CHAPTER IV

PDS & the Balance of the American Bar Association's Ten Principles

Because of PDS' strong client-centered approach, the organization has long surpassed the minimum standards of the balance of the American Bar Association *Ten Principles* that are in their control, as detailed below. Our assessment of PDS against the ABA *Ten Principles* does not proceed in the numeric sequence in which the principles were promulgated, for ease of analysis.

A.1: Ensuring Consistent Quality Representation: The Case for Attorney Qualification, Training & Supervision Standards (Principles 6, 9 &10)

All national standards, including ABA *Principle 6*, require attorneys representing indigent clients in criminal proceedings to have the appropriate experience to handle a case competently.[48] That is, policy-makers should not assume that an attorney who is newly admitted to the bar is skilled to handle every type of case or that even an experienced real estate lawyer would have the requisite skill to adequately defend a person accused of a serious sexual assault. ABA *Principle 6* acknowledges that attorneys with basic skills can effectively handle less complicated cases and those with less serious potential consequences. However, significant training, mentoring, and supervision are needed to foster the budding skills of even the most promising new attorney before allowing her to handle more complex cases.[49]

The systemic need to foster attorneys is the thrust of the call for on going training encapsulated in ABA *Principle 9*.[50] For example, new attorney training is essential to cover matters not typically taught in law school, such as how to interview a client; the level of investigation, legal research, and other preparation necessary for a competent defense; trial tactics; relevant case law; and ethical obligations. Effective training includes a thorough introduction to the workings of the indigent defense system, the district attorney's office, the court system and the probation and sheriff's departments, as well as any other corrections components. It makes use of role playing and other mock exercises and videotapes to record student work on required skills, such as direct and cross-examination and interviews (or mock inter-

views) of clients, which are then played back and critiqued by a more experienced attorney or supervisor.

As *Principle 9* indicates, training should be an on going facet of a public defender agency. Skills need to be refined and expanded, and knowledge needs to be updated as laws change and practices in related fields evolve. As the practice of law grows more complex each day, even the most skilled attorney practicing criminal law must undergo training to stay abreast of such continually changing fields as forensic sciences and police eye witness identification procedures, while also learning to recognize signs of mental illness or substance abuse in a client.[51]

Such training should not be limited to theoretical knowledge. Defense practitioners also must gain practical trial experience by serving as co-counsel in a mentoring situation on a number of serious crimes, and/or having competently completed a number of trials on less serious cases, *before* accepting appointments on serious felonies. Moreover, the authority to decide whether or not an attorney has garnered the requisite experience and training to begin handling serious cases as first chair should be given to an experienced criminal defense lawyer who can review past case files and continue to supervise, or serve as co-counsel, as the newly qualified attorney begins defending her initial serious felony cases – all as demanded by ABA *Principle 10*.[52]

Without supervision, attorneys are left to determine on their own what constitutes competent representation and will often fall short of that mark. To help attorneys, an effective performance plan should be developed – one that is much more than an evaluation form or process for monitoring compliance with standards – and should include: a) clear plan objectives;[53] b) specific performance guidelines;[54] c) specific tools and processes for assessing how people are performing relative to those expectations and what training or other support they need to meet performance expectations;[55] and d) specific processes for providing training, supervision and other resources that are necessary to support performance success.

A.2: PDS' Quality Control Systems

By statute, PDS is limited to appointment in cases involving serious criminal charges.[56] It therefore faces the challenge of how to build a staff of qualified attorneys without the opportunity normally afforded other public defender offices to train attorneys on traffic or low-level cases.

PDS has risen to the challenge by creating an intensive new attorney training program and sophisticated mentoring and supervision structure. All newly hired lawyers experience a full 36 months of dedicated training resources.[57] For the first eight-weeks of employment, recent hires undergo all day training, agency and justice system orientation, and an advocacy skills building program, during which time the new attorneys have no client or caseload responsibilities. Current and former PDS attorneys and staff actively participate in this training process, which communicates PDS' client-centered culture and expectation of excellence. The new attorney class also receive extensive written materials to support their advocacy and practice needs, as well as their ethical and professional responsibilities.[58]

After an initial eight-week period of individualized training, attorneys are assigned to the juvenile section. During their rotation in the juvenile division, new hires are super-

vised closely with supervisors having only three to four supervisees at a time. In addition these new hires begin the four-year sequence of Trial Practice Groups (TPG's). Case assignment and case intake is restricted to accommodate the attorney's relative lack of experience.[59] The trial chief, the training director, the deputy trial chief for the juvenile section, and the two supervising attorneys closely monitor juvenile section attorney case assignments, so these new attorneys have a workload that builds during the course of the training year in the juvenile section.[60] Through this close supervisory process, TPG's newest attorneys receive extensive instruction on how to investigate cases (done in teams of two attorneys and assisted by investigator interns in the summer months); prepare cases for trial; draft and file appropriate motions; litigate motions and adjudicatory hearings; and prepare/present appropriate disposition arguments and alternative placement recommendations.

After the initial eight-week intensive training, TPG lawyers continue to receive training through a variety of programs. Juvenile lawyers, general felony lawyers, and AFTC lawyers are required to participate in "Trial Practice Groups" that meet bi-monthly and alternate between substantive law and trial skills exercises. The TPG's are run by supervising attorneys using a four-year, tiered program developed by the training director. PDS also produces three annual programs for both its staff lawyers and the panel attorneys: the spring Forensic Science Conference, which is a day and a half dedicated to forensic science training that brings both practitioners and experts to produce interactive programs on such topics as DNA, fingerprints, ballistics and crime scene reconstruction; a summer series of twice-weekly lectures on new topics in criminal law, mitigation and the collateral consequences of criminal convictions; and the "Criminal Practice Institute," a two-day program on criminal law and practice produced each fall. Other training is provided during judicial training breaks and attendance at training around the country is encouraged for every division at PDS.

The training process at PDS is greatly enhanced by the recent addition of the digital, electronic moot courtroom and its adjoining training room, located across the street from the main office building. The moot courtroom with its judicial dais, jury box, and counsel tables offers state of the art technology that would, for example, fully permit attorneys to practice using PowerPoint presentations as part of a witness examination or as part of closing argument.[61]

PDS' attorneys heavily rely upon the professional services and support provided by offender rehabilitation division (ORD) program developers (social workers), who are part of the defense team. ORD program developers train the new class of attorneys during their initial eight-week training program and work with the attorneys on their juvenile cases, including explaining the available treatment modalities as well as the funding intricacies that may affect acceptance and eligibility for a program placement. ORD program developers also educate attorneys, judges, probation officers, law students and many other criminal justice system stakeholders.

Following the juvenile section experience, PDS typically judges whether new attorneys have acquired the skills necessary to represent adult clients accused of felonies and transfers the attorneys to the general felony section of the trial division. Supervision in the felony sections is also intensive. Line supervisors are responsible for three or four attorneys, while the trial chief and assistant trial chief also provide direct attorney supervision. This intensity of supervision augments the quality of representation in individual felony cases. It also permits the attorneys to directly interact with PDS's most experienced attorneys

with respect to advanced trial skills and tactical decision-making. There is very much a mentoring relationship between attorneys assigned to the trial division and their supervisors. This mentoring experience is enhanced through a practice of using co-counsel opportunities to develop less experienced attorneys and fully staff serious cases. The intensive supervisor-lawyer interaction in the division helps to offset deficits of experience of individual trial attorneys.[62]

Moreover, an intern program has been in existence at PDS for more than 20 years. It was the sole source of investigation for PDS cases prior to the increased funding PDS received as a result of the Revitalization Act. The program adds 20 to 50 bright, energetic college students to the PDS ranks every semester. These candidates are selected from a much larger applicant pool. Each intern participates in a week-long training program staffed by attorneys and investigators. Once the intern completes the training, the intern is paired with another intern and the pair is assigned to two attorneys. The interns report directly to the attorneys and receive additional supervision from the intern coordinator.[63]

Part of the success of the intern program rests with the requirement that new attorneys investigate their own cases. Following their eight-week training and while their caseloads are at a level designed to accommodate this additional work, juvenile attorneys pair with one of their colleagues to conduct case investigations. These attorneys gain valuable experience talking with government witnesses in the field; taking detailed written statements; measuring, diagramming and assessing crime scenes; locating documents; and using databases to locate and uncover information about possible witnesses. Cases in the juvenile division go to trial relatively quickly, allowing lawyers to develop an appreciation for detailed written statements that allow for solid impeachment and the advantage gained through familiarity with the crime scene and the background of government and defense witnesses. These attorneys are then uniquely equipped to prepare detailed investigation memos and provide specific direction to interns and later to staff investigators. Most attorneys accompany their interns whenever a critical witness is being interviewed until that intern proves his or her ability to take a detailed written statement from government witnesses. The use of interns allows PDS to devote its most experienced staff to its most difficult and complex cases. Given the other demands on Felony I and Felony II high attorneys (supervision duties, longer trials, extended jail visits to talk with clients), this group most needs investigators that can work independently and still produce high quality work. The use of interns also allows PDS to maintain an acceptable caseload level for investigators and interns, assuring that each case is completely investigated.[64]

The appellate division handles direct appeals for PDS clients. It also provides a broad range of consultative service, research support, training and technical assistance to the trial division and to panel attorneys. Perhaps the strongest comment about the quality of its services is the fact that the District of Columbia Court of Appeals regularly invites the appellate division to file amicus briefs in non-PDS cases that involve unique or complicated legal issues.[65] PDS' appellate division has a long standing practice of conducting two moots before every oral argument. The moots employ a cross section of senior and junior lawyers assigned to participate as judges. All participants review the briefs in advance. The moots are formal, long and grueling. At the completion of the moot, the floor is opened for an informal discussion/critique of the presentation and alternatives to be considered. Each moot is training for the lawyer arguing the particular case and for the less experienced appellate lawyers who participate in the moot as judges. In addition, the appellate division requires extensive interaction when drafting briefs. Appellate division moots and

the editing process function both as ongoing training and ongoing performance review.

In addition to the three annual training conferences discussed previously, PDS also conducts other training for the development of its own staff and to promote quality defense. PDS's investigations division provides a weeklong initial training for Criminal Justice Act (CJA) investigators and provides ongoing training on an annual basis. PDS also provides periodic training for attorneys seeking admission to the family court panel. Finally, PDS attorneys and program developers provide training for public defenders across the country participating in a wide variety of conferences and programs hosted by defender organizations and universities.

PDS' written performance guidelines for trial attorneys and trial division supervisors are contained in the *Trial Division Manual*, which contains a comprehensive "Client's Bill of Rights" (CBR), "Criteria for Trial Division Lawyers and Supervisors," "Trial Preparation Outline" and "Trial Division - Administrative Matters." There is also a "Lawyer Development Plan" form (based on the criteria in the *Trial Division Manual*), used by trial division supervisors to evaluate the performance of the attorneys they supervise. In addition, there are memos describing the "Procedure for Moving from General Felony Practice Level to Serious Felony Practice Level" and the "Procedure for Moving from Serious Felony Practice Level to Felony One Practice Level."

Trial division supervisors generally supervise three attorneys, in addition to carrying a limited caseload. Supervisors are expected to meet with the attorneys they supervise on a regular basis to review the supervisees' cases, including motions, opening and closing arguments and examination of witnesses. Supervisors are also expected to conduct courtroom observations of the attorneys they supervise. In addition, supervisors can, to some extent, track the work of the attorneys they supervise through their case-tracking system. Trial division attorneys (at least those below the Felony I level) are evaluated with the "Lawyer Development Plan" every three months. Trial division attorneys generally rotate to a new supervisor every year. Trial division supervisors, according to what the NLADA study team was told, are not formally evaluated.

A.3: Assessment of Principles 6, 9 & 10

PDS meets ABA *Principle 6* with respect to trial division attorneys. Close supervision and assiduous oversight and tracking of workload support the matching of case complexity to individual capacity. Able, hard-working attorneys and support staff prepare their cases thoroughly, care about their clients and have high practice standards. There is a thoughtful, progressive movement of attorneys into more complicated and serious work. The attorneys seem excited about and dedicated to their work. Many of the trial division attorneys are relatively inexperienced for the cases they are handling, but they have supervision and opportunity to consult with others and to prepare for their cases.

