

GUIDELINES ON
INDIGENT DEFENSE SERVICES
DELIVERY SYSTEMS

**Approved by the State Bar of California
Board of Governors
December 8, 1990**

**GUIDELINES ON INDIGENT DEFENSE
SERVICES DELIVERY SYSTEMS**

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GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS

INTRODUCTION

During the past decade, it has become increasingly clear that competent legal services for the indigent accused are vital to the entire criminal justice system, as well as for the protection of the individual. In an era of an increasingly complex system of criminal law and procedure, well-trained, experienced defense attorneys, as well as prosecutors, judges, and law enforcement officers are essential to the fairness and effectiveness of our justice system.

In California, the responsibility of providing defense services has been left primarily to county governments. Squeezed between a growing crime rate and shrinking tax resources, counties have been hard pressed to fund defense services as well as the other heavy costs of the criminal justice system. Efforts to control defense expenditures have prompted counties to experiment with alternative defense delivery systems, such as contracting with private attorneys, administered assigned counsel programs, and second public defender offices.

The problems encountered with the contract system prompted a statewide study of defense services by the State Bar's Standing Committee on the Delivery of Legal Services to Criminal Defendants. The Committee reported that among California's 58 counties there was no consistency in the manner, cost efficiency, and quality of legal services being provided to the indigent accused throughout the state. It also found that the quality of these services varied "from outstanding to woefully inadequate," and that "the ethics vary from being consistent with the highest ideals of the profession to practices which are, at best, unwise and, at worst, unethical."

To address these problems and bring about more uniform quality defense services throughout the state, the Standing Committee recommended a statewide commission to develop statewide guidelines on indigent defense delivery systems and to offer technical assistance to local jurisdictions.

That recommendation was adopted in 1987 when the Board of Governors established the State Bar Commission on the Delivery of Legal Services to the Indigent Accused. The Commission was given the authority to "advise, assist and facilitate the review and improvement of programs and systems providing defense services in the superior, municipal and justice courts to indigent persons accused of crime."

Among its duties, the Commission is charged with promulgating "voluntary guidelines for systems for the delivery of indigent criminal defense services." The following guidelines were drafted by the Commission pursuant to that authority, and were approved by the Board of Governors of The State Bar of California in December 1990.

These guidelines are modeled after the standards recommended by the American Bar Association, the National Legal Aid and Defender Association, the National Advisory Commission on Criminal Justice Standards and Goals, and the National Study Commission on Defense Services. These authorities are cited in the Comments to the black letter text of the various guidelines as follows:

National Legal Aid and Defender Standards for the Administration of Assigned Counsel Systems (Draft, Sept. 1989) [herein cited as, "NLADA Assigned Counsel Standards"];

Model Indigent Defense Services Contract (August, 1988) developed by the State Bar of California's Standing Committee on the Delivery of Legal Services to Criminal Defendants [hereafter cited as, "Model Contract"];

American Bar Association's Standards on Criminal Justice on the Defense Function (1980) [herein cited as, ABA Defense Function Standards];

American Bar Association's Standards on Criminal Justice on Providing Defense Services (1979) [herein cited as, "ABA Standards"];

National Legal Aid and Defender Association's National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States (1976) [hereafter cited as, "NSC Guidelines"];

National Advisory Commission on Criminal Justice Standards and Goals, Courts (1973) [hereafter cited as, "NAC Standards"];

National Legal Aid and Defender Association, Standards for Defender Services [hereafter cited as, "NLADA Defender Standards"].

**PART I: GUIDELINES ON INDIGENT DEFENSE SERVICES
DELIVERY SYSTEMS: ASSIGNED COUNSEL SYSTEMS**

1. ESTABLISHMENT OF ORGANIZED PROGRAM

LEGAL SERVICES TO THE INDIGENT ACCUSED WHICH ARE NOT DELIVERED THROUGH A PUBLIC DEFENDER PROGRAM OR A CONTRACT PROGRAM SHOULD BE PROVIDED THROUGH AN ORGANIZED, ADMINISTERED ASSIGNED COUNSEL PROGRAM IN LIEU OF AD HOC OR RANDOM ASSIGNMENT OF COUNSEL BY THE COURT.

COMMENT:

Systematic assignment of counsel through a planned program, in lieu of ad hoc assignments by the courts, has been uniformly recommended by national professional organizations and governmental study groups. (See ABA Standard 5-2.1, Commentary, pp. 5-24 through 5-26); NLADA Defender Standards, I.2(b); NAC Standards Courts, 13.5; NSC Guidelines, p. 142.)

Among the reasons for avoiding the ad hoc or random method of assignments are the following: 1) frequent use of inexperienced counsel and overall lack of quality control; 2) the potential for patronage and discrimination in the selection process and of political control or undue influence; 3) pressure to obtain waivers because of the unavailability of counsel; 4) inadequate or uneven compensation and lack of fiscal control and responsibility; 5) lack of training and continuing education; and 6) lack of development of a skilled and vigorous criminal defense bar able and willing to seek criminal justice reforms. (ABA Standards, p. 5-25; NSC, p. 142.)

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**2. ESTABLISHMENT OF "MIXED" SYSTEM AND
COORDINATED PLAN**

JURISDICTIONS WHICH UTILIZE PUBLIC DEFENDER AND/OR CONTRACT PROGRAMS SHOULD ALSO PROVIDE, UNDER A COORDINATED PLAN, FOR THE ASSIGNMENT OF PRIVATE COUNSEL IN A FIXED PROPORTION OF CASES, OR AT A MINIMUM, IN CONFLICT OF INTEREST CASES, AND IN CASES REQUIRING RELIEF FROM AN EXCESSIVE WORKLOAD.

COMMENT:

An adequately funded and staffed public defender program has many advantages. However, national and state authorities have also uniformly recommended that "substantial private bar participation" in the delivery of legal services to the indigent accused is important for the continued vitality and improvement of the criminal justice system, and that government employees attorneys should not be the sole providers. (The State Bar of California Committee on Criminal Justice, Defense Services in California - A Report to the Board of Governors (April, 1977) [hereafter, "State Bar Report"], pp. 5-6; ABA Standards, 5-2.2, Commentary, p. 5-10; NAC, Courts 13.5.)

The commentary to the ABA Standards sets forth several practical reasons for this recommendation, pointing out that a "mixed" system of representation permits private attorneys to learn from experienced defenders and vice versa. Such a system also offers a "safety valve" to relieve caseload pressures in situations where caseloads have increased faster than the size of staffs and necessary revenues, and that the "continued interest of the bar in the welfare of the criminal justice system" is assured by the involvement of private attorneys in defense services. On this point, the commentary concludes: "Without the knowledgeable and active support of the bar as a whole, continued improvements in the nation's justice system are rendered less likely." (ABA Standards, p. 5-10.)

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3. THE GOVERNING BOARD AND FUNCTIONS

THE ASSIGNED COUNSEL PROGRAM SHOULD BE OPERATED UNDER A GOVERNING BOARD THE MAJORITY OF WHOSE MEMBERS SHOULD BE ATTORNEYS WITH EXPERIENCE IN CRIMINAL DEFENSE PRACTICE. JUDGES, PROSECUTORS, LAW ENFORCEMENT OFFICERS AND FUNDING OFFICIALS SHOULD NOT SERVE ON THE BOARD. MEMBERS SHOULD RECEIVE NO SALARY BUT SHOULD BE REIMBURSED FOR EXPENSES. TERMS OF OFFICE OF THE MEMBERS SHOULD BE STAGGERED. THE BOARD SHOULD BE EMPOWERED TO ESTABLISH PROGRAM POLICIES AND PROCEDURES IN CONFORMITY WITH THESE GUIDELINES, EXERCISE GENERAL SUPERVISION OVER THE OPERATIONS OF THE PROGRAM, AND APPOINT AN ADMINISTRATOR. THE BOARD SHOULD NOT INTERFERE IN THE CONDUCT OF INDIVIDUAL CASES.

COMMENT:

A governing board serves to ensure the independence of the program from the judiciary, prosecutors, law enforcement officials, and the funding source, to protect against compromise, or the appearance of compromise, of the interests of clients of the program.