PDS exceeds the requirements of *Principle 9* with respect to the training provided to trial and appellate division attorneys. PDS has made a strong institutional commitment to the training of its trial and appellate attorneys, and it provides them with systemic and comprehensive training, education and development programs. PDS has made an equally strong commitment to the training and development of attorneys receiving court appointments under the Criminal Justice Act. In summary, the training for PDS staff includes the following: a one-week training for interns and law clerks; a three-week training for new

staff investigators; a one-week training for new appellate attorneys; an eight-week long training for new trial division attorneys; and a one-week training for juvenile section lawyers transferring into adult court. Ongoing training includes the following: the trial division conducts bi-monthly Trial Practice Groups for each practice level; the offender rehabilitation division conducts bi-monthly formal case rounds discussions; and the appellate division conducts ongoing training through moot arguments. The parole, mental health and investigations divisions all conduct periodic staff meetings that include discussions of cases and updates in the divisions' practice. All divisions, legal and non-legal, have the opportunity to send staff to conferences, and in FY05 every division sent at least one staff member to training outside of PDS. All divisions have access to internal IT training and the IT department has a position dedicated to training. All divisions receive annual ethics training.

Moreover, since the NLADA team visited PDS, PDS has taken several more steps to further develop its training program. Prior to the NLADA visit, PDS modified its training director position and tasked that position with developing a PDS-wide training program for all direct services divisions (e.g. trial, investigations and offender rehabilitation divisions). The first priority for the position was developing a three-year Trial Practice Group (TPG) plan to be implemented by the trial chief and the other trial division supervisors in the trial division. That plan has been completed, materials have been developed, and implementation began. The training director's next area of focus will be developing training for trial division supervisors.

PDS believes that development of a training program for the administrative portion of PDS (e.g., budget & finance, facilities, administration) will require a different knowledge base than the knowledge base it seeks in its training director. As this group represents only 15 percent of PDS' total workforce, PDS believes this program is best developed through the human resources division in conjunction with the division chiefs and should rely primarily on training provided by outside vendors with specific expertise.

PDS' strong commitment to excellent client-centered representation is reflected in the close supervision (formal and/or informal) that attorney and non-attorney staff members receive, which exceeds the requirements of *Principle 10*. Supervision and performance reviews appear to be conducted in a professional, constructive manner, which ensures that they are viewed by those being supervised and is aimed at providing them with the skills they need to do the best possible job for PDS clients. PDS is developing an office-wide performance evaluation system and expanding its employee manual.

B.1: Fostering a Positive Attorney/Client Relationship: The Case for Early Entry into Cases, Continuous Representation, and Confidentiality (Principles 3, 4 & 7)

Requirements of prompt appointment of counsel are based on the constitutional requirement that the right to counsel attaches at "critical stages" that occur before trial, such as custodial interrogations,[66] lineups[67] and preliminary hearings.[68] In 1991, the U.S. Supreme Court ruled that one critical stage – the probable cause determination, often conducted at arraignment – is constitutionally required to be conducted within 48 hours of arrest.[69] Most standards take these requirements beyond the constitutional minimum requirement, to be triggered by detention or request even though for-

mal charges may not have been filed, in order to encourage early interviews, investigation and resolution of cases, and to avoid discrimination between the outcomes of cases involving indigent and non-indigent defendants.[70]

The third of the ABA's *Ten Principles* addresses the obligation of indigent defense systems to provide for prompt financial eligibility screening of defendants, toward the goal of early appointment of counsel.[71] Standardized procedures for client eligibility screening serve the interest of uniformity and equality of treatment of defendants with limited resources. When individual courts and jurisdictions are free to define financial eligibility as they see fit – e.g., ranging from "absolutely destitute" to "inability to obtain adequate representation without substantial hardship," with factors such as employment or ability to post bond considered disqualifying in some jurisdictions but not in others – then the resulting unequal application of the Sixth Amendment has been suggested by the National Study Commission on Defense Services to constitute a violation of both due process and equal protection.[72]

Once a client has been deemed eligible for services and an attorney is appointed, *Principle 4* demands that the attorney be provided sufficient time and a confidential space to meet with the client.[73] As the *Principle* itself states, the purpose is "to ensure confidential communications" between attorney and client. This effectuates the individual attorney's professional ethical obligation to preserve attorney-client confidences,[74] the breach of which is punishable by bar disciplinary action. It also effectuates the responsibility of the jurisdiction and the indigent defense system to provide a structure in which confidentiality may be preserved[75] – perhaps nowhere more important than in indigent criminal defense, where liberty and even life are at stake and client mistrust of the public defender as a paid agent of the state is high.[76]

The trust that is fostered in those early stages would not mean much if the client never saw the same attorney again. For this reason, ABA *Principle 7* demands that the same attorney continue to represent the client – whenever possible – throughout the life of the case.[77] Though it may seem intuitive to have an attorney work a case from beginning to end, many jurisdictions employ an assembly line approach to justice whereby a different attorney handles each separate part of a client's case (i.e., arraignment, pre-trial conferences, trial, etc.). Standards on this subject note that the reasons for public defender offices to employ the assembly line model are usually related to saving money and time. Lawyers need only sit in one place all day long, receiving a stream of clients and files and then passing them onto another lawyer for the next stage, in the manner of an "assembly line."[78]

But standards uniformly and explicitly reject this approach to representation[79] for very clear reasons: it inhibits the establishment of an attorney-client relationship; fosters in attorneys a lack of accountability and responsibility for the outcome of a case; increases the likelihood of omissions of necessary work as the case passes between attorneys, is not cost-effective; and is demoralizing to clients as they are re-interviewed by a parade of staff.[80]

B.2: The PDS Approach to Fostering Client Trust

All defendants facing the possibility of incarceration as a result of conviction in the District of Columbia are screened for eligibility for court-appointed counsel prior to the first appearance in court. The Defender Services Office (DSO) conducts this el-

igibility interview in the courthouse cellblock prior to the initial appearance,[81] using Department of Labor regulations governing Temporary Assistance to Needy Families.[82] Alleged misdemeanants and felons with monthly income of less than $1,035/mo are deemed eligible.[83] The criteria are the same for both in- and out-of-custody defendants. Answers to the eligibility questionnaire are given under oath. Observations of Superior Court arraignments on two separate occasions showed every defendant qualifying for court appointed counsel. In cases of questionable eligibility the matter is referred to a judge who, probably for the sake of court efficiency, tends to order appointment. A denial by DSO of court-appointed counsel can be reviewed by the court.

Following the determination that the defendant is eligible for court-appointed counsel, DSO uses it case-tracking system to prepare a docket, subject to approval by the assigned appointing judge, of the day's calendar and the appointments. Typically PDS receives some general felonies and almost all of the major felonies; the private bar and clinical programs receive most of the general felonies and virtually all of the misdemeanors. The docket is provided to the magistrate judge presiding over the initial appearances and posted outside the courtroom.

PDS attorneys do meet with the clients before the initial appearance and conduct the initial interview "as soon as possible" after the initial court appearance, using model forms adapted by the attorneys to their practice. These forms are designed to obtain information both about the facts of the case and the client's background - including information that will support arguments related to the client's bond status. During the site visit, the NLADA team confirmed what PDS reported, namely that there is no confidential meeting space in the courthouse for attorney/client meetings prior to the defendants' initial court appearance. Rather, these interviews are conducted in the cellblock in space designed for that purpose, but without any protections for confidentiality, with the result that interviews are conducted within earshot of other defendants who are awaiting appearance.

The NLADA team did not visit the DC jail during the site visit. However, PDS reported that, while the jail has attorney/client meeting rooms that allow for confidential communications, these rooms are sometimes full, requiring either a wait or meetings in less confidential space. When attorneys wait for confidential meeting space, the delays can be considerable. For example, one trial division supervisor reported he spent four and a half hours at the jail seeing two clients – of which three hours were spent waiting and one and a half hours with the clients.[84] PDS has sufficient confidential meeting space in its offices, though very few clients come to the PDS office because most of them are in custody.

PDS is committed to having the same attorney represent a client throughout the life of a case. An unusual aspect of PDS' continuous representation policy is that the juvenile attorneys keep their open cases with them when they transfer to adult felony work. Because the court for juveniles is not in a different location and because caseloads are low, it seems quite possible for this practice to work effectively, but it delays to some extent the lawyers' adjustment to the adult felony practice. The NLADA team was told that juvenile attorneys keep the cases until the child turns 21. We also were told that if there has been a long interval between a disposition and a new charge then a new juvenile attorney would take the case. There is a meeting with a supervisor when a juvenile attorney goes to adult felonies to determine which cases need to be transferred.

B.3: Assessment of Principles 3, 4 & 7

PDS exceeds the requirements of *Principle 3*. Counsel is provided within 24 hours of arrest to all persons who are financially unable to obtain adequate representation without substantial hardship.[85] A determination of eligibility using a questionnaire is made for all defendants by PDS, subject to a review by the court of any determination of ineligibility.[86] Reimbursement for counsel is not generally required.[87]

As part of its commitment to client-centered representation, PDS ensures that attorneys meet with clients prior to the initial court appearance – although a more in-depth interview is conducted as soon as possible after the initial court appearance. Appellate division attorneys travel to prisons across the country to conduct in-person meetings with their clients. And, PDS is committed to continuous representation – exceeding normal expectations of *Principle 7*.

The lack of adequate confidential meeting space in the courthouse and at the jail is a major, chronic problem for DC defendants and their attorneys, whether PDS, CJA appointed, or privately retained. However, the confidentiality issue is not within the sole purview of PDS and NLADA is confident that PDS continues to fight for more private meeting space as required under *Principle 4*.

C.1: Creating a Level Playing Field: Prosecutor & Defender Parity (Principle 8)

ABA *Principle 8* requires parity between the resources of the public defender and those of the prosecutor, including "parity of workload, salaries and other resources."[88] One of the reasons the *Gideon* Court determined that defense lawyers were "necessities" rather than "luxuries" was the simple acknowledgement that states "quite properly spend vast sums of money" to establish a "machinery" to prosecute offenders. This "machinery" – including federal, state and local law enforcement (FBI, state police, sheriffs), federal and state crime labs, state retained experts, etc. – can overwhelm a defendant unless she is equipped with analogous resources. Without such resources, the defense is unable to play its appropriate roles of testing the accuracy of the prosecution evidence, exposing unreliable evidence and serving as a check against prosecutorial or police overreaching.

In 1972, Chief Justice Warren Burger in his concurring opinion in *Argersinger* even went so far as to state that "society's goal should be that the system for providing counsel and facilities for the defense should be as good as the system that society provides for the prosecution."[89] The Chief Justice's comments reflect the interrelatedness of the various components that make up the criminal justice system. The actions of any one component necessarily causes reaction in each of the other interrelated agencies, either positively or negatively. Just as an illness in any one area of the body threatens the overall health of the entire complex human structure, the failure of any individual component of the legal system – be it police, prosecution, courts, public defense, corrections or probation – threatens the ability of the entire system to dispense justice both uniformly and effectively. U.S. Attorney General Janet Reno stated in 1999: "If one leg of the system is weaker than the others, the whole system will ultimately falter."

The Justice Department's 1999 report, *Improving Criminal Justice*, concludes that:

> Salary parity between prosecutors and defenders at all experience levels is an important means of reducing staff turnover and avoiding related recruitment/training costs and disruptions to the office and case processing. Concomitant with salary parity is the need to maintain comparable staffing and workloads – the innately linked notions of "equal pay" for "equal work." The concept of parity includes all related resource allocations, including support, investigative and expert services, physical facilities such as a law library, computers and proximity to the courthouse, as well as institutional issues such as access to federal grant programs and student loan forgiveness options.[90]

C.2: Assessment of ABA Principle 8

An assessment of this standard is complicated by the nature of the indigent defense system in the District of Columbia and the limits of this study. The NLADA team did not have access to comparative salary and benefits data for the prosecutorial agencies in DC, the United States Attorney's Office (adult criminal matters), or Office of the Attorney General (juvenile delinquency matters and traffic cases), and their support staff. Consequently, this aspect of parity could not be assessed.[91] However, the data provided to the NLADA team on attorney pay shows it to be somewhat less than that of several other offices in urban areas of which the NLADA team is aware.[92]

PDS actively participates in and contributes to a broad variety of justice system committees, work groups and policy-setting bodies. Our meetings with District of Columbia officials, judicial officers and prosecutors validates that PDS not only participates as a full partner, but also is a major contributor to the work product of these functions.

The NLADA team did, however, note one apparent disadvantage suffered by PDS compared to the prosecution. The United States Attorney accesses the immense investigative and forensic resources of the District of Columbia Metropolitan Police Department along with many federal law enforcement agencies located in the District of Columbia.[93] While dedicated and obviously skilled, PDS investigation staff has nowhere near the combined resources of these agencies. PDS addresses this through extensive use of independent experts and private laboratories. The funding for these services comes from the very small portion of PDS's budget that is not tied to payroll and required administrative services (e.g. rent). Any reduction in funds in this area could significantly diminish the quality of representation PDS is currently able to provide.

D.1: Keeping the Private Bar Involved (Principle 2)

Several reports have concluded that public defender offices provide efficient and cost-effective representation in jurisdictions with sufficient caseload due to a number of factors, including: familiarity with criminal law; specialization for certain types of cases; and, centralization of administrative costs.[94] At the same time, ABA *Principle 2* recognizes the benefit of maintaining private bar involvement, especially in regard to innovation.[95]

The number of indigent defense cases in the District of Columbia requires the active participation and cooperation of the private bar. The caseload of PDS is limited by statute[96] both in number and by type of case, leaving the numerical majority of cases to be handled

by attorneys in private practice who have applied and been selected to participate on one or more of the panels.[97]

In addition to performing the eligibility interviews and processing the docket of initial appearances, the DSO is the contact for private attorneys to notify the court of their availability for appointments and a source for judges when they require additional attorneys for appointment. Some members of the private bar will indicate their availability virtually every day. There does not appear to be a weekly or monthly schedule of rotation of attorneys. Attorneys new to the panel list are only eligible to be placed on a provisional list for minor criminal offenses. However, the court does not employ strict, detailed qualification standards for appointment of attorneys to various types of cases.

After six to eight months, a provisional list attorney may apply in writing to be allowed more serious appointments. A panel of 11 judges and magistrates then informally investigates and reviews that attorney's performance and makes the appropriate placement. Attorneys are allowed to indicate to the court and to DSO unavailability for appointment to certain types of cases (e.g. domestic violence or sexual offenses). From a judicial administration standpoint, the system for the appointment of cases both to PDS and to the private bar is laudable.

An efficient system has been developed that starts early in the morning with DSO receiving a list from the Metropolitan Police Department of all arrestees who will make their initial appearance in court that afternoon. Checks are made for conflicts of interest and pending cases; if a defendant has pending cases, where appropriate current counsel is appointed to the new case. DSO prepares a preliminary docket pending screening for financial eligibility. The docket is then finalized with recommended assignments for PDS, pursuant to instructions from the trial chief, and the remainder of the cases are assigned to individual panel attorneys or to clinics supervised by the local law schools. Once the docket is approved by the appointing judge, the docket is posted outside of the arraignment courtroom wall in advance of the court coming into session, allowing attorneys sufficient time to gather documentation and to make initial contact with the new client within 24 hours of arrest and to be present at the initial appearance in compliance with the recent *Rothgery* decision.

D.2: Assessment of Principle 2

The plan for legal representation in the Superior Court of the District of Columbia does include, indeed relies upon, the substantial participation by assigned counsel.[98] The DSO provides administrative assistance central to ensuring predictability and continuity to the processes of the court and leads to the timely appointment of counsel. The DSO provides competent staff able to advise and assist judges and privately assigned counsel at the appointment phase.[99] The plan, however, requires that the court select the panels, make individual appointment and review payment requests. While the plan provides for set fees, hourly rates and investigative services or expert services upon request,[100] there are no specific mechanisms in place to create independence from the court or for an independent review of the adequacy of the funding for specific cases or services. The quality of the panel system is, however, beyond the scope of this evaluation.

Holistic & Community Defense Representation: A Different Model Resulting from the Client-Centered Approach

During the last decade there has been a notable shift of attitudes and approaches to representation within the criminal defense community across the country. Driven by both internal and external forces, these changes challenge traditional notions of defense representation and traditional roles of defense lawyers. As opposed to prosecutors, who necessarily have to take an adversarial approach to defendants, public defenders have a unique chance to not only address a client's specific criminal charges, but to use the trauma of a criminal arrest for positive gain by addressing specific life-issues that may have led to the alleged criminal activity. For instance, the client may have substance abuse issues, public housing issues, immigration issues, or, in the case of children, educational needs that are not being met. By addressing the full array of client issues, public defenders can both reduce justice expenditures *and*, more importantly, potentially reduce the chances that a client will re-offend. Client-centered offices typically have lawyers, investigators, social workers and psychologists on staff to offer this fuller range of services.[101]

Such client-centered services work best when the defender office is woven into the fabric of the community that the public defender program represents. The most effective way to achieve this is to physically locate the public defender office in the community it serves. The community defender office is thereby seen as a safe-haven where anyone can seek legal advice or air community concerns of any nature. Some community-based offices around the country provide community education on what a juvenile or adult should do when arrested, understanding the court process, or advising persons on their rights and responsibilities even before an arrest has occurred. Because these suggestions come from a known and trusted source that is non-adversarial, public education campaigns by community-based public defender offices may result in the police encountering less hostility during arrests, courts experiencing defendants with more understanding of the justice system, and the community-at-large experiencing a greater stability.[102]

The impact of client-centered, community-based services is most noticeable in the lives of juveniles facing delinquency proceedings. At-risk juveniles, in particular, require special attention from public defenders if there is hope to change behavior and prevent escalating behavioral problems that increase the risk they will eventually be brought into the adult criminal justice system in later years. These are commonly children who have been neglected by parents and the range of other support structures that normally channel children in appropriate constructive directions. When they are brought to court and given a public defender who has no resources and a caseload that dictates that he dispose of cases as quickly as possible, the message of neglect and valuelessness continues, and the risk of not only recidivism, but of escalation of misconduct, increases.[103]

By ensuring that attorneys have the time and independence to effectively advocate for their clients through caseload controls, Public Defender Services for the District of Columbia has been at the forefront of this movement toward holistic, community-based defense representation. PDS offices are very accessible to clients, and its attorneys and staff engage in a wide array of client-centered best practices and community involvement. The Community Defender Program (CDP) provides a broad range of legal services to adults and juveniles in a community-based setting. The CDP's community work is done in the areas of collateral consequences of criminal convictions, offender re-entry, administrative hear-

ings in the District's juvenile detention facilities and institutional issues facing District of Columbia adult inmates incarcerated in facilities through the country.[104] CDP also participates in community forums, conducts community-based conferences and trainings, and participates in a number of consortiums.

The special litigation division supports PDS trial lawyers in the litigation of systemic criminal justice issues, including eyewitness identification issues, forensic issues and issues pertaining to the suppression of exculpatory information by the government. The division also brings civil rights and constitutional lawsuits designed to change systemic criminal justice practices through the use of courts' injunctive relief powers. In the course of this litigation, SLD attorneys have appeared before every court in the District of Columbia – the Superior Court and Court of Appeals in the local system; and the District Court for the District of Columbia, the Court of Appeals for the D.C. Circuit and the U.S. Supreme Court in the federal system.

The civil legal services division specializes in advocacy for children under the Individuals with Disabilities in Education Act (IDEA). Most of the clients are involved in the juvenile delinquency system. The IDEA guarantees rights in education to children who have learning and mental disabilities. Civil legal services division advocacy is directed at assuring these services to PDS clients in a fashion that benefits them in the juvenile court process. As in the case of other Divisions, it also provides consultative and support services, developing expertise in civil litigation involving collateral consequences of criminal charges (e.g. neglect proceedings, child support) and in the intersection of the criminal proceedings and immigration consequences.

The offender rehabilitation division (ORD) assesses the social, health and background circumstances of PDS clients for use in sentence mitigation and case disposition. This information is used to develop alternatives to incarceration, treatment, job or educational placement, housing and rehabilitative services. While these types of services represent relatively new and vanguard approaches for other public defense providers across the county, ORD services have existed since 1964.[105] Because of its expertise and success, ORD provides consultation and courtesy services to judges, CJA Panel attorneys, and others involved in the criminal justice system.

The mental health division (MHD) provides representation to persons for whom civil commitment is sought because they are mentally ill or mentally retarded. It also represents individuals who have been judicially committed by the criminal courts, such as commitments after a finding of not guilty by reason of insanity. The mental health division also provides consultative services and second chair resources to lawyers in the trial division in cases that involve complicated mental health and forensic commitment issues. The mental health division was a major contributor to the recent enactment of new civil commitment laws in the District of Columbia that contain significantly greater patients' rights provisions and commitment protections.

Even the Best Can Get Better

CHAPTER V

PDS is one of the most effective public defender offices in the country. However, quality can be continuously improved. This chapter highlights issues that PDS leadership may want to consider as it strives to maintain its client-centered approach.

1. Consider Evaluating the Need to Reduce Supervisors Caseload

Division chiefs and line supervisors carry caseloads, often involving difficult cases and sometimes in numbers equivalent to staff attorneys. In the nationwide public defender community, there continues to be disparate approaches to the issue of supervisor caseloads. Those that favor supervisors doing casework, such as PDS, believe that the legal abilities of experienced managers benefit clients, set a good organizational example and keep the managers close to the practice. Those that disfavor the practice believe that handling cases diminishes manager oversight and supervision and distracts managers from implementing policy. The assessment team has not taken a position on this issue. However, we do encourage all defender organizations to regularly evaluate the merits of these positions and adjust their management practices according to current need.

In weighing that decision, PDS should know that while most of the trial division attorneys and supervisors the NLADA study team met with describe the supervision as good; there were concerns expressed by some trial division supervisors and attorneys that supervisors do not have enough time to perform adequate supervision and that some supervisors seem to take their responsibilities more seriously than others. These staff said that supervisors are not always available to meet with them on a regular basis and/or to observe them in court, and the staff believe that going to another trial division supervisor for advice is not sufficient.

Given these concerns, PDS should seriously consider eliminating the requirement that supervisors carry caseloads.[106] As an alternative, supervisors could handle one or two cases periodically, but those should not be major cases. PDS should also conduct periodic, formal evaluations of supervisors. Using the example of the *Trial Division Manual*, PDS should consider developing written performance guidelines for all divisions and sections within the office (tailored to the specific division/section) and for the support staff. PDS should continue to expand and refine its employee manual. PDS

should continue its development of an office-wide performance evaluation system, which should include assessment of supervisory functions.

2. Consider Formalizing Rotations to Reduce Turnover

A significant number of attorneys leave PDS comparatively soon after they achieve the ability to handle felony cases independently.[107] The NLADA team concluded from interviews that it is common for attorneys to leave within a few years of hiring because they dislike the intensity of PDS's felony practice or because some simply "burnout." There appears to be an institutional acceptance in PDS of early exits from the trial division simply because the priority set by management is service quality.

Attorney longevity appears to be greater in legal divisions other than in the trial division.[108] Attorney longevity may be increased in the felony sections of the trial division by regular mandatory rotations into and out of this high-intensity practice. This may obviate some of the turnover related to stress, family and personal obligations and instances of "burnout." Rotations of attorneys from other legal divisions would supply the trial division with rested attorneys who have valuable experience in PDS's specialty practices. For example, attorneys who have appellate, civil rights, education or mental health law experience could bring valuable knowledge directly into the felony practice. The NLADA team recognizes that this sort of rotation is already done to a limited extent, however, formalizing these rotations and making them mandatory would assure the effectiveness of this practice.