Among the governing board's specific functions are the following: set the qualifications for and define the functions of the position of Administrator (See guideline on "Qualifications and Functions of Administrator"); authorize sufficient support staff to enable the Administrator to discharge those functions; set salaries and terms of employment for staff; adopt guidelines for program operations; establish procedures for exercising general fiscal and organizational control; seek and maintain adequate funding and ensure the independence of the Administrator and participating assigned counsel. As provided below, the board should also set qualifications for assigned counsel and determine attorney fee levels.

Written by-laws should be adopted by the board, governing its functions and including both procedural matters (meeting times, quorums, officers, etc.) and policy limitations, e.g., prohibition against interference in handling specific cases.

In discharging its functions, the board should give special attention to provision of adequate attorney compensation and training and workload control.

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4. THE ADMINISTRATOR AND FUNCTIONS

4.1 POSITION, QUALIFICATIONS AND COMPENSATION

AN ADMINISTRATOR SHOULD BE APPOINTED BY THE ASSIGNED COUNSEL BOARD TO CARRY OUT ITS POLICIES AND MANAGE THE PROGRAM. THE ADMINISTRATOR SHOULD PREFERABLY BE AN ATTORNEY LICENSED TO PRACTICE LAW WITH CRIMINAL DEFENSE EXPERIENCE AND ADMINISTRATIVE EXPERIENCE. SELECTION OF THE ADMINISTRATOR SHOULD BE BASED ON MERIT WITH DISMISSAL ONLY FOR GOOD CAUSE UPON NOTICE AND HEARING BY THE BOARD. THE ADMINISTRATOR SHOULD NOT ENGAGE IN PRIVATE LAW PRACTICE, AND SHOULD BE APPOINTED FOR A STATED TERM OF OFFICE. A FULL-TIME ATTORNEY-ADMINISTRATOR OF A PROGRAM WHICH IS THE PRIMARY PROVIDER IN THE JURISDICTION SHOULD BE COMPENSATED AT PARITY WITH THE DISTRICT ATTORNEY.

COMMENT:

The requirement that the Administrator preferably be a member of the bar with experience in criminal defense representation -- as distinguished from a lay person lacking such experience -- is based on a study of the two types of administrators showing that programs administered by attorney-administrators placed greater emphasis on training and on monitoring courtroom performance. That study also demonstrated the crucial significance of such training and monitoring. (See NLADA, Statewide Evaluation of the Massachusetts Bar Advocate Program, pp. 43-33 (1986).)

The prohibition against private law practice is designed to avoid the potential conflict of interest when, as an attorney, the Administrator deals with the same law enforcement officials and judges in both capacities. This also avoids the potential of compensating the Administrator poorly on the assumption that the low salary can be supplemented through private practice. Likewise, there is danger that the Administrator may be tempted to put private cases above the duties of the office to increase income.

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4.1 POSITION, QUALIFICATIONS AND COMPENSATION (cont'd)

COMMENT: (cont'd)

In rural jurisdictions, where the volume of cases may be too small for a full-time Administrator, it may be advisable for assigned counsel programs to regionalize in order to create offices with sufficient caseloads. A term of office for the Administrator of between three and six years, with the possibility of renewal, is recommended to afford the Administrator some security during good performance, yet permitting the Board to re-examine the Administrator's performance.

Competitive salaries are necessary in order to attract and retain capable candidates. In counties where there are full-time attorney-administrators, the requirement of a salary comparable to that of the district attorney or public defender is modeled after ABA Standards governing public defender salaries. (See ABA Standards, 5-3.1.)

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4.2 DUTIES OF THE ADMINISTRATOR

THE DUTIES OF THE ADMINISTRATOR SHOULD INCLUDE, BUT NOT BE LIMITED TO: ASSISTING THE BOARD IN DEVELOPMENT OF THE PROGRAM BUDGET; PLANNING AND ESTABLISHING FEE SCHEDULES AND FISCAL CONTROLS; SELECTING NECESSARY STAFF; ESTABLISHING INTERNAL PROCEDURES FOR ORDERLY DISPOSITION OF CASES, ASSIGNMENT OF COUNSEL IN ACCORDANCE WITH PROGRAM CRITERIA, MAINTENANCE OF STATISTICAL DATA, AND PROVISION OF SUPPORT SERVICES; ORGANIZING TRAINING PROGRAMS; MONITORING THE PERFORMANCE OF ASSIGNED ATTORNEYS; AND REPRESENTING THE PROGRAM BEFORE BAR ASSOCIATIONS, LEGISLATIVE BODIES AND COMMUNITY GROUPS.

COMMENT:

The duties of the Administrator are pursuant to his function as the manager of the operations of the Program, to be carried out in accordance with policies established by the Board and in conformity with these guidelines. The duties of the Administrator with respect to public relations are modeled after guidelines related to public defenders. (See NAC Standards, Courts, Std. 13.9.)

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4.3 FUNDING AND BUDGETARY RESPONSIBILITIES

A PROPOSED BUDGET SHOULD BE PREPARED AND SUBMITTED TO THE FUNDING AUTHORITY BY THE BOARD OF THE PROGRAM IN CONSULTATION WITH THE ADMINISTRATOR. IT SHOULD PROVIDE FOR FUNDING OF THE PROGRAM BY THE FUNDING AUTHORITY IN A MANNER AND IN AN AMOUNT CONSISTENT WITH THE FUNDING AUTHORITY'S CONSTITUTIONAL DUTY TO PROVIDE QUALITY REPRESENTATION.

THE BUDGET SHOULD PROVIDE ADEQUATE FUNDS FOR: 1) REASONABLE FEES FOR PROGRAM ATTORNEYS TAKING INTO ACCOUNT THE AVERAGE OVERHEAD COSTS OF PRIVATE PRACTITIONERS IN THE AREA; 2) COSTS OF ADMINISTRATION, TRAINING, OFFICE SPACE, LIBRARY, EQUIPMENT AND SUPPLIES; AND 3) INSURANCE FOR THE BOARD AND ADMINISTRATOR. INSURANCE FOR ASSIGNED ATTORNEYS PARTICIPATING IN THE PROGRAM SHOULD EITHER BE PROVIDED, OR ATTORNEYS SHOULD BE REQUIRED TO PROVIDE PROOF OF MALPRACTICE AND LIABILITY COVERAGE AS A REQUIREMENT FOR PARTICIPATION IN THE PROGRAM.

COMMENT:

It is the responsibility of government to provide adequate funding of defense services for all persons eligible to receive it. (ABA Standards, Std. 5-15.) Without adequate compensation of attorneys, an assigned counsel program will fail to meet the constitutional requirement of providing quality representation. Furthermore, inadequate fees will result in capable attorneys resigning from the program. (See Ferri v Ackerman, 444 U.S. 195, 204-205 (1979) (dicta expressing concern that low fees coupled with liability for malpractice suits would discourage representation of indigents).

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4.3 FUNDING AND BUDGETARY RESPONSIBILITIES (cont'd)

COMMENT: (cont'd)

In addition to adequate compensation, sufficient funds should be provided for the administration of the program. Insurance coverage for the program board and administrator should be afforded in order to protect against risks arising in connection with the conduct of their offices since, in their administrative capacities, they would generally not be accorded official immunity. Likewise, attorneys should either be covered in the budget or be required to provide their own insurance. The level of required insurance for the attorneys should be set by the program board based on local circumstances. Provision for coverage of program cases may be available at a reasonable cost from national professional associations.

Suitable office space should be provided at appropriate locations convenient to the courts but preferably not in the court building or close enough to associate the program with the judicial or law enforcement agencies. The office space should include a conference room available for assigned counsel to reserve, and the program should also have a private room available in the courthouse for assigned attorneys to confer with clients.

The program should assure that assigned attorneys have access to an adequate criminal law library, including looseleaf service and coverage of relevant medical, scientific and other forensic developments.