Further, rotations from other legal divisions into the juvenile section of the trial division may enhance the level of delinquency practice and provide valuable experience in complex juvenile cases. These rotations might be from the felony sections or from the legal divisions that have specialty practices. An additional benefit would be the increased availability of mentoring and supervision for attorneys new to PDS.[109]

3. Consider Creating a Full-Time Training Director

Numerous PDS staff members actively participate in the training process and direct training programs. However, there is no one individual who has primary responsibility for articulating PDS' organizational training goals and objectives, developing an office-wide training plan, program development and the training budget. PDS may want to consider whether it would benefit from having a permanent, non-rotating training director to assume these responsibilities.

A training director could work toward the goal of continuing PDS' management and leadership training initiative for the executive team, as well as for its division and section managers and supervisors. PDS should also work toward its goal of expanding the internal training process for non-lawyer staff members. PDS may want to look at programs offered to non-lawyer staff by the Defender Association of Philadelphia and the Kentucky Department of Public Advocacy.

4. Consider Creating the Position of a Full-Time Assigned Counsel Administrator

NLADA standards call for an independent attorney assigned counsel administrator.[110] The present system could be modified to require Panel lawyers' appearance on certain dates to assure that assignments are not being made merely because certain lawyers are always present at arraignments.[111] Such an administrator could coordinate with DSO the assignment of Panel cases. An independent administrator could also more properly fulfill functions now being carried out by the court: approval of attorney fees; approval of attorney expenses; oversight of attorney qualification; and training.[112] This assessment did not encompass a statistical or performance audit of the private bar function. Anecdotal evidence suggests that judges frequently cut attorney fee requests; there is no standardized review of private bar qualifications or performance evaluations; judges make individual appointments based on favoritism; and, there have been recent prosecutions of attorneys for fraudulent billing. NLADA acknowledges that these changes would require legislative and or rule changes to the CJA Plan.

5. Draft Bylaws

The process of appointment of board members is not described in statute or in any form of written protocol. By practice, the board notifies the appointing panel of vacancies and, effectively, nominates individuals to fill those vacancies. The actual appointment transpires in a relatively informal fashion. On occasion the panel has conducted a conference call or has circulated an authorizing memorandum for signature. Interviewed board representatives and panel members could not recall disagreement or dissent concerning appointment of board members. NLADA saw no evidence that independence of PDS as described in *Principle 1* is in danger. At the time of our visit, however, no statutory provision or written protocol addressed the mechanics of board or director selection. An opportunity exists for PDS management and board to consider what steps might be taken to assure board independence through the drafting of bylaws. Bylaws can be the means that assure future boards and board members cannot attempt to skew the mission of PDS or its high quality of representation of clients. NLADA references this recommendation only to note that our oral suggestions have already been acted upon.

Endnotes

[1] *Gideon* established the right to counsel for felony trials. Subsequent cases extend that right to: direct appeals – *Douglas v. California*, 372 U.S. 353 (1963); custodial interrogation – *Miranda v. Arizona*, 384 U.S. 436 (1966); juvenile proceedings resulting in confinement – *In Re Gault*, 387 U.S. 1 (1967); critical stages of preliminary hearings – *Coleman v. Alabama*, 399 U.S. 1 (1970); misdemeanors involving possible imprisonment – *Argersinger v. Hamlin*, 407 U.S. 25 (1972); and misdemeanors involving a suspended sentence – *Shelton v. Alabama*, 535 U.S. 654 (2002). Most recently, the Roberts Court found that indigent defendants who plead guilty at the trial-level do not give up their right to counsel on appeal to challenge their sentencing – *Halbert v. Michigan*, 545 U.S. 602 (2005).

[2] "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. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama*:

> '*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.

[3] See for example: i) Hawaii: "We are, however, finding it increasingly difficult to secure private attorneys who can afford to represent indigent defendants at the current statutory rate. It is clearly insufficient to cover even the most basic overhead expenses, let alone provide appointed-counsel fair compensation for their time … I realize that criminal defense attorneys and those accused of crimes do not have much of a popular constituency, but we need to remember: first, that attorneys perform a vital and necessary role in the administration of justice; second, that persons accused of crimes face the awesome power of the State; and, third, any system of justice worthy of the name must assure that an individual's liberty is not taken away without putting the prosecution's evidence to the time-honored tests of examination, cross-examination, and proof beyond a reasonable doubt. I, therefore, implore you to examine and address this issue during this legislative session before it reaches the kind of constitutional crisis that has occurred and is occurring in other jurisdictions." - Chief Justice Ronald Moon (*State of the Judiciary Message*, January 26, 2005); ii) Louisiana: "I admonish you [the State Legislature] to simply do the right thing. Provide for a workable and adequately funded indigent defense system, so that another victim does not have to go through the agony of an overturned conviction and repeat of grueling trial testimony, or so that an innocent person is spared the ordeal of an unjust conviction and punishment." - Chief Justice Pascal Colagero, (*State of the Judiciary Message*, May 3, 2005); iii) Massachusetts: "[A]ccess to justice in this Commonwealth is not always equal….[O]ur system of representation for criminal defendants is severely strained. We cannot fulfill the constitutional mandate of *Gideon* unless we provide adequate resources to make that possible. Consider this fact: the average loan burdening a law school graduate is more than twice the annual salary of new prosecutors and public defenders. How can we expect new lawyers to accept and remain in these critical positions when compensation is so low?" – Chief Justice Margaret Marshall, (*Address to the Massachusetts Bar Association*, January 24, 2004); iv) New Mexico: "There are three essential parts of the criminal justice system, the courts, the prosecutor, and the defender. I have been quoted in the newspaper as characterizing the criminal justice system as like a three-legged stool .... When one leg is weakened, you know what happens. You end up on the floor. Well, we are not on the floor yet, but we are not far off. The fiscal needs of the public defender are so dire, their situation seems so hopeless, that many times prosecutions cannot go forward due to lack of sufficient personnel. We in the Supreme Court grant extensions in criminal prosecutions every week, by the dozen, most of the time because the public defender is so far behind. I ask for your help, not because we favor criminal defendants over the prosecution, but because without your help, the system will collapse. When that happens, when delay becomes so pervasive, those who suffer the most are the victims of crime, twice victimized if you will, their hope of justice a mere illusion." - Chief Justice Richard Bosson, (*State of the Judiciary Message*, January 20, 2005); v) New York: "Having studied published materials and gather information from scores of knowledgeable witnesses, the Commission has convincingly concluded that the existing system [of indigent defense in New York] needs overhaul .... I have not seen the word 'crisis' so often, or so uniformly echoed by all sources, whether referring to the unavailability of counsel in Town and Village Courts, or the lack of uniform standards for determining eligibility, or the counties' efforts to safeguard county dollars, or the disparity with prosecutors, or the lack of attorney-client contact, or the particular implications for communities of color." - Chief Justice Kaye, (*State of the Judiciary*, February 6, 2006). vi) North Dakota: "I will not belabor you with all of the deficiencies of our present contract [indi-

gent defense] system other than to underscore that in addition to the conflict of interest resulting from judges operating the indigent defense system, we are woefully underfunded and finding it increasingly difficult to interest attorneys in providing contract services.... Although lack of resources is not the only problem, this lack of funding has exacerbated the flaws inherent in our current system." - Chief Justice Gerald VanderWalle, State of North Dakota (*State of the Judiciary Message*, January 5, 2005); vii) Washington: "Unfortunately, our public defender systems in this state are not in good shape—I wish I could say otherwise, but I can't. Because almost the entire financial responsibility for providing counsel is being borne by local government, we have a situation where no two defender systems in Washington are the same. The result is that we have a crazy quilt of systems. Although the systems in some counties are better than in others, the most common feature that these systems share is public defender caseloads that are too large, a lack of training, and proper supervision for public defenders, and, almost always, a lack of adequate support services. The system, in other words, is broken and in crisis." – Chief Justice Gerry L. Alexander, (*State of the Judiciary Message*, January 18, 2005); and, viii) Virginia: "The issue of funding for court-appointed counsel has been a major concern for many years .... Court-appointed counsel in Virginia are the poorest paid in the nation, and we must work hard to eradicate this problem." - Chief Justice Hassell, (*State of the Judiciary Message*, 2005).

[4] See for example: i) The Missouri Bar Association assembled a taskforce in 2005 made up of representatives of the judiciary, law enforcement, state policy-makers, and Bar Association members, among others. Their conclusion was that the Missouri State Public Defender system is "currently operating in crisis mode." Maskery, Meghan. *Public Defender System 'in crisis,' report finds: Missouri Ranks 47th in public defense funding, and caseloads are soaring 80 percent above standard*. Missourian News (November 11, 2005) http://columbiamissourian.com/news/story.php?ID=17026; and, ii) The Criminal Justice Section of the Michigan State Bar Association passed a resolution stating: "We recognize that public funding to support services needed for criminal defense, including investigators and expert witnesses, is limited or non-existent. We believe improvements in Michigan are necessary to meet minimum standards of fundamental fairness, and minimum constitutional requirements for defense services." Criminal Law Section of State Bar of Michigan in Conference Mackinac Island, MI. (Adopted June 15, 2003), available at: http://www.sado.org/publicdefense/Mac 03Resolution.pdf

[5] See for example: (i) Alabama, Bright, Stephen B., *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at stake* (1997); Survey of the American Law 783 (New York University School of Law, 1999); (ii) Arizona, *Report on Status of Indigent Defense in Arizona* (The Spangenberg Group, Jan. 1993); (iii) California, *Contracting for Indigent Defense Services: A Special Report* (U.S. Department of Justice, Bureau of Justice Assistance, Apr. 2000); *Evaluation Report & Recommendations, Riverside County Public Defender* (NLADA, Dec. 2000); *Evaluation Report & Recommendations, San Bernardino County Public Defender* (NLADA, Nov. 2001); *A Pilot Assessment of the Offices of the Public Defender, Santa Clara County California* (NLADA, Dec. 2003) (hereinafter "NLADA, *Pilot Assessment in Santa Clara County*"); (iv) Georgia, *Report of the Chief Justice's Commission on Indigent Defense* (2003); *Status of Indigent Defense in Georgia: A Study for the Chief Justice's Commission on Indigent Defense – Part II: Analysis of implementing Alabama v. Shelton in Georgia* (2003); (The Spangenberg Group, 2003); *Report to the Chief Justice's Commission on Indigent Defense* (The Spangenberg Group, 2002); (v) Louisiana, *In Defense of Public Access to Justice: An Assessment of Trial-Level Indigent Defense Services in Louisiana 40 Years after Gideon* (NLADA, Mar. 2004), available at www.nlada.org/Defender?Defender_Evalution (hereinafter NLADA, *Assessment of Trial-level Indigent Defense Services in Louisiana 40 Years after Gideon*); (vi) Maine, *An Assessment of Access to Counsel and Quality Representation in Delinquency Proceedings* (New England Juvenile Defender Center & American Bar Association, Oct. 22, 2003); (vii) Michigan, *Model Plan for Public Defense Services in Michigan* (Oct. 2002); (viii) Mississippi, *Assembly Line Justice Mississippi's Indigent Defense Crisis* (NAACP Legal Defense and Education Fund, Inc. (LDF)), (Mar. 2003); *Economic Losses and the Public System of Indigent Defense: Empirical Evidence on Pre-Sentencing Behavior from Mississippi* (NAACP Legal Defense and Education Fund, Inc. (LDF)), (Mar. 2004); (ix) Nevada, *Miranda v. Clark County*, 279 F.3d 1102, 1112 (9th Cir. 2002); *Indigent Defense Services in the State of Nevada: Findings and Recommendation* (The Spangenberg Group, Dec. 2003); *Evaluation of the Public Defender Office: Clark County, Nevada* (NLADA, Mar. 2003), available at www.nlada.org/Defender/Defender_Evaluation (hereinafter NLADA, *Evaluation in Clark County, Nevada*); (x) North Dakota, American Bar Association, *Review of Indigent Defense Services in North Dakota* (Jan. 2004); (xi) Pennsylvania, *Indigent Defense Services in Venango County* (Franklin) Pennsylvania (NLADA , Mar. 2002) (hereinafter NLADA, *Indigent Defense in Venango County*); (xii) South Carolina, South Carolina Office of Indigent Defense, *Newsletter*, v. 1, n. 1 (1998); (xiii) Tennessee, *Tennessee Public Defender Case-Weighting Study* (The Spangenberg Group, Apr. 1999); (xiv) Texas, *The Fair Defense Report* (Texas Appleseed Fair Defense Project, Dec. 2000); (xv) Vermont, *Report of Indigent Defense Task Force* (Task Force on Indigent Defense in Vermont, Jan. 2001); (xvi) Virginia, *A Comprehensive Review of Indigent Defense in Virginia* (The Spangenberg Group, Jan. 2004).

See also the 2005 series of reports released by the then ABA-sponsored Juvenile Defender Management Institute identified institutional problems that prevent six states' juvenile defense systems from providing children with adequate defense representation (Maine, Maryland, Montana, North Carolina, Pennsylvania and Washington) The Spangenberg Group for the American Bar Association Bar Information Program, *Statewide Indigent Defense Systems: 2005*, available at www.abanet.org/legalservices/downloads/sclaid/indigentdefense/statewideinddefsystems2005.pdf. "The conditions in each state are unique, but these reports paint a disturbing picture," said then ABA President Dennis Archer upon release of the assessments. "Too many children, particularly children of color, fall victim to conveyer belt justice – with kids rushed through a system riddled with institutional flaws without regard for the individual cases or needs. The net result is a massive misdirection of resources that fails children, and undermines public safety." American Bar Association Press Release, *ABA President Says Reports Show "Conveyor Belt Justice" Hurting Children and Undermining Justice*, available at www.njdc.info/pdf/ABA-pressrelease.pdf.

[6] The ACLU successfully sued the State of Connecticut in *Rivera v. Rowland*. The settlement agreement significantly increased the staff of the state's public defender system will increase, the rates of compensation paid to special public defenders will double, and the public defender system will substantially enhance the training, supervision and monitoring of its attorneys. For more information see: *www.aclu.org/crimjustice/gen/10138prs19990707.html?s_src=RSSS*. This was the second successful ACLU lawsuit. Prior to *Rivera*, the ACLU sued Allegheny County, Pennsylvania (Pittsburgh) reaching similar reform in the settlement decree for *Doyle v. Allegheny County Salary Board*. In Montana, the ACLU lawsuit *White v. Martz* was postponed to allow the attorney general to advocate for sweeping legislative reforms. For more information, see: "ACLU Files Class-Action Lawsuit Against Montana's Indigent Defense Program." ACLU Press Release (Feb. 14, 2002) at www.aclu.org/crimjustice/indigent/10127prs20020214.html. Washington – see generally: *www.aclu.org/rightsofthepoor/indigent/24078prs20060202.html*.

In 2004, NACDL filed a class action lawsuit against the State of Louisiana alleging systemic denial of counsel in Calcasieu Parish (*Anderson v. Louisiana*). For more information see: "Justice Failing in Calcasieu Parish: Lawsuit Seeks Systemic Reform and Relief for Defendants Deprived of Constitutional Rights." NACDL News Release (2004) at www.nacdl.org/public.nsf/DefenseUpdates/Calcasieu. See also: "Virginia and National Criminal Defense Lawyers Associations Delay Filing of Federal Suit Enjoining Court-Appointed Lawyer 'Fee Caps': Legislative Move Stalls Federal Suit." NACDL News Release (Feb. 1, 2006) at www.nacdl.org/public.nsf/newsreleases/2006mn003?OpenDocument.

Massachusetts: *Lavallee, et al., v. Justices in the Hampden Superior Court, et al.*, 442 Mass. 228, SJC-09268. See: www.masslawyersweekly.com/signup/gtwFulltext.cfm?page=ma/opin/sup/1013904.htm. New York City and State were sued in 2002 for claims relating to the low rate of compensation paid to assigned counsel who represent minors and indigents in both family and criminal actions in *New York County Lawyers' Association v. State*, 763 N.Y.S.2d 397, 414 (N.Y. Sup. Ct. 2003). The action was supported through pro bono legal assistance provided by the law firm of Davis Polk & Wardwell. The trial judge ultimately ruled for the plaintiffs, entered an injunction against the City and State and ordered that assigned counsel compensation rates be raised. Mississippi: Quitman County, an impoverished Delta community, sued Mississippi in 1999, alleging that the state law requiring local governments to pay for indigent defense was a violation of the U.S. Constitution and the Mississippi Constitution. The state supreme court rejected the county's contention, however, and refused to find unconstitutional the state's failure to provide any funding for indigent defense. In fairly unsympathetic language, the court's majority said that if the county was concerned about indigent defense, it could have budgeted more for it.

[7] American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon's Broken Promise* available at http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf.

[8] According to The Sentencing Project, each year an estimated 5.3 million Americans are denied the right to vote because of laws that prohibit voting by people with a felony conviction. A fundamental obstacle to participation in democratic life, 47 states and the District of Columbia prohibit inmates from voting while incarcerated for a felony offense and the vast majority disenfranchise ex-felons while on parole and probation. See: http://sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cfd_bs_fdlawsinus.pdf.

[9] Congress established PDS in 1970 to provide defense representation to individuals charged with crimes in the District of Columbia who lack the means to retain counsel. Until 1997, PDS was an independent District of Columbia agency funded by the District of Columbia and governed by a Board of Trustees. As a result of the Revitalization Act in 1997, PDS is now a federally funded independent legal organization governed by a Board of Trustees. PDS's authorizing statute was amended to provide for federal funding, certain services from federal agencies, independence from restrictions place on the District of Columbia government, and some federal benefits for PDS employees. D.C. Code section 2-1605(c)(1) and 1607(a). However, PDS employees are not federal employees and PDS is not a federal executive agency. Instead personnel authority rests with the director. D.C. Code section 2-1605. PDS's authorizing statute is found at District of Columbia Code §2-1601 et. seq."

PDS provides services at any stage of a proceeding to adults charged with crimes that carry a sentence of six months or more; persons charged with probation or parole violations; persons subject to civil mental health, chronic alcoholism or narcotics addiction commitments; alleged delinquent children in the juvenile courts; persons found not guilty by reason of insanity in the criminal courts and incarcerated persons in certain prescribed corrections facilities [District of Columbia Code §2-1602(a)(1)]. Representation occurs in the DC Superior Court, the federal District Court, the DC Court of Appeals and, when called upon by the case, the DC Circuit Court and the United States Supreme Court. While PDS is specifically prohibited from representing "inmates" in certain suits for damages against the District of Columbia or its employees [District of Columbia Code §2-1602(a)(2)], the board otherwise has the authority to expand the functions of PDS as necessary and appropriate to performing the duties identified above.

[10] The National Legal Aid & Defender Association (NLADA) is a national, non-profit membership association dedicated to quality legal representation for people of insufficient means. Created in 1911, NLADA has been a leader in supporting equal justice for over 90 years. NLADA currently supports a number of initiatives, including the American Council of Chief Defenders (ACCD), a leadership forum that brings together the top defender executives nationwide, and the National Defender Leadership Institute (NDLI), an innovative training project to support current managers and develop future leaders.

Over its long history, NLADA has become a leader in the development of national standards for indigent defense functions and systems. See: *Guidelines for Legal Defense Systems in the United States* (National Study Commission on Defense Services [staffed by NLADA; commissioned by the U.S. Department of Justice], 1976); The *Ten Principles of a Public Defense Delivery System* (written by NLADA officials, adopted by ABA in February 2002, published in U.S. Department of Justice *Compendium of Standards for Indigent Defense Systems*) (http://www.abanet.org/legalservices/downloads/sclaid/10principles.pdf); *Standards*

for the Appointment and Performance of Counsel in Death Penalty Cases (NLADA, 1988; ABA, 1989), *Defender Training and Development Standards* (NLADA, 1997); *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995); *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* (NLADA, 1984; ABA, 1985); *Standards for the Administration of Assigned Counsel Systems* (NLADA, 1989); *Standards and Evaluation Design for Appellate Defender Offices* (NLADA, 1980); *Evaluation Design for Public Defender Offices* (NLADA, 1977); and *Indigent Defense Caseloads and Common Sense: An Update* (NLADA, 1994). Other related national standards: American Bar Association, *Standards for Criminal Justice, Providing Defense Services* (3rd ed., 1992); American Bar Association, *Standards for Criminal Justice: Defense Function* (3rd ed., 1993); *Report on Courts, Chapter 13: The Defense* (National Advisory Commission on Criminal Justice Standards and Goals, 1973).

[11] See for example: NLADA, *An Assessment of Indigent Defense Services in the State of Montana* (2004); NLADA, *In Defense of Public Access to Justice: An Assessment of Trial-level Indigent Defense Services in Louisiana 40 Years after Gideon* (2004); NLADA, *Pilot Assessment in Santa Clara County, California* (2004); NLADA, *Evaluation in Clark County, Nevada* (2003); NLADA, *Indigent Defense in Venango County, Pennsylvania* (2002).

[12] "The Public Defender Service of the District of Columbia has demonstrated its ability to provide quality legal representation to its clients. Adequate salaries and intensive training in defense strategies have enabled the Service to attract and hold highly-qualified staff. Supporting services, including background investigation, psychiatric evaluations, and evidence analysis, assists attorneys in effective preparation of cases. Because of its proven success, the Public Defender Service has been designated by LEAA as an 'Exemplary Project' which can serve as a model for other jurisdictions." United States Department of Justice, Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice. *The D.C. Public Defender Service: An Exemplary Project – Volume I: Policies and Procedures* (1973).

[13] See: The United States Department of Justice, National Institute of Justice, *The Implementation and Impact of Indigent Defense Standards*. Prepared by Scott Wallace and David Carroll. Award No. 1999-IJ-CX-0049. December 2003. Available at: http://www.ncjrs.gov/pdffiles1/nij/grants/205023.pdf

[14] While the vast majority of judges strive to do justice in all cases, political pressures, administrative priorities such as the need to move dockets, or publicity generated by particularly notorious crimes can make it difficult for even the most well-meaning judges to maintain the appearance of neutrality.

[15] Moreover, having judges maintain a role in the oversight of indigent defense services can create the appearance of impartiality – creating the false perception that judges are not fair arbitrators. The Legislature 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 of the factual merits of the case and not on a public defender's desire to please the judge in order to maintain his job. When the public fears that the court process is unfair, people are less inclined to show up for jury duty or to come forward with critical information about crimes.

[16] The onus on state government to fund 100 percent of indigent defense services is supported by American Bar Association and National Legal Aid & Defender Association criminal justice standards. See the American Bar Association, *Ten Principles of a Public Defense Delivery System*, *Principle 2*: "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". See also: *Guidelines for Legal Defense Systems in the United States* (National Study Commission on Defense Services, U.S. Department of Justice, 1976), Guideline 2.4.

[17] Only two states, Delaware and Rhode Island, had established statewide public defender programs prior to the *Gideon* decision. Rhode Island's public defender system was established in 1942 while Delaware's was created in 1953. The New Jersey state public defender was legislatively enacted post-*Gideon* and began taking cases in 1967. Likewise, Maryland's statewide public defender was founded in 1971. More states began fulfilling their constitutional obligation in the five year aftermath of *Argersinger* by establishing state public defender systems, including: 1) Hawaii, Kentucky, New Hampshire and Vermont (1972); New Mexico (1973); Connecticut (1974); and, Wisconsin and Wyoming (1977).

[18] County governments rely primarily on property tax as their main source of revenue. When property values are depressed because of factors such as high unemployment or high crime rates, poorer counties find themselves having to dedicate a far greater percentage of their budget toward criminal justice matters than more affluent counties. This, in turn, limits the amount of money these poorer counties can dedicate toward education, social services, healthcare, and other critical government functions that could positively impact and/or retard rising crime rates. The inability to invest in these needed government functions can lead to a spiraling effect in which the lack of such social services increases crime, further depressing real estate prices, which in turn can produce more and more crime – further devaluing income possibilities from property taxes. And, since less affluent counties also tend to have a higher percentage of their population qualifying for indigent defense services, the counties most in need of indigent defense services are often the ones that least can afford to pay for it.