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5. ASSIGNMENT OF CASES

ALL INCOMING CASES SHOULD BE CLASSIFIED BY LEVEL OF SERIOUSNESS IN CATEGORIES, AND THEY SHOULD BE ASSIGNED TO AVAILABLE ATTORNEYS ON THE APPROPRIATE ROSTER, IN SEQUENCE. DEPARTURES FROM STRICT ROTATION OF NAMES MAY BE MADE WHEN NECESSARY FOR THE BEST INTERESTS OF THE CLIENT AND AS REQUIRED BY THE EFFICIENT ADMINISTRATION OF THE PROGRAM.

COMMENT:

Five general classifications of cases which may be useful for this purpose include: 1) misdemeanors; 2) felonies; 3) aggravated felonies; 4) homicides; and 5) capital offenses. (See NLADA Assigned Counsel Standards, pp. 86-87.) Since misdemeanors may sometimes be quite complicated, a separate roster of attorneys only for misdemeanor cases is not advisable.

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6. QUALIFICATIONS OF ATTORNEYS

ATTORNEY QUALIFICATIONS FOR ASSIGNMENTS SHOULD BE BASED ON CRITERIA REFLECTING THE NECESSARY EXPERIENCE AND TRAINING FOR THE VARIOUS CATEGORIES OF CASES HANDLED BY THE PROGRAM. MINIMUM QUALIFICATIONS FOR ASSIGNMENT TO CAPITAL CASES SHOULD REQUIRE ATTORNEYS WITH AT LEAST 5 YEARS OF CRIMINAL LITIGATION EXPERIENCE, INCLUDING AT LEAST TEN JURY TRIALS OF SERIOUS AND COMPLEX CASES AS LEAD COUNSEL AND FAMILIARITY WITH THE USE OF EXPERT WITNESSES AND THE PRESENTATION OF PSYCHIATRIC AND FORENSIC EVIDENCE. ATTORNEYS HANDLING SERIOUS FELONIES SHOULD HAVE A MINIMUM OF THREE YEARS OF CRIMINAL PRACTICE EXPERIENCE WITH AT LEAST SIX JURY TRIALS TRIED TO VERDICT, OF WHICH TWO SHALL BE FELONY CASES. ATTORNEYS HANDLING OTHER FELONY CASES SHOULD HAVE A MINIMUM OF THREE YEARS OF CRIMINAL PRACTICE EXPERIENCE WITH AT LEAST SIX JURY TRIALS TRIED TO VERDICT.

IN ADDITION TO EXPERIENCE AND TRAINING, PROFICIENCY AND COMMITMENT NECESSARY TO PROVIDE QUALITY REPRESENTATION SHOULD BE REQUIRED. ATTORNEYS SHOULD BE REQUIRED TO MAINTAIN THEIR COMPETENCY BY ATTENDING A MINIMUM OF 12 HOURS OF CONTINUING LEGAL EDUCATION ANNUALLY IN THE FIELD OF CRIMINAL LAW AND PROCEDURE AND/OR TRIAL PRACTICE, IN ADDITION TO THE 8 HOURS OF ETHICS OR LAW PRACTICE MANAGEMENT (WITHIN A 36 MONTH PERIOD) UNDER THE NEW STATE LAW ON Mandatory Continuing Legal Education.

THE SIZE AND CHARACTERISTICS OF THE POOL OF AVAILABLE ATTORNEYS SHOULD NOT BE PERMITTED TO JUSTIFY QUALIFICATIONS SO MINIMAL THAT QUALITY REPRESENTATION IS ENDANGERED. PROGRAM-SPONSORED OR OTHER TRAINING AND SOME FORM OF SUPERVISION SHOULD BE REQUIRED FOR NEWLY-ADMITTED MEMBERS OF THE BAR. VERIFIABLE INFORMATION TO SUPPORT AN APPLICATION FOR PLACEMENT ON A ROSTER OR RECLASSIFICATION TO A HIGHER ROSTER SHOULD BE PROVIDED BY THE ATTORNEY APPLICANT.

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6. QUALIFICATIONS OF ATTORNEYS (cont'd)

COMMENT:

The requirement of "proficiency and commitment" is to ensure against placement on the roster of attorneys who have been in practice a certain number of years, or have been counsel of record in a certain number of serious cases, but whose past performance does not represent the competence required for quality representation in difficult cases. Only more skilled attorneys should be classified as eligible for appointment in such cases.

The requirement of a minimum of 12 hours of annual continuing legal education is in addition to requirements under the new state law on mandatory continuing legal education which requires 36 hours of legal education activities every three years beginning February 1992. (Calif. Bus. & Prof. Code, §6070(a).)

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7. STANDARDS OF REPRESENTATION

THE ASSIGNED COUNSEL PROGRAM SHOULD FURNISH A REASONABLY COMPETENT ATTORNEY ACTING AS A DILIGENT, CONSCIENTIOUS ADVOCATE WHO HAS THE FOLLOWING RESPONSIBILITIES: 1) CAREFUL FACTUAL AND LEGAL INVESTIGATION; 2) PROMPT ACTION TO PROTECT A CLIENT'S LEGAL RIGHTS; 3) INFORMING THE CLIENT OF CASE DEVELOPMENTS; 4) (FOR CASES TO BE TRIED) PREPARING FOR JURY SELECTION, EXAMINATION OF WITNESSES, SUBMISSION OF INSTRUCTIONS AND PRESENTATION OF ARGUMENT; 5) KNOWING AND EXPLORING SENTENCING ALTERNATIVES; 6) ADVISING CLIENTS CONCERNING THEIR RIGHTS OF APPEAL; 7) REFUSING TO ACCEPT MORE CASES THAN THE ATTORNEY CAN COMPETENTLY HANDLE; 8) DECLINING MATTERS WHICH THE ATTORNEY KNOWS OR SHOULD KNOW HE OR SHE IS NOT COMPETENT TO HANDLE; AND 9) MAINTAINING CLIENT CONFIDENCES AND SECRETS. THE PROGRAM SHOULD ALSO REQUIRE THAT THE ASSIGNED ATTORNEYS MAINTAIN ADEQUATE OFFICE SPACE AND BE OPEN DURING NORMAL BUSINESS HOURS FOR APPOINTMENTS WITH CLIENTS WHO ARE NOT IN CUSTODY. TELEPHONE ANSWERING EQUIPMENT OR A MESSAGE SERVICE SHOULD BE REQUIRED FOR CALLS FROM CLIENTS DURING NON-BUSINESS HOURS. WHENEVER POSSIBLE, INTERVIEWS OF CLIENTS WHO ARE IN CUSTODY SHOULD BE CONDUCTED WITHIN 24-HOURS OF APPOINTMENT. CLIENTS OUT OF CUSTODY SHOULD BE INTERVIEWED NO LATER THAN 72 HOURS AFTER APPOINTMENT WHENEVER POSSIBLE.

COMMENT:

The acknowledgement of the attorney's professional responsibilities serve as a reminder to both parties. (See People v Pope (1979) 23 Cal.3d 412; Strickland v Washington (1984) 466 U.S. 2668, 104 S.Ct. 2052, 80 L.Ed.2d 674.) The more mundane provisions concerning adequate office space, telephone answering, and prompt interviews, are equally important in responding to practical concerns underlying the more general guidelines, and they address frequent complaints by clients about a lack of responsiveness and communication with their appointed attorneys.

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8. WORKLOAD OF ATTORNEYS

AN ATTORNEY SHOULD NOT BE ASSIGNED MORE CASES THAN HE OR SHE CAN EFFECTIVELY HANDLE. APPROPRIATE RECORDS SHOULD BE KEPT BY THE PROGRAM TO AVOID ASSIGNING AN EXCESSIVE NUMBER OF CASES TO AN ATTORNEY.

COMMENT:

A lawyer may not accept more employment that he or she can handle within the constitutional mandate for speedy trial and the limits of a lawyer's capacity to afford effective representation. It is unprofessional to accept employment for the purpose of delaying trial. (ABA Defense Function Standards, 4-1.2(d).) Defense services organizations also have a professional obligation to take steps to reduce their pending or projected workloads when an excessive workload interferes with the "rendering of quality representation or lead(s) to the breach of professional obligations." (ABA Standards, 5-4.3.)