See, for example: The National Legal Aid & Defender Association. *Indigent Defense Assessment of Venango County, Pennsylvania*. June, 2002, at pp. 54-55. " In conclusion, NLADA believes that Venango County has the personnel to make the tough criminal justice decisions that lay ahead to ensure adequate representation to its indigent citizens. Unfortunately, the economic realities of the county are such that should all of the recommendations detailed in this report be enacted, we still believe that it is only a matter of time until the adequacy of indigent defense services is again put in jeopardy. The number of

cases entering the Venango County criminal court system is growing and becoming more serious in nature with each passing year, despite a declining population. Thus, the burden of paying to protect the rights of defendants will continue to increase as the county tax-base further declines."

[19] Flat fee contracting is oriented solely toward cost reduction, in derogation of ethical and constitutional mandates governing the scope and quality of representation. Fixed annual contract rates for an unlimited number of cases create a conflict of interest between attorney and client, in violation of well-settled ethical proscriptions compiled in the *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, written by NLADA and adopted by the ABA in 1985. Guideline III-13, entitled "Conflicts of Interest," prohibits contracts under which payment of expenses for necessary services such as investigations, expert witnesses and transcripts would "decrease the Contractor's income or compensation to attorneys or other personnel," because this situation creates a conflict of interest between attorney and client. The same guideline addresses contracts which simply provide low compensation to attorneys thereby giving attorneys an incentive to minimize the amount of work performed or "to waive a client's rights for reasons not related to the client's best interests." For these reasons, all national standards, as summarized in the eighth of the ABA's *Ten Principles* direct that: "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."

[20] The *Ten Principles of a Public Defense System* is based on a paper by James Neuhard, State Appellate Defender of Michigan and former NLADA president, and H. Scott Wallace, NLADA director of defender legal services, which was published in December 2000 in the *Compendium of Standards for Indigent Defense Systems.* www.ojp.usdoj.gov/indigentdefense/compendium/.

[21] American Bar Association. *Ten Principles of a Public Defense System*, from the introduction. At: http://72.14.207.104/search?q=cache:li1_aP9C2sJ:www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf+ABA+Ten+Principles&hl=en&gl=us&ct=clnk&cd=1.

[22] National standards address the need for independence in the context of all three basic models for delivering indigent defense services in the United States. Where private lawyers are assigned, the concern is with unilateral judicial power to select lawyers to be appointed to individual cases, and to reduce or deny the lawyer's compensation. Where contracts with nonprofit public defense organizations or law offices are used, the concern focuses primarily on flat-fee contracts which pay a single lump sum for a block of cases regardless of how much work the attorney does, creating a direct financial conflict of interest with the client, in the sense that work or services beyond the bare minimum effectively reduces the attorney's take-home compensation. Where a public defender system is used, the concern is with vesting the power to hire and fire the chief public defender in a single government official, such as the jurisdiction's chief executive or chief judge, a concern compounded when that official must run for popular election.

[23] NCJ 181344, February 1999, at 10.

[24] *NSC* Report, at 220, citing National Advisory Commission on Criminal Justice Standards and Goals (1973), commentary to Standard 13.9.

[25] Legislative authorization for PDS exists in Chapter 16 of the District of Columbia Code, §§2-1601 and following (hereafter the Statute).

[26] The board has general policy responsibility and the authority to hire PDS director and assistant director who "… serve at the pleasure of the Board." The board also has authority to prescribe "… other functions as are necessary and appropriate to the duties …" of PDS. However, the Statute further provides that the board "… shall not direct the conduct of particular cases." The board's authority, then, is limited to setting general policy, hiring and oversight of senior management and the specification of certain non-statutory responsibilities.

[27] Prior to the statutory creation of PDS, indigent defense services in our nation's capitol was provided exclusively through assigned counsel and a five-attorney law office known as the Legal Aid Agency (LAA). Historically, LAA had operated as a private contractor with its own independent board. The statute establishing PDS retained the independent board structure.

There are neither specific statutory provisions nor written standards with respect to the hiring or compensation of PDS director or deputy director. By accepted practice, however, the board determines their pay and performance rewards and does not exceed that paid to their counterparts at the United States Attorney's Office for the District of Columbia (USAO). The director, assisted by the deputy director, has broad statutory authority to hire staff and direct PDS operations. Hiring, personnel policy, compensation, case management and the individual representation of clients are the sole responsibility of management but by statute compensation for PDS staff cannot exceed that paid to similarly qualified and experienced staff at the USAO.

[28] PDS did, however, work closely with the court to coordinate a large scale draft of private attorneys in large firms for a period of time until the court appointed counsel crisis was resolved.

[29] Workload limits have been reinforced in recent years by a growing number of systemic challenges to underfunded indigent defense systems, where courts do not wait for the conclusion of a case, but rule before trial that a defender's caseloads will in-

evitably preclude the furnishing of adequate defense representation. See, e.g., *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981), *cert. den.* 454 U.S. 1142 (1982); *State v. Robinson*, 123 N.H. 665, 465 A.2d 1214 (1983) *Corenevsky v. Superior Court*, 36 Cal.3d 307, 682 P.2d 360 (1984); *State v. Smith*, 140 Ariz. 355, 681 P.2d 1374 (1984); *State v. Hanger*, 146 Ariz. 473, 706 P.2d 1240 (1985); *People v. Knight*, 194 Cal. App. 337, 239 Cal. Rptr. 413 (1987); *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987); *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), *cert. den.* 495 U.S. 957 (1989); *Hatten v. State*, 561 So.2d 562 (Fla. 1990); *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit*, 561 So.2d 1130 (Fla. 1990); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990); *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991); *City of Mount Vernon v. Weston*, 68 Wash. App. 411, 844 P.2d 438 (1993); *State v. Peart*, 621 So.2d 780 (La. 1993); *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996). Many other cases have been resolved by way of settlement.

[30] The following is just a partial list of ethical duties required under national and state performance guidelines. *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995) is available on-line at: www.nlada.org/Defender/Defender_Standards/Performance_Guidelines.

[31] For example: bail reduction motions; motion for preliminary examination; motion for discovery; motion for bill of particulars; and motion for initial investigative report. Also, motions to quash and motions to suppress.

[32] Throughout our country, more than 80 percent of people charged with crimes are deemed too poor to afford lawyers. See: Harlow, U.S. Department of Justice, Office of Justice Programs, *Defense in Criminal Cases* at 1 (2000); Smith & DeFrances, U.S. Department of Justice, Office of Justice Programs, *Indigent Defense* at 1 (1996). See generally: Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 Harv. J. L. & Pub. Pol. 443, 452 (1997). The actual number of such individuals will increase as the number of poor people in the United States (currently estimated at 37 million) goes up. See A.P., *U.S. Poverty Rate Rises to 12.7 Percent*, N.Y. Times, August 30, 2005, http://www.nytimes.com/aponline/national/AP-Census-Poverty.html?ei=5094&en=d74b58. (8/30/2005).

[33] ABA *Principle 5* states: "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."

[34] American Bar Association, Standing Committee on Ethics and Professional Responsibility. *Formal Opinion 06-441: Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation.* May 13, 2006. Opinion can be found online at: www.abanet.org/cpr/pubs/ethicopinions.html.

[35] *Ibid.* (emphasis added).

[36] See for example: *NSC*, Guideline 5.1, 5.3; ABA, Standards 5-5.3; ABA *Defense Function*, Standard 4-1.3(e); *NAC*, Standard 13.12; *Contracting*, Guidelines III-6, III-12; *Assigned Counsel*, Standards 4.1,4.1.2; ABA *Counsel for Private Parties*, Standard 2.2 (B) (iv); ABA *Ten Principles #5*.

[37] National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, *Courts* (Washington, D.C., 1973), p. 186 states: "The caseload of a public defender attorney should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25." What this means is that an attorney who handles only felony cases should handle no more than 150 such cases in a single year *and nothing else*.

[38] For maximum efficiency and quality, national standards call for particular ratios of staff attorneys to other staff, e.g., one investigator for every three staff attorneys (every public defender office should employ at least one investigator), one full-time supervisor for every ten staff attorneys, as well as professional business management staff, social workers, paralegal and paraprofessional staff, and secretarial/clerical staff for tasks not requiring attorney credentials or experience. National Study Commission, Guideline 4.1.

[39] See for example: ABA *Ten Principles #5*. Despite their proven resiliency of the NAC standards they simply do not take into account local factors that may raise or lower the number of cases an attorney can reasonably be expected to handle in a year (See: NLADA, *Indigent Defense and Commonsense: An Update*, (Washington, DC 1992), p. 7.) Moreover, the standards were first created through what is known as a "Delphi" methodology. Instead of using a time-tracking methodology in which attorneys record time by case-type, activity and disposition, the Delphi methodology relies on experienced defense attorneys to estimate the amount of time necessary to complete specific tasks in the life of a case. These educated guesses are then averaged to produce the estimated amount of time needed to bring a particular type of case to disposition.

Because these standards were not empirically created, the assumptions that form the basis of the national caseload standards may or may not hold true for a particular jurisdiction. For example, the NAC standards do not take into consideration the variations in practice between indigent defense practices and procedures in rural, urban and suburban jurisdictions. In many rural areas of the country, public defenders must travel considerable distances to meet with incarcerated clients, staff

various courts, and investigate crime scenes. These factors may decrease the number of cases any one public defender could handle in a rural area compared to a colleague practicing in an urban area in which the court, jail, and public defender office may all be situated within a single city block. In urban areas, public defenders may be able to handle more misdemeanors than suggested by the NAC standards.

[40] For all these reasons, NLADA recommends that the NAC standards only be used as a citation to government funding bodies as a means to compare a specific office's actual caseload with national averages in an attempt to give a general assessment of attorney workload. To establish a jurisdictional-specific standard that can form the basis of a statistical funding formula, NLADA recommends that public defender offices undergo a case-weighting study.

"Case weight" is a term that denotes the amount of effort (in staff hours) needed to bring a case to disposition. As opposed to the Delphi methodology, case-weighting studies require public defender staff to record actual hours spent on case-related and non-case-related activities over a certain period of time as the basis for formulating an object workload standard. Case-weighting studies are modeled on the successful practices of private law firms. In the private realm, employees track their billable and non-billable hours by activity to determine the net profitability of each individual case. In the public realm, similar activity-based time records are kept to determine the standard amount of staff time needed to adequately bring the average case of a certain case-type to disposition. The subsequent creation of jurisdictional-specific workload standards provides an objective, quantitative means by which public defender managers and funding agents can accurately project staffing needs, and assess whether time is spent efficiently by staff on each type of case.

The "case-weighting" methodology requires public defender employees to track their time by activity by case-type for a 12-week period. During the time study, attorneys are also required to record dispositions by case-type. The first step in forming caseload standards for budget purposes is to divide the aggregate amount of time recorded per case-type by the number of dispositions recorded for the same period to form case-specific "time per disposition" figures.

For example, if attorneys recorded 2,520 hours and 288 dispositions during the time study under the "juvenile delinquency" classification, then the average delinquency case in the jurisdiction takes eight hours and 45 minutes to bring to disposition (2,500/288 = 8.75). An exception to this rule is in civil cases such as Children in Need of Services. Since those case-types may continue on for years with out a formal disposition, attorneys will be asked to track the number of hearings. In these cases only, standards will be form based on the number of attorney hours required per hearing.

Dividing the resulting time-per-disposition figure into the annual work year forms workload standards. Public defender attorneys are generally considered exempt employees. Using nationally recognized methodologies to measure workload of exempt employees, a 40-hour workweek is used as the starting point for calculating a work year (NLADA recognizes the fact that public defenders often work in excess of a 40-hour workweek.) The work year is determined by multiplying 40-hours by 52 weeks minus hours associated with vacation, holidays, other allowable leave time and required training days.

Staffing projections can be accurately forecasted by applying the standards to the office's projected caseload. If a jurisdiction's public defender work year were 1,750 hours, then the resulting juvenile delinquency standard in the example above would be 200 cases (1,750/8.75 = 200). This means that no public defender attorney should handle more than 200 delinquency cases in a single year if that were the only type of case she handled. If a defender manager projects 2,200 delinquency cases for the ensuing year, the office requires 11 attorneys to handle the juvenile representation (2,200/200 = 11).

Case-weighting studies also leave public defender managers with detailed information by which to determine the most efficient use of staff. For instance, if attorneys are recording an excessive number of hours under "clerical-related activity," it may be more cost-effective for the public defender manager to hire more support staff and shift the attorneys to more traditional attorney activities like "case preparation." Similarly, a time study may show that attorney staff are being asked to do traditional social service activities that they may not be professionally trained to perform. A public defender manager may decide that he needs to add more social workers.

Finally, the aggregate time by activity information allows a public defender manager the quantitative data needed to assess the performance of an office against nationally recognized standards, such as NLADA's *Performance Guidelines for Criminal Defense Representation*. For instance, Guideline 1.3(c) states, "[c]ounsel has an obligation to keep client informed of the progress of the case." Time studies would determine whether or not attorneys are acting in accordance with the guideline and recording a sufficient amount of time under "client contact" activity code. Once the case-weighting study is tailored to a specific jurisdiction, public defender managers can recreate the study annually. Some public defender programs have even institutionalized case-weighting and require attorneys and staff to track time in the same manner as assigned counsel conflict attorneys.

[41] DC Code § 2-1602

[42] Recent changes in U.S. immigration law have dramatically increased the likelihood of deportation and other negative immigration consequences for non-citizen defendants who are convicted of criminal offenses. Today's criminal defense counsel must master the intricacies of a substantial body of U.S. immigration law which did not exist in 1973.

[43] PDS provides services at any stage of a proceeding to adults charged with crimes that carry a sentence of six months or more; persons charged with probation or parole violations; persons subject to civil mental health, chronic alcoholism or narcotics addiction commitments; alleged delinquent children in the juvenile courts; persons found not guilty by reason of insanity in the criminal courts and incarcerated persons in certain prescribed corrections facilities. District of Columbia Code §2-1602(a)(1). Representation occurs in the DC Superior Court, the federal District Court, the DC Court of Appeals and, when called upon by the case, the DC Circuit Court and the United States Supreme Court. PDS is specifically prohibited from representing "inmates" in certain suits for damages against the District of Columbia or its employees. District of Columbia Code §2-1602(a)(2)

[44] In 2003, PDS implemented a sophisticated case tracking and management system called ATTICUS. It is replacing many paper records and files that were manually maintained. The NLADA team observed managers using ATTICUS and was given a two-hour demonstration of its capabilities. ATTICUS is impressive. An electronic case file is created by DSO staff at the time of client intake and electronically assigned to a PDS attorney upon completion of the appointment process. Case-related information is updated by the attorney, support staff and supervisors and is available on dedicated screens. Investigator and ORD staffing requests are made on-line through dedicated screens. Experts and transcript requests are also made on-line through dedicated screens. The system enables case-related communication without face-to-face interaction or hardcopies of forms or memoranda.

Supervisors track case activity and progress by viewing on-line screens. This supports decisions about intake and allows adjustments of individual workloads that are consistent with the PDS's mission and statutory responsibility. ATTICUS does not currently support sophisticated database functions and statistical analysis. However, it was designed to support these functions. PDS management has planned the development of "data warehousing" and statistical analysis components for ATTICUS and has a clear vision of how these will be used for management decision-making when they are implemented. This will constitute a significant enhancement of the PDS's management information system.

[45] In a fashion roughly similar to the trial chief and his supervisors, the section chief and an assistant section chief of the juvenile section continuously monitor attorney workload. This includes personal observation and consultation with section attorneys along with monitoring of the ATTICUS system. Workload is adjusted through coordination with the DSO of case intake. PDS estimates that it undertakes representation in about 40 percent of juvenile cases filed in the District of Columbia. The frequency of intake varies during the year depending on the experience and training of the attorneys. At times when newly hired attorneys heavily populate the juvenile section, intake is relatively lighter.

The mental health division estimates that it accepts about 70 percent of the approximately 1500 potential cases within its expertise. Of these, about 70 percent are civil commitment cases; the remainder consists of forensic commitment proceedings. The attorneys who work these cases have extensive experience in mental health cases. As with the trials division, intake of new cases is regulated to maintain the appropriate workload. A relatively small staff and close working relationships among the staff of the mental health division allows the division chief to sufficiently monitor workload. NLADA team observation and validation from the United States Attorney confirm that while individual attorney workload is high in the mental health division, it is consistent with quality legal service. The mental health division does not, however, make extensive use of technology or statistical data to monitor workload.

[46] A shelter house is the juvenile equivalent to the more familiar halfway house for adult criminal defendants.

[47] PDS's juvenile practice is staffed with its first year trial division hires following their 8 week training program, four experienced education advocates in the civil legal services division, two experience juvenile program developers in the offender rehabilitation division, one permanent juvenile lawyer with over 20 years of litigation experience, two supervising attorneys and a deputy trial chief for the juvenile section who is primarily responsible for developing and coordinating PDS's involvement in improving the juvenile practice through participation in the Council for Court Excellence and the JDAI. In addition, PDS has an attorney and law clerks at the detention facilities to handle administrative hearings and assist in post-commitment proceedings. Lastly, PDS attorneys in the special litigation division are co-counsel with the ACLU and, more recently, Covington & Burling LLP, in a 20 plus year class action suit on behalf of all children committed to the District of Columbia.

[48] *Principle 6* of the ABA *Ten Principles* demands that "Defense counsel's ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation," *Ten Principles of a Public Defense Delivery System* (ABA 2002) at p. 3. See also *Performance Guidelines for Criminal Defense Representation* (NLADA 1995), Guidelines 1.2, 1.3(a); *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (ABA 1989), Guideline 5.1.

[49] For most public defender offices across the country, the training and practical experience gained by attorneys working on less serious criminal cases permits them, over time, to acquire the skills necessary to handle more serious cases. Consequently, public defender offices across the country generally assign misdemeanor charges, traffic offences and preliminary stages of a prosecution to newer attorneys. Over time--often measured in years - attorneys in these offices acquire the skills that support handling more challenging cases.

[50] *Principle 9*: Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors. *NAC*, Standards 13.15, 13.16; *NSC*, Guidelines 2.4(4), 5.6-5.8; ABA, Standards 5-1.5; *Model Act*, § 10(e); *Contracting*, Guideline III-17; *Assigned Counsel*, Standards 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA *Defender Training and Development Standards* (1997); ABA *Counsel for Private Parties*, Standard 2.1 (A).

[51] Commentary to the ABA *Standards for Providing Defense Services* views attorney training as a "cost-saving device" because of the "cost of retrials based on trial errors by defense counsel or on counsel's ineffectiveness." The Preface to the NLADA *Defender Training and Development Standards* states that quality training makes staff members "more productive, efficient and effective." www.nlada.org/Defender/Defender_Standards/Defender_Training_Standards.

[52] ABA *Principle 10* states: "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." *NSC*, Guidelines 5.4, 5.5; *Contracting*, Guidelines III-16; *Assigned Counsel*, Standard 4.4; ABA *Counsel for Private Parties*, Standards 2.1 (A), 2.2; ABA *Monitoring*, Standards 3.2, 3.3. Examples of performance standards applicable in conducting these reviews include NLADA *Performance Guidelines*, ABA *Defense Function*, and NLADA/ABA *Death Penalty*.

[53] These can vary greatly both in kind and number but they commonly include such things as: fostering and supporting professional development; giving people clear guidance about what is expected of them; and supporting accountability. Moreover, effective performance plans are tied to and support the fulfillment of the agency's mission and vision. Critically, effective plans emphasize a goal of promoting employees' performance success.

[54] People need to know what is expected of them in order to work to fulfill those expectations. Performance expectations should include for example, attitudinal expectations and administrative responsibilities as well as substantive knowledge and skills.

[55] People whose positions require them to conduct performance evaluations must be trained and evaluated as part of their performance plan so that evaluations are done fairly and consistently.

[56] District of Columbia Code §2-1602(a)(2).

[57] In 2004, PDS reevaluated its training process for new attorneys entering its trial division, a process previously supervised by an attorney training coordinator.

[58] New US attorneys learn through on the job training and assignment rotations that move them from less serious case prosecution to the most serious cases. New juvenile unit attorneys general also receive on the job training and are permanently assigned to that unit within the District's Attorney General's office.

[59] As a result, the juvenile section handles a minority of the juvenile delinquency cases filed in the District of Columbia (CJA Panel attorneys handle most of the juvenile cases).

[60] The supervisors, the deputy trial chief for the juvenile section and one senior lawyer permanently assigned to the juvenile section caseloads are developed consistent with their experience and supervisory responsibilities.

[61] PDS' commitment to training and staff education is also demonstrated by its technology training program and technology training space. PDS maintains a technology training room designed in classroom style with 12 PCs at multiple workstations and with an overhead projector system that allows the staff technology trainer to project images on a large screen for all students to follow the offered instruction. In addition to organized classes available to all PDS staff, the technology trainer also has the capacity to send out short, specific subject matter technology training programs through the e-mail system to one or more designated employees. Training may be offered as a subject matter class, a unit wide or user group program, or on a one-on-one basis. A help desk service is also provided with technology user tips and tricks sent out through the e-mail system to PDS users and posted on the web page.

[62] Within the trial division, lawyers do have some control over the pace with which they move to another practice level. Following a year in juvenile and a year in low-level felonies, lawyers are invited to apply to move up to the next practice level. Lawyers are not required to apply. Lawyers have not complained about being moved too quickly from one practice level to the next. Instead, most complaints are limited to lawyers whose applications to move up to the next level have not been accepted. At the Felony I and Felony II High practice level lawyers are permitted to keep cases that are subsequently charged at a lesser level. If they keep those cases, those cases are counted as part of the lawyer's workload. Thus, lawyers can, if they choose, carry a few cases that do not involve life offenses even at the highest practice level at PDS.

[63] PDS has grown and will continue to grow its investigations division as funds are available. It is, however, very unlikely that PDS will ever have the funding for one full time staff investigator per one or even two attorney(s) in the trial, civil, mental health, and parole divisions. PDS knows of no local defender program that provides the level of investigative services provided by its combination of interns and investigators.

[64] PDS has reviewed the practice of hiring retired law enforcement officers as investigators and has found that practice inconsistent with an effective client-centered zealous approach to defense investigation. PDS has found its staff of defense-trained investigators more creative and more effective when communicating with witnesses and clients. PDS has reviewed the practice of giving investigators higher caseloads and found that practice inconsistent with quality representation. PDS has hired attorneys from other jurisdiction without investigative experience and found this to be an area of weakness as the attorney begins at PDS. Criminal cases are generally won or lost on the facts. There is no substitute for effective fact gathering other than engaging in hands-on experience to provide lawyers with the insight and abilities needed to effectively supervise interns and investigators.

[65] The chief judge of the District of Columbia Court of Appeals confirmed this in our interview.

[66] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[67] *Kirby v. Illinois*, 406 U.S. 682 (1972).

[68] *Coleman v. Alabama*, 399 U.S. 1 (1970).

[69] *County of Riverside v. McGlaughlin*, 500 U.S. 44 (1991).

[70] ABA *Defense Services*, commentary to Standard 5-6.1, at 78-79.

[71] ABA *Principle 3*: "Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention or request, and usually within 24 hours thereafter." Standardized procedures for client eligibility screening serve the interest of uniformity and equality of treatment of defendants with limited resources. When individual courts and jurisdictions are free to define financial eligibility as they see fit – e.g., ranging from "absolutely destitute" to "inability to obtain adequate representation without substantial hardship," with factors such as employment or ability to post bond considered disqualifying in some jurisdictions but not in others – then the resulting unequal application of the Sixth Amendment has been suggested, by the National Study Commission on Defense Services, to constitute a violation of both due process and equal protection. *NSC* commentary at 72-74.

[72] *NSC* commentary at 72-74.

[73] ABA *Principle 4*: **Defense counsel is provided sufficient time and a confidential space with which to meet with the client.** Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. 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.