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9. ORIENTATION AND TRAINING

AN ORIENTATION ON PROGRAM POLICIES AND PROCEDURES SHOULD BE PROVIDED TO EACH ATTORNEY BEFORE CASES ARE ASSIGNED. ENTRY-LEVEL TRAINING SHOULD BE MANDATORY FOR ALL ATTORNEYS, UNLESS AN ATTORNEY'S PRIOR EXPERIENCE MERITS AN EXCEPTION. IN-SERVICE TRAINING SHOULD ALSO BE PROVIDED, INCLUDING SYSTEMATIC, COMPREHENSIVE INSTRUCTION IN SUBSTANTIVE AND PROCEDURAL LAW AND COURTROOM SKILLS. A MINIMUM NUMBER OF HOURS OF TRAINING SHOULD BE REQUIRED ANNUALLY. ATTORNEYS SHOULD ALSO BE ENCOURAGED TO ATTEND ADDITIONAL TRAINING PROVIDED BY OUTSIDE ORGANIZATIONS.

COMMENT:

Modern criminal law practice is a highly complex and specialized field of law, which requires specialized training beyond a law degree and a license to practice. (See ABA Standards, 5-1.4. NSC Guidelines, p. 437.) (See Assigned Counsel Guideline No. 6, supra, on the mandatory minimum hours of training which should be required in the field of criminal law and procedure and/or trial practice.)

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10. SUPERVISION OF ATTORNEYS

POLICIES AND PROCEDURES SHOULD BE ESTABLISHED FOR SUPERVISION OF ATTORNEYS AND FOR HANDLING COMPLAINTS OF CLIENTS AND OTHERS. A MENTOR SYSTEM SHOULD BE ESTABLISHED TO ENABLE LESS EXPERIENCED ATTORNEYS TO OBTAIN ADVICE FROM MORE EXPERIENCED, COMPETENT ATTORNEYS. A MONITORING SYSTEM SHOULD ALSO BE ESTABLISHED TO REVIEW THE PERFORMANCE OF ATTORNEYS, BASED ON ESTABLISHED, PUBLICIZED CRITERIA, IN ORDER TO ENSURE QUALITY PERFORMANCE AS WELL AS FINANCIAL CONTROL.

COMMENT:

Attorney supervision is essential to ensuring quality representation. Such supervision should not be limited to investigation of complaints. An on-going program of supervision will do much to avoid problems and complaints. It also affords an opportunity to determine training needs and to provide a basis for removal of attorneys when necessary to protect current or future clients. The orientation program should inform attorneys of the supervision aspect of the program and the criteria used.

Mentors should be available for consultation, demonstrations, confidential criticism, informal advice on procedural or tactical matters and feedback. The mentor should be available by telephone as reasonably needed. Mentors may be selected from the same or a higher program roster, from a defender office (if that can be arranged), from the local bar association, etc.). An alternative or supplementary volunteer "second chair" program may also be established in which a less experienced attorney would be allowed to work without compensation with an experienced attorney.

Monitoring of attorneys should be directed toward both financial accountability and quality performance. Administrative records such as case summaries or vouchers that detail actions taken should be used not only to establish entitlement to the compensation requested, but also to determine whether functions necessary to quality defense have been discharged. Such records may disclose a pattern of avoidance of preliminary hearings, a failure to use investigative resources or to file pretrial motions, or an apparent excessive number of guilty pleas -- any of which may suggest the need for closer review of an attorney's practices, including personal observation.

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11. DISCIPLINARY PROCEDURES

PROCEDURES SHOULD BE ESTABLISHED FOR REMOVAL OF ATTORNEYS FROM THE ROSTERS OR FOR LESSER DISCIPLINARY MEASURES FOR VIOLATION OF PROGRAM RULES, INCLUDING FAILURE TO PROVIDE COMPETENT REPRESENTATION. THE PROCEDURES SHOULD INCLUDE NOTICE AND HEARING WITH THE RIGHT OF APPEAL TO THE BOARD.

COMMENT:

The program Board must have the power to enforce its policies and procedures, including the power of removal, to ensure quality legal representation to clients. At the same time, care should be taken to avoid violating an attorney's professional independence or chilling zealous representation. Nor should there be interference with the attorney-client relationship, if the client is satisfied with appointed counsel. (See Smith v Superior Court (1968) 68 Cal.2d 547, 562, 68 Cal.Rptr. 1, 10, 440 p.2d 65, 75.) Care should also be taken not to deny the attorney due process in the procedures for suspension or removal.

Less drastic sanctions than removal should be imposed for less serious breach of program rules such as admonition or suspension with a time limit for demonstrating that deficiencies have been corrected.

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12. PROVISION OF SUPPORT SERVICES

THE PROGRAM SHOULD ENSURE THE AVAILABILITY TO ASSIGNED COUNSEL OF INVESTIGATORY, EXPERT AND OTHER SERVICES NECESSARY FOR PROVISION OF EFFECTIVE REPRESENTATION AT EVERY PHASE OF THE ASSIGNED CASES.

COMMENT:

Examples of the kinds of "other services" referred to in this guideline include: paralegals, social workers, interpreters, sentencing experts and advocates, and extraordinary services such as computerized legal research for novel questions of law.

The use of trained investigators to interview witnesses is more effective and economical than using attorneys for this function, and avoids potential conflicts of interest or ethical problems if it becomes necessary to impeach a witness with an inconsistent statement. (See ABA Defense Function Standards, 4-4.3(d); ABA Standards, 5-1.4.) Investigative support services are required, and should be available for stages of proceedings other than trial, such as bail hearings, pre-trial motions, plea negotiations, sentencing and post-conviction proceedings.

The Board should establish procedures for authorization of routine support services. Procedures should facilitate rapid access to services for preservation of evidence, compliance with filing deadlines, and to meet other exigencies. Applications for extraordinary support services should be by means of an ex parte procedure so that defense tactics are not prematurely disclosed. (See Penal Code § 987.9 (ex parte applications for support services in death penalty cases).)

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13. COMPENSATION AND REIMBURSEMENT OF EXPENSES

13.1 FEEs

**REASONABLE COMPENSATION SHOULD BE PROVIDED TO
ASSIGNED COUNSEL**

COMMENT:

Section 987.3 of the Penal Code provides in pertinent part that among the factors which should be considered by the courts in setting court-appointed counsel fees, the court should consider, "Customary fee[s] in the community for similar services rendered by privately retained counsel to a nonindigent client..."

The compensation provided should be sufficient to ensure quality representation. Fees should be reviewed periodically and adjusted when necessary to conform to this guideline.

Rates of compensation that do not exceed law office overhead costs by a sufficient amount to ensure reasonable compensation will inevitably lead to a deterioration of services and the loss of competent attorneys.

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Delivery Systems: Assigned Counsel Systems**

13.2 METHOD OF COMPENSATION

ATTORNEYS SHOULD BE COMPENSATED AT AN HOURLY RATE, WITHOUT DISTINCTION BETWEEN SERVICES PERFORMED IN AND OUT OF COURT. MAXIMUM FEE LIMITS SHOULD NOT BE IMPOSED BUT WHERE PROVIDED SHOULD BE SUBJECT TO EXCEPTION UPON APPROVAL OF THE ADMINISTRATOR WITHIN ESTABLISHED GUIDELINES. ALL COMPENSATION CLAIMS SHOULD BE REVIEWED BY THE ADMINISTRATOR AND SHOULD BE APPROVED UNLESS THERE IS CAUSE TO BELIEVE THE AMOUNT CLAIMED IS UNWARRANTED. IN LENGTHY CASES, PERIODIC BILLING AND PAYMENT DURING THE COURSE OF REPRESENTATION SHOULD BE PROVIDED. ATTORNEYS SHOULD NEITHER SEEK NOR ACCEPT PAYMENTS FROM CLIENTS OR OTHER SOURCES ON BEHALF OF CLIENTS THAT ARE IN ADDITION TO FEES AND EXPENSES AUTHORIZED BY THE PROGRAM.

COMMENT:

Flat rate compensation that does not link attorney time and effort to the level of remuneration encourages attorneys to do what is most profitable for themselves and what is efficient for the system but not what is in the best interests of clients. (See ABA Standards, 5-2.4, Commentary, p. 5-33.) On the other hand, hourly rates that compensate attorneys for actual work performed do not penalize thorough preparation and aggressive advocacy. Any danger that hourly rates may lead to inflation of bills can be controlled by the Administrator by careful overview of claims for payment. Setting fee caps to avoid inflation acts as a disincentive to quality representation, as in the case of flat rates. However, this should not discourage the setting of benchmark criteria of fees based on the program's experience.

No differentiation should be made between attorney services in and out of court. Activities outside court, such as directing investigation, negotiation, tactical planning, etc., require no less legal skill and expertise than in-court appearances, and are at least as important, if not more so, to quality representation.

The Administrator, rather than the courts, should be empowered to approve or disapprove fees. This avoids the danger of impairment of the independence of counsel, and it is also more efficient and relieves judges of the burden of this administrative task. It also helps to equalize fees through a centralized fee-approval system.

**Part I Guidelines on Indigent Defense Services
Delivery Systems: Assigned Counsel Systems**

13.3 PAYMENT OF EXPENSES

POLICIES SHOULD BE ESTABLISHED ON REIMBURSABLE AND NON-REIMBURSABLE EXPENSES. ROUTINE OFFICE EXPENSES AND OUT-OF-POCKET EXPENSES SHOULD BE PAID BY ASSIGNED COUNSEL WITHOUT REIMBURSEMENT. REIMBURSEMENT OF NECESSARY EXTRAORDINARY EXPENSES SHOULD BE AUTHORIZED.

COMMENT:

The program should not reimburse attorneys for expenses that are considered "overhead" and which should be covered by the rate of compensation. Such overhead expenses include rent, secretarial and other clerical costs, local telephone service, and in-house routine photocopying. Reimbursable expenses would be those normally billed to a paying client, or which are inherent in representing indigents (e.g., collect phone calls from custody facilities, photocopying of transcripts and air travel).

**PART II. GUIDELINES ON INDIGENT DEFENSE
SERVICES DELIVERY SYSTEMS:
CONTRACT DEFENSE SERVICE SYSTEMS**

1. PARTIES

CONTRACTS FOR DELIVERY OF INDIGENT DEFENSE SERVICES SHOULD SPECIFY PRECISELY THE PARTIES TO THE AGREEMENT AND WHAT THEIR RELATIONSHIP IS.

COMMENT:

The basic defense service contract model is an agreement between an attorney and a political entity authorized to contract for defense services, generally a county. Many counties contract with groups of attorneys, for example: 1) General practice law firms, including partnerships and professional corporations; 2) Specialized law firms (also including partnerships and professional corporations) organized specifically to service the contract caseload exclusively; and 3) Groups or "consortia" of attorneys and/or firms which jointly agree to share responsibility for servicing the contract caseload.

Examples of the latter include: individual firms that mutually agree to accept contract appointments on a percentage (e.g., 50/50) or rotational basis; several firms which contract to accept cases under a distribution system administered by a contract "administrator"; or an entire county bar association that contracts to perform the defense function, including designation of the "administrator" who distributes case assignments to eligible county bar members under a system that considers facts such as case complexity and attorney ability.

Contracts differ widely in defining the relationship of the courts to the contract. Although § 987.2(b) of the Penal Code, provides for contracts "between the court and one or more responsible attorneys after consultation with the board of supervisors as to the total amount of compensation and expenses to be paid....," most contracts are directly between the county and attorney with no reference to the court as a party. One California contract (L.A. County/Pomona) even goes so far as to specifically name the relevant court(s) and/or presiding judge(s) as contract parties along with the county and the attorney. Penal Code § 987.2(b) notwithstanding, all of the above "court role" variations seem to pass muster under Phillips v Seely (1974) 43 Cal.App.3d 104, which views county/attorney contracts as authorized under Government Code, § 31000, with subsequent court appointment of a "contract attorney" deemed the equivalent of contract "ratification."

**Part II Guidelines on Indigent Defense Services
Delivery Systems: Contract Defense Service Systems**

1. PARTIES (cont'd)

COMMENT: (cont'd)

Notwithstanding Penal Code § 987.2, including the court as a specific party to the contract may pose a problem if the courts are called on to interpret or enforce the contract in a dispute. Furthermore, the court's power to void the contract by refusing to appoint should not be compromised by involving the court as a contract party.

**Part II Guidelines on Indigent Defense Services
Delivery Systems: Contract Defense Services Systems**

2. SCOPE OF ATTORNEY SERVICES

CONTRACTS SHOULD SPECIFICALLY DELINEATE THE TYPES OF CASES COVERED BY THE AGREEMENT, WHEN REPRESENTATION COMMENCES, AND SHOULD CONTAIN A PROVISION FOR INITIATION OF SERVICES PRIOR TO APPOINTMENT, WHERE NECESSARY.

COMMENT:

Specificity of the types of cases covered by an agreement enables the attorney to anticipate caseload, plan for adequate staffing, and, in the case of flat rate contracts, prevent unexpected appointments from causing case overload. (See Model Contract, p. 2, for examples of specification of included and excluded services.)

The definition of a "case" should include whether or not a case is based on defendants or charges. A single defendant may be charged with multiple counts which may or may not arise out of the same factual situation. If the counts are independent, they will usually entail more work and expose the defendant to a heavier sentence.

It is not recommended that attorneys providing trial level services also provide appellate services in the same cases. Independent counsel on appeal should be provided in order to ensure that any issues concerning ineffective assistance of counsel may be objectively assessed.

**Part II Guidelines on Indigent Defense Services
Delivery Systems: Contract Defense Services Systems**

**3. ANCILLARY SERVICES: INVESTIGATION AND
EXPERT ASSISTANCE**

**CONTRACTS SHOULD MAKE SPECIFIC PROVISION FOR
ANCILLARY SERVICES THAT DO NOT CONFLICT WITH THE
ATTORNEYS' COMPENSATION.**

COMMENT:

Provision of ancillary support services has been recognized as essential to effective assistance of counsel. (See Corenevsky v Superior Court (1984) 36 Cal.3d 307.) In addition to trained investigators to interview witnesses and gather evidence, such services should include expert witnesses and social work personnel who can assist with pretrial release hearings and at sentencing. (See ABA Standards, 5-1.4.)

Failure to make clear provision for such services, or requiring that such services be paid out of attorney compensation, serves as a financial disincentive to thorough preparation.

The Model Contract, pp. 6-7, suggests a number of alternatives, including: requiring employment of a predetermined number of investigators to service the anticipated caseload; estimating the amount of funds needed and isolating the budget source; and specifying the manner for use of experts. Investigators should be retained either on a full-time basis or case-by-case basis without prior court approval since the frequency of using investigators and urgency, in some case, makes prior court approval impractical.

**Part II Guidelines on Indigent Defense Services
Delivery Systems: Contract Defense Services Systems**

**4. CONTRACT TERM: COMMENCEMENT AND
DURATION OF REPRESENTATION; TERMINATION;
GOOD CAUSE**

THE DURATION OF THE CONTRACT SHOULD BE SPECIFIED, AS SHOULD THE RATE OF COMPENSATION FOR POST-CONTRACT REPRESENTATION. AN EARLY TERMINATION OF A CONTRACT SHOULD BE MADE ONLY FOR GOOD CAUSE, WHICH SHOULD BE SPECIFICALLY DEFINED, UPON NOTICE AND FAIR HEARING.

COMMENT:

Contracts of multi-year duration are preferable to one-year contracts or contracts that are indefinite. Multi-year contracts facilitate smooth and efficient management and avoid the uncertainty of annual county budget hassles that can play havoc with attracting and retaining qualified staff.

Contracts should be terminable only for "good cause" and not "at the pleasure" of the contracting authority as this opens the door for summary removal because of political dissatisfaction with the attorney's defense in an individual case. The threat of such removal may pressure the attorney into less than vigorous advocacy on behalf of the client.

The Model Contract, p. 9, defines "good cause" for early termination of a contract (see clause No. 4), to include: conviction of a felony or crime of moral turpitude; persistent failure to perform the duties of the contract; serious disability which interferes with performance of duties; willful misconduct pertaining to the contract; habitual intemperance; and conduct prejudicial to the administration of justice. The Model Contract, pp. 10-11 also sets forth a procedure for either a confidential or public hearing, at the attorney's option, with the right to appear personally and by counsel, and to produce evidence, and the right to a written specification of the reasons for termination.

**Part II Guidelines on Indigent Defense Services
Delivery Systems: Contract Defense Services Systems**

5. FINANCIAL ELIGIBILITY DETERMINATION

IT IS THE SOLE RESPONSIBILITY OF THE COURT (OR ITS DESIGNEE), AND NOT OF THE ATTORNEY, TO DETERMINE FINANCIAL ELIGIBILITY OR INDIGENCE. NON-PRIVILEGED INFORMATION SUBSEQUENTLY OBTAINED BY THE ATTORNEY WHICH SUGGESTS THAT A CLIENT IS NOT ELIGIBLE FOR APPOINTMENT OF COUNSEL SHOULD BE PROVIDED TO THE COURT. TO THE EXTENT INFORMATION IS NOT PRIVILEGED, THE ATTORNEY SHOULD COOPERATE WITH THE COURT IN ANY HEARING TO DETERMINE THE CLIENT'S ABILITY TO REIMBURSE THE COUNTY FOR THE COST OF LEGAL SERVICES. UPON COMMENCEMENT OF REPRESENTATION, THE ATTORNEY SHOULD ADVISE THE CLIENT OF THE REQUIREMENTS OF REIMBURSEMENT OF THE COST OF LEGAL SERVICES.

COMMENT:

The contract should delineate the attorney's limited role in the process for determining eligibility in order to avoid misunderstanding and disputes with the courts, county or client.

**Part II Guidelines on Indigent Defense Services
Delivery Systems: Contract Defense Services Systems**

6. RATE OF COMPENSATION AND PAYMENT

RATES OF COMPENSATION SHOULD BE SUFFICIENT TO ASSURE EFFECTIVE ASSISTANCE OF COUNSEL ON THE BASIS OF THE FACTORS SET FORTH IN SECTION 987.3 OF THE CALIFORNIA PENAL CODE. THE METHOD FOR DETERMINING THE RATE OF COMPENSATION SHOULD ADEQUATELY COMPENSATE THE ATTORNEY FOR ALL NECESSARY REPRESENTATION OF EACH CLIENT AND SHOULD NEVER PLACE THE CLIENT'S RIGHT TO VIGOROUS REPRESENTATION IN CONFLICT WITH THE ATTORNEY'S NEED FOR ADEQUATE COMPENSATION.

AN HOURLY RATE OR A PER-CASE RATE SHOULD BE USED AS THE METHOD OF COMPENSATION. FIXED-PERIOD, BULK OR FLAT RATES SHOULD NOT BE UTILIZED UNLESS BASED ON RELIABLE STATISTICAL CASELOAD DATA TO AVOID ANY FINANCIAL DISINCENTIVES TO THE ATTORNEY, AND ONLY IN CONJUNCTION WITH A METHOD, SPECIFIED IN THE CONTRACT, FOR INCREASING THE RATE OF COMPENSATION TO ACCOUNT FOR INCREASES IN CASELOAD SIZE OR EXTRAORDINARY CASES. CONTRACTS SHOULD NOT BE AWARDED SOLELY ON THE BASIS OF COMPETITIVE BIDDING WITHOUT CONSIDERATION OF OBJECTIVE STANDARDS OF REPRESENTATION. SUCH OBJECTIVE STANDARDS OF REPRESENTATION SHOULD BE CONSISTENT WITH THOSE SET FORTH IN OTHER SECTIONS OF THESE GUIDELINES. CONTRACTS SHOULD PROVIDE FOR REGULAR, PERIODIC PAYMENTS TO THE ATTORNEY, AND PAYMENTS SHOULD NOT BE WITHHELD UNTIL COMPLETION OF ANY CASE OR CASES.

**Part II Guidelines on Indigent Defense Services
Delivery Systems: Contract Defense Services Systems**

6. RATE OF COMPENSATION AND PAYMENT (cont'd)

COMMENT:

Penal Code § 987.3 specifies the following factors to be considered in awarding reasonable compensation to appointed counsel: (a) customary fees in the community for similar services by privately retained counsel; (b) time and labor required; (c) difficulty of the defense; (d) novelty or uncertainty of the law; (e) degree of professional ability, skill and experience required; and (f) professional character, qualification and standing of the attorney.

Experience with competitive bidding indicates that too often it encourages attorneys and counties to ignore adequate client representation in favor of financial advantage. Withholding payment until the conclusion of the case places a premium on rushing a case to a conclusion that may place the attorney in a position of financial conflict with the client.

**Part II Guidelines on Indigent Defense Services
Delivery Systems: Contract Defense Services Systems**

7. EXTRAORDINARY EXPENSES AND FEES

IN ADDITION TO THE REGULAR COMPENSATION, THE CONTRACT SHOULD PROVIDE FOR REIMBURSEMENT TO ATTORNEYS FOR REASONABLE COSTS AND FEES ASSOCIATED WITH EXTRAORDINARY CASES.

COMMENT:

Extraordinary cases which require unusual time or expense, such as serial homicides, political cases or those requiring a change of venue, cannot be anticipated when evaluating a contract caseload and fixing a rate of compensation. These cases can cause severe financial and workload problems. A provision for prior court approval of extraordinary expenses can protect the county from abuse. (See Model Contract, p. 18.)

**Part II Guidelines on Indigent Defense Services
Delivery Systems: Contract Defense Services Systems**

8. CASELOAD AND WORK LEVEL CHANGES

CONTRACTS SHOULD BE AWARDED ON THE BASIS OF REASONABLE CASELOAD STANDARDS AND WORKLOAD WITHIN GENERALLY ACCEPTED NATIONAL AND STATE PROFESSIONAL STANDARDS AND WITH DUE CONSIDERATION FOR LOCAL CRIMINAL JUSTICE PRACTICES AND PROCEDURES. CONTRACTS SHOULD PROVIDE FOR THE RIGHT TO REQUEST MODIFICATION OR CANCELLATION OF A CONTRACT BY THE ATTORNEY UPON REASONABLE NOTICE BASED UPON UNFORESEEN CHANGES IN CRIMINAL JUSTICE POLICIES OR PROCEDURES WHICH SUBSTANTIALLY AFFECT THE ABILITY OF THE ATTORNEY TO PERFORM THE OBLIGATIONS OF THE CONTRACT WITHIN ANTICIPATED STAFF OR FUNDING LEVELS.

COMMENT:

The National Legal Aid and Defender Association's "Guidelines for Negotiating and Awarding Indigent Defense Contracts" (1985) recommend the following as reasonable caseload-workload standards: (a) 150 felonies per attorney per year (this number may vary based on the seriousness and complexity of the offenses); or (b) 300 misdemeanors per attorney per year; or (c) 200 juvenile cases per attorney per year; or (d) 200 mental commitment cases per attorney per year; or (e) 25 appeals per attorney per year.

Caseload standards are affected by many variables, such as the policies and procedures within a local jurisdiction. For example, overcharging practices and a district attorney's policy of refusing to plea bargain can substantially affect attorney workload by increasing the necessity and frequency of trials and motion litigation. Local court calendar management practices, such as a "speedy trial project," can also play havoc with attorney workload as can legislative changes and new judicial decisions. What may appear to be a relatively small caseload can actually represent a tremendous workload depending on various state and local policies and procedures. When unforeseen changes in these practices occur, it is only reasonable that attorneys be permitted the right to seek a modification or cancellation of the contract so as to protect the quality of representation provided and avoid the financial disincentive that may result.

**Part II Guidelines on Indigent Defense Services
Delivery Systems: Contract Defense Services Systems**

9. STANDARDS OF REPRESENTATION

CONTRACTS SHOULD CONFIRM THE ATTORNEY'S OBLIGATION TO FURNISH QUALITY REPRESENTATION TO CLIENTS CONSISTENT WITH CONSTITUTIONAL AND PROFESSIONAL STANDARDS, TO-WIT, THE SERVICES OF A "REASONABLY COMPETENT ATTORNEY ACTING AS A DILIGENT, CONSCIENTIOUS ADVOCATE," INCLUDING THE FOLLOWING RESPONSIBILITIES: 1) CAREFUL FACTUAL AND LEGAL INVESTIGATION; 2) PROMPT ACTION TO PROTECT A CLIENT'S LEGAL RIGHTS; 3) INFORMING THE CLIENT OF CASE DEVELOPMENTS; 4) (FOR CASES TO BE TRIED) PREPARING FOR JURY SELECTION, EXAMINATION OF WITNESSES, SUBMISSION OF INSTRUCTIONS AND PRESENTATION OF ARGUMENT; 5) KNOWING AND EXPLORING SENTENCING ALTERNATIVES; 6) ADVISING CLIENTS CONCERNING THEIR RIGHTS OF APPEAL; 7) REFUSING TO ACCEPT MORE CASES THAN THE ATTORNEY CAN COMPETENTLY HANDLE; 8) DECLINING MATTERS WHICH THE ATTORNEY KNOWS OR SHOULD KNOW HE OR SHE IS NOT COMPETENT TO HANDLE; AND 9) MAINTAINING CLIENT CONFIDENCES AND SECRETS.

CONTRACTS SHOULD ALSO REQUIRE THAT THE ATTORNEY MAINTAIN ADEQUATE OFFICE SPACE AND BE OPEN DURING NORMAL BUSINESS HOURS FOR APPOINTMENTS WITH CLIENTS WHO ARE NOT IN CUSTODY. TELEPHONE ANSWERING EQUIPMENT OR A MESSAGE SERVICE SHOULD BE REQUIRED FOR CALLS FROM CLIENTS DURING NON-BUSINESS HOURS. WHENEVER POSSIBLE, INTERVIEWS OF CLIENTS WHO ARE IN CUSTODY SHOULD BE CONDUCTED WITHIN 24-HOURS OF APPOINTMENT. CLIENTS OUT OF CUSTODY SHOULD BE INTERVIEWED NO LATER THAN 72 HOURS AFTER APPOINTMENT WHENEVER POSSIBLE.

**Part II Guidelines on Indigent Defense Services
Delivery Systems: Contract Defense Services Systems**

9. STANDARDS OF REPRESENTATION (cont'd)

COMMENT:

The acknowledgement of the attorney's professional responsibilities serve as a reminder to both parties. (See People v Pope (1979) 23 Cal.3d 412; Strickland v Washington (1984) 466 U.S. 2668, 104 S.Ct. 2052, 80 L.Ed.2d 674.) The more mundane provisions concerning adequate office space, telephone answering, and prompt interviews, are equally important in responding to practical concerns underlying the more general guidelines, and they address frequent complaints by clients about a lack of responsiveness and communication with their appointed attorneys.

**Part II Guidelines on Indigent Defense Services
Delivery Systems: Contract Defense Services Systems**

10. PROFESSIONAL QUALIFICATIONS AND DEVELOPMENT

CONTRACTS SHOULD LIST THE NAMES AND PROFESSIONAL QUALIFICATIONS OF THE ATTORNEYS WHO ARE TO PROVIDE LEGAL SERVICES. CONTRACTS THAT CONTEMPLATE THE DELIVERY OF SERVICES IN CAPITAL CASES SHOULD REQUIRE THAT THE ATTORNEYS HANDLING SUCH CASES BE ACTIVE TRIAL PRACTITIONERS WITH AT LEAST FIVE YEARS OF CRIMINAL LITIGATION EXPERIENCE, INCLUDING AT LEAST TEN JURY TRIALS OF SERIOUS AND COMPLEX CASES AS LEAD COUNSEL AND FAMILIARITY WITH THE USE OF EXPERT WITNESSES AND THE PRESENTATION OF PSYCHIATRIC AND FORENSIC EVIDENCE. ATTORNEYS HANDLING SERIOUS FELONIES SHOULD HAVE A MINIMUM OF THREE YEARS OF CRIMINAL PRACTICE EXPERIENCE WITH AT LEAST SIX JURY TRIALS TRIED TO VERDICT, OF WHICH TWO SHALL BE FELONY CASES. ATTORNEYS HANDLING OTHER FELONY CASES SHOULD HAVE A MINIMUM OF THREE YEARS OF CRIMINAL PRACTICE EXPERIENCE WITH AT LEAST SIX JURY TRIALS TRIED TO VERDICT.

PREFERENCE IN AWARDING CONTRACTS SHOULD BE GIVEN TO ATTORNEY CERTIFIED AS CRIMINAL LAW SPECIALISTS. CONTRACTS SHOULD ALSO REQUIRE THAT ATTORNEYS WHO ARE TO PROVIDE LEGAL SERVICES WILL MAINTAIN THEIR COMPETENCY BY ATTENDING A MINIMUM OF 12 HOURS OF CONTINUING LEGAL EDUCATION ANNUALLY IN THE FIELD OF CRIMINAL LAW AND PROCEDURE, OR TRIAL PRACTICE, IN ADDITION TO THE 8 HOURS OF ETHICS OR LAW PRACTICE MANAGEMENT (WITHIN A 36 MONTH PERIOD) REQUIRED UNDER THE NEW STATE LAW ON Mandatory Continuing Legal Education. THE COST OF SUCH TRAINING SHOULD BE A BUDGETED ITEM IN THE CONTRACT.

**Part II Guidelines on Indigent Defense Services
Delivery Systems: Contract Defense Services Systems**

10. PROFESSIONAL QUALIFICATIONS AND DEVELOPMENT (cont'd)

COMMENT:

The constitutional right to effective assistance of counsel requires the services of "a reasonably competent attorney acting as a diligent and conscientious advocate who actively participates in the full and effective preparation of a client's case." (People v Pope, supra, 23 Cal.3d 412, 424.) This constitutional imperative cannot be met by lawyers lacking adequate knowledge in the complex and difficult field of criminal law practice. Contracts that ignore this factor for the sake of cost-savings are likely to result in greater costs to the system, as well as the clients, in the way of protracted appellate litigation, reversals, retrials, court delays and jail crowding.

The recommended experience levels are based upon similar requirements in assigned counsel programs. (E.g., see, Committee for Public Counsel Services, Commonwealth of Massachusetts, Manual for Counsel Assigned Through the Committee for Public Counsel Services (1988), pp. 6-7.)

The requirement of a minimum of 12 hours of annual continuing legal education in criminal law and procedure or trial practice is in addition to the new state law on mandatory continuing legal education which requires 36 hours of legal education activities within a 36-month period beginning February 1, 1991. (Calif. Bus. & Prof. Code, § 6070(a).)

**Part II Guidelines on Indigent Defense Services
Delivery Systems: Contract Defense Services Systems**

11. LIABILITY AND INSURANCE

THE CONTRACT SHOULD PROVIDE FOR PROFESSIONAL MALPRACTICE INSURANCE COVERAGE FOR ANY LIABILITY ARISING OUT OF THE ATTORNEY'S SERVICES UNDER THE CONTRACT. SUCH COVERAGE SHOULD BE PROVIDED EITHER BY THE ATTORNEY OR BY THE CONTRACTING JURISDICTION, OR IN LIEU THEREOF, THE LATTER MAY ELECT TO INDEMNIFY, DEFEND AND HOLD THE ATTORNEY HARMLESS FROM ALL SUCH LIABILITY. IN NO EVENT, SHOULD THE ATTORNEY BE REQUIRED TO HOLD THE CONTRACTING JURISDICTION HARMLESS FROM SUCH LIABILITY.

COMMENT:

Clients who suffer the effects of professional malpractice should be provided with a realistic opportunity for recourse. (See Holliday v Jones (1989) 214 Cal.App.3d 465, 262 Cal.Rptr 661.) This should be recognized as an obligation of the jurisdiction providing the services, as well as the attorney. The high cost of liability coverage should be considered a cost of providing adequate representation and should be included in the defense cost projections with the attorney's rate of compensation adjusted according to which party bears the insurance expense. Provision for coverage of contract cases may be available at a reasonable cost through national professional associations.

**Part II Guidelines on Indigent Defense Services
Delivery Systems: Contract Defense Services Systems**

**12. CONFLICTS OF INTERESTS AND APPEARANCES
OF IMPROPRIETY**

THE CONTRACT SHOULD ACKNOWLEDGE THAT THE ATTORNEY'S PROFESSIONAL RESPONSIBILITY MAY REQUIRE THAT HE OR SHE DECLINE REPRESENTATION IN CERTAIN CASES BECAUSE OF CONFLICTS OF INTEREST OR OTHER ETHICAL CONSIDERATIONS. THE ATTORNEY SHOULD BE REQUIRED TO ESTABLISH A SYSTEM FOR SCREENING NEW APPOINTMENTS UPON INTAKE TO DISCOVER SUCH CASES AND TO IMMEDIATELY NOTIFY THE AFFECTED CLIENT AND MOVE TO BE RELIEVED AS COUNSEL. THE ATTORNEY SHOULD ALSO BE REQUIRED TO ADOPT A UNIFORM METHOD FOR DETERMINING WHICH CLIENT(S) TO ACCEPT IN SITUATIONS IN WHICH THE ATTORNEY MUST DECLINE REPRESENTATION OF ONE CLIENT WHILE SEEKING RELIEF FROM FURTHER REPRESENTATION OF ANOTHER. IN NO EVENT SHOULD THE CONTRACT PROVIDE FOR ANY FINANCIAL DISINCENTIVES AGAINST IDENTIFYING AND DECLARING CONFLICTS OF INTEREST.

COMMENT:

The constitutional right to counsel entitles a defendant to conflict free representation by an attorney who is "not attempting to serve two masters." (Wood v Georgia (1981) 450 U.S. 261, 271; Culyer v Sullivan (1980) 446 U.S. 335.) Conflicts of interest can arise in a multitude of situations in addition to the typical multiple defendant case; for example, where the "victim" or prosecution witness is a current or former client. (E.g., see Laversen v Superior Court (1983) 34 Cal.3d 530.) These and other situations documented in ethics codes and case law require careful attention, and are best handled through a written conflict policy and procedure.

A method for choosing between clients in conflict situations is also recommended in order to protect the attorney from charges of "case dumping" -- (the practice of selecting the "easier" case while "conflicting out" of the more difficult or distasteful one).

**Part II Guidelines on Indigent Defense Services
Delivery Systems: Contract Defense Services Systems**

**12. CONFLICTS OF INTERESTS AND APPEARANCES
OF IMPROPRIETY (cont'd)**

COMMENT: (cont'd)

Contracts which contain financial disincentives for declaring conflicts, such as a bonus if conflicts are avoided, have been condemned by the California Supreme Court. (See People v Barboza (1981) 29 Cal.3d 375.) The Barboza opinion points out that "[n]ot only is there an 'appearance of impropriety' [in such contracts], there is also a real and insoluble tension ... between the defender's conflicting interests [his professional obligation to his client and his own financial stake]." This suggests that the financial terms of a contract can provide great potential for conflicts of interest.

**Part II Guidelines on Indigent Defense Services
Delivery Systems: Contract Defense Services Systems**

13. FINANCIAL DISINCENTIVES

THE TERMS OF THE CONTRACT SHOULD AVOID ANY ACTUAL OR APPARENT FINANCIAL DISINCENTIVES TO THE ATTORNEY'S OBLIGATION TO PROVIDE CLIENTS WITH COMPETENT LEGAL SERVICES. THE CONTRACT SHOULD NOT PENALIZE THE ATTORNEY FOR INCREASING THE COST OF DEFENSE, NOR SHOULD IT REWARD CUTTING COSTS. CONTRACTS SHOULD NOT BE AWARDED ON THE BASIS OF A FLAT RATE (PER CASE OR CASELOAD) BY BIDDING OR ANY OTHER SYSTEM WHICH DOES NOT REALISTICALLY ASSESS THE COST OF PROVIDING COMPETENT REPRESENTATION, INCLUDING THE COSTS OF TRIAL, INVESTIGATION, EXPERT ASSISTANCE, OR EXTRAORDINARY EXPENSES. CONTRACTS SHOULD PROVIDE THAT SUCH COSTS ARE TO BE PAID FROM CONTRACT FUNDS SPECIFICALLY BUDGETED FOR THESE PURPOSES AND ARE NOT TO BE USED FOR ATTORNEY COMPENSATION. CONTRACTS SHOULD NOT REWARD ATTORNEYS FOR "COST SAVINGS" OR "EFFICIENCY" BY OFFERING "GOOD MANAGEMENT" BONUSES FOR CUTTING COSTS.

COMMENT:

People v Barboza, *supra*, 27 Cal.3d 375, teaches that the financial terms of a contract can provide great potential for conflicts of interest in the form of financial disincentives to quality representation. In that case, the contract public defender was, in effect, rewarded for not declaring conflicts of interest by receiving at the end of the year the funds budgeted for fees in conflict cases.

Other contract terms, such as those noted in the above guideline, create similar financial disincentives that place the attorney's interests in conflict with his or her clients.

**Part II Guidelines on Indigent Defense Services
Delivery Systems: Contract Defense Services Systems**

14. RETENTION OF FILES

CONTRACTS SHOULD PROVIDE FOR THE MAINTENANCE BY THE ATTORNEY OF ALL CLIENT FILES AND TIME RECORDS FOR NOT LESS THAN FIVE YEARS FOLLOWING THE CONCLUSION OF SERVICES BY THE ATTORNEY UNLESS SUCH FILES AND RECORDS ARE ASSIGNED TO THE ATTORNEY'S SUCCESSOR. ANY ARRANGEMENT BY WHICH THE CONTRACTING JURISDICTION TAKES CUSTODY OF THE FILES SHOULD PROVIDE FOR ACCESS BY THE ATTORNEY AS NECESSARY AND SHOULD GUARANTEE THE CONFIDENTIALITY AND PROTECTION OF THE FILES WITHOUT ACCESS EXCEPT UPON WRITTEN CONSENT OF THE ATTORNEY OR COURT ORDER.

COMMENT:

There should be a clear understanding as to the obligations of the parties with respect to the preservation and access to client records and files.

**Part II Guidelines on Indigent Defense Services
Delivery Systems: Contract Defense Services Systems**

15. REPORTS AND RECORDS

CONTRACTS SHOULD REQUIRE THE ATTORNEY TO MAINTAIN RECORDS AND TO PRODUCE A PERIODIC REPORT WHICH SHOULD INCLUDE THE NUMBERS OF CASES HANDLED BY CATEGORY, HOURS WORKED, ATTORNEY STAFF AND SUPPORT STAFF USED, CASE DISPOSITIONS, EXPENDITURES FOR INVESTIGATION AND EXPERT WITNESSES, AND FEES. REPORTS SHOULD NOT REVEAL PRIVILEGED INFORMATION OR INFORMATION WHICH MIGHT OTHERWISE COMPROMISE THE DEFENSE OF A PENDING CASE.

COMMENT:

Effective contract management and evaluation require reporting of data in a carefully designed report. Maintenance of data and preparation of reliable reports is a time consuming, expensive process, but one that is the best interest of all parties and should be contemplated in the costs of the contract. Such information can also be used to enable counties to seek reimbursement under applicable statutes (e.g., Penal Code, §§987.4, 987.6, 987.8, 987.9, 903.1; Gov. Code §§ 15200-15204.3).

**PART III. GUIDELINES ON INDIGENT DEFENSE
SERVICES DELIVERY SYSTEMS:
PUBLIC DEFENDER SYSTEMS**

1. ADVISORY COMMISSION

A PUBLIC DEFENDER ADVISORY COMMISSION SHOULD BE ESTABLISHED IN EACH COUNTY THAT HAS A PUBLIC DEFENDER SYSTEM. THE COMMISSION SHOULD CONSIST OF FIVE MEMBERS OF WHOM AT LEAST THREE ARE ATTORNEYS WITH SUBSTANTIAL EXPERIENCE IN CRIMINAL LAW PRACTICE; NONE SHOULD BE JUDGES, PROSECUTORS OR LAW ENFORCEMENT OFFICERS. TWO MEMBERS OF THE COMMISSION SHOULD BE APPOINTED