[74] ABA *Model Rules of Professional Conduct*, Rule 1.6; *Model Code of Professional Responsibility*, DR 4-101; ABA *Defense Function*, Standard 4-3.1; NLADA *Performance Guidelines*, 2.2.

[75] *NSC*, Guideline 5.10.

[76] *Id.*, and commentary at p. 460.

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

[78] *NSC* at 470.

[79] ABA *Defense Services*, commentary to Standard 5-6.2, at 83.

[80] *NSC* at 462-470, citing *Wallace v. Kern* (slip op., E.D.N.Y. May 10, 1973), at 30; *Moore v. U.S.* (432 F.2d 730, 736 (3rd Cir. 1970); and *U.S. ex rel Thomas v. Zelker*, 332 F.Supp. 595, 599 (S.D.N.Y. 1971).

[81] For arrestees not released on a summons this initial court appearance typically occurs within 24 hours of arrest. Exceptions occur when individuals are arrested Saturday afternoon (there is no Sunday court) and if arrestees are hospitalized.

[82] The interview process is not in a confidential setting and is usually quite brief because practically none of the defendants has a monthly income that requires further questioning or exploration to establish eligibility. As required under the Criminal Justice Act, the information provided is sworn to by the defendant and the defendant is subject to criminal penalties if the statements are found to be false.

[83] Experience has shown that more than 95 percent of those arrested are qualified for court appointed counsel.

[84] Appellate division attorneys have a different, but equally time-consuming challenge. Because Lorton Prison in suburban Virginia closed as the result of DC Revitalization, persons sentenced in DC Superior Court are now incarcerated all over the country. So PDS appellate division attorneys must travel considerable distances to see their clients - but they do make those trips and meet with the clients in person.

Mental health division attorneys meet with most of their clients in treatment facilities. Interaction with MHD clients in the MHD offices at St. Elizabeth's Hospital is rare. Privacy varies, depending on the facility. MHD attorneys are quite sensitive to this issue and they make careful efforts, to protect client confidences.

[85] ABA *Standards for Criminal Justice*, Standard 5-7.1

[86] ABA *Standards for Criminal Justice*, Standard 5-7.3

[87] ABA *Standards for Criminal Justice,* Standard 5-7.2

[88] *Principle 8* of the American Bar Association's *Ten Principles* states, "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." See also National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976), Guidelines 2.6, 3.4, 4.1 (includes numerical staffing ratios, e.g.: there must be one supervisor for every 10 attorneys, or one part-time supervisor for every five attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office); American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992), Standards 5-2.4, 5-3.1, 5-3.2, 5-3.3, 5-4.1, and 5-4.3; National Legal Aid & Defender Association, *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984), Guidelines III-6, III-8, III-9, III-10, and III-12; *Standards for the Administration of Assigned Counsel Systems* (NLADA 1989), Standard 4.7.1 and 4.7.3; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980) (Performance); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979), Standard 2.1(B)(iv); and American Bar Association Standards for Criminal Justice, *Defense Function* (3rd ed. 1993), Standard 4-1.2(d). *Cf.* National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973), Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

[89] *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

[90] Note 10, *supra*.

[91] Adequacy of compensation in terms of the local cost of living was not part of this study.

[92] Specifically, Clark County Nevada, Los Angeles County California and Santa Clara County California.

[93] For example drug test are performed by the DEA, DNA testing is performed by the FBI, arson investigations are often under taken by the ATF, fingerprint, handwriting and document analysis is often done by the Secret Service. In addition all of these agencies have increased the sophistication of their databases and have considerably more access to electronic information on suspects and witnesses.

[94] See: West Virginia Office of Legislative Auditor, *Preliminary Performance Review of Public Defender Services* (1998) - available at www.wvpds.org; West Virginia Public Defender Services, *Report of the Indigent Defense Task Force,* January 2000 – also available at www.wvpds.org. Report includes: The Spangenberg Group, *Final Report to the West Virginia Indigent Defense Task Force,* January 2000; North Carolina Indigent Defense Services, *FY02 North Carolina Public Defender & Private Assigned Counsel Cost Benefit Analysis,* 2003 – available at www.ncids.org.

[95] ABA *Principle 2*: "Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar. 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."

[96] District of Columbia Code Chapter 16 § 2-1602 (a)(1).

[97] During the past seven years the Superior court of the District of Columbia has established panels of attorneys for U.S. Criminal cases, D.C. and Traffic offenses, and delinquency matters among others.

[98] D.C. Code § 11-2601 *et seq*.

[99] ABA *Standards for Criminal Justice*, Standard 5-2.1.

[100] ABA *Standards for Criminal Justice*, Standard 5-2.4.

[101] For example, in addition to addressing a client's pending criminal charges, the public defender of Knox County, Tennessee (Knoxville) has developed a Community Law Office (CLO) with a social service component dedicated to working directly with the client to design a life skills plan of action. This plan offers clients the opportunity to address individual needs and to utilize their skills and talents to generate personal and community value. Rather than dictating a direction for the future, the CLO empowers the client to play an active role in shaping his or her own personal goals, including: assessment of client's physical needs including housing, food, transportation, and clothing; assessment in client's need for alcohol and drug treatment; as-

sessment in client's mental and behavioral health needs; aid in obtaining valid identification, such as Social Security card, valid drivers license, or birth certificate; job counseling; housing placement assistance; life skills classes, including budgeting and parenting; and, literacy classes. In addition, the CLO sponsors other innovative initiatives, including the "Introduction to Communication through Art" program. The program is open to at-risk kids ages 11 to 19, or siblings of clients of the public defender's office, juvenile court clients, and youth at risk and supports dramatic arts performances, music and art classes.

Fulton County, Georgia (Atlanta) is typical of urban areas throughout the United States with respect to the pressures on its criminal justice system. Court calendars, courthouses and jails are overcrowded. Judges, defense attorneys, prosecutors, probation officers and ancillary court personnel cope with immense caseloads. The prevalence of substance abuse-related crime is all but absolute and there is an over representation of people charged with crime who have mental disabilities. The Fulton County Conflict Defenders (FCCD) began the "SB440 Youths Indicted as Adult Defendants" program to address the needs of 13 to 17 year old teenagers who are charged with felonies in the adult Superior Court. Upon assignment, a FCCD staff social worker immediately begins assessment and case mitigation activities. The social workers can complete psychological, social and personal history assessments as needed. Consequently, trial strategies can be developed quickly and effectively without the need to retain outside experts. The social workers are directly involved in development of dispositional and sentence mitigation strategies related to such things as substance abuse residential treatment programs, supervised residential living and outpatient treatment.

A problem faced by the SB440 program was a lack of family and home support for young people charged in the adult court. This inhibited judges from releasing these young people on bond and discouraged dispositions other than incarceration. Simply said, there was no place for these kids to go besides jail. So, FCCD created a place by seeking partners and establishing Rosser House, a group home that cares for and supervises SB440 youths. In collaboration with other community stakeholders, FCCD obtained funding to rent a two-story house in suburban Decatur, obtained the necessary licensing and permits, refurbished the house, installed phone lines for each resident subject to ankle monitoring, and contracted an established residential service provider to supervise the youth.

[102] One of the best community-based offices is The Neighborhood Defender Services of Harlem (NDS) in New York City. NDS was founded in 1990 on the premise that the public law office should be situated in the client community rather than near the courthouse. NDS offers its clients both public defender services and civil legal services to address both the pending criminal charges and the life-situations that may have contributed to the client becoming caught up in the criminal justice system. NDS practices what is known nationally as "team" representation. NDS clients are assigned not solely to a single attorney but to a "cross-functional" (multidisciplinary) team of attorneys, investigators, social workers and others, all of whom are expected to be able to step in if necessary to provide services to a particular team client. Through educational workshops and youth programs, NDS also teaches community members about the legal system, the rights and responsibilities of ordinary citizens and members of law enforcement, and the myths and realities of the criminal justice system. Community members ranging from teenagers to senior citizens want advice on how to deal with police who stop them on the street; parents and grandparents want to know how to help children who get in trouble; and everyone wants help navigating a criminal justice system that seems foreign and hostile. NDS' education and outreach programs respond directly to these needs, helping people cope with the daily frustrations and occasional crises of life in a heavily policed inner city.

[103] Recognizing this, other public defender systems have elevated the priority of juvenile representation and established special divisions not only to promote assessment and placement of juveniles in appropriate community-based service programs, but also to train and collaborate with others in the system to support the same goals, such as jail officials, judges, prosecutors and policy makers. See Juvenile Sentencing Advocacy Project, Miami/Dade County, Florida (proposal for this and other successful federal Byrne grants on-line at www.nlada.org/Defender/Defender_Funding/Successful). See also Youth Advocacy Project, Roxbury, MA (www.nlada.org/News/NLADA_News/1005694565.43).

[104] District of Columbia offenders are currently housed at Bureau of Prison facilities and contract facilities around the country as a result of federal legislation closing the local prison complex and turning the responsibility over to the federal government for housing DC prisoners.

[105] Indigent defense services were then provided by the DC Legal Aid Agency, PDS's predecessor.

[106] PDS believes that certain condition in DC make this recommendation difficult. While the USAO supervisors do not have caseloads, they supervise considerably more attorneys per supervisor. As a small organization PDS feels it cannot afford to have a large number of supervisors who do not handle cases. Likewise, PDS management feels it cannot offer a large number of purely management or administrative jobs as an incentive for high achieving lawyers to remain at PDS. However, PDS acknowledges that it can offer senior attorneys the opportunity to handle a reduced caseload and supervisory responsibilities should the attorney tire of his/her role as a full time felony I litigator. The PDS Executive Team believes this system promotes longevity among these individuals and makes them available as trainers and co-counsels to less experienced lawyers. If they did not handle any cases the opportunity for co-counsels would diminish significantly. While some co-counsels may generate additional work, most reduce some of the burden on the lead attorney. Because the supervisory positions are temporary, the annual or bi-annual selection process includes a solicitation for input from all staff that generates an annual performance evaluation of each supervisor in the trial division. This process allows the director, as part of the selection process, to discuss with each supervisor the supervisor's strengths and weakness.

[107] One individual suggested that half the attorneys newly assigned to felonies leave within two years. The comparison noted

here is to the experiences of individual team members and data from other NLADA assessments.

[108] Again, this is an anecdotal observation for which adequate data do not exist.

[109] PDS acknowledges that they have experimented with both formal and informal rotations in the past. Most recently, a one-year rotation through the appellate division was required before a trial attorney would be permitted to handle felony I matters. This forced rotation was resoundingly deemed a failure by trial division staff and appellate division supervisors. The prevailing view was that "tired" lawyers often used the time in the appellate division to rest and look for another job, or that the rotators, as a result of limited experience, were not sufficiently productive to justify the additional supervision required by appellate supervisors, or that rotators preferring to be in the trial division were not sufficiently motivated and difficult to supervise. Thus, it appeared the appellate division suffered low productivity from these forced rotations into the appellate division.

PDS has also tried informal rotations have also rarely been beneficial to the trial division. Other divisions try to take the most productive lawyers from the trial division. Once receiving a rotation, many lawyers try to extend their rotation or secure a permanent position with another division. Few come back to the trial division re-energized. No lawyer has sought a rotation in the trial division, though some apply and are accepted for permanent positions. It is unclear that forced rotations into the trial division would provide any real benefit to the trial division. Lawyers with little criminal or trial experience could not be assigned to life count felonies. Thus these rotations would not assist PDS in its primary mission to represent clients in the majority of serious felony cases in the District.

[110] NLADA *Guidelines for Legal Defense Systems in the United States*, 2.14

[111] ABA *Standards for Criminal Justice*, Standard 5-2.1

[112] NLADA *Guidelines for Legal Defense Systems in the United States*, 2.14.

The National Legal Aid & Defender Association (NLADA), founded in 1911, is the oldest and largest national, nonprofit membership organization devoting all of its resources to advocating equal access to justice for all Americans. NLADA champions effective legal assistance for people who cannot afford counsel, serves as a collective voice for both civil legal services and public defense services throughout the nation and provides a wide range of services and benefits to its individual and organizational members.

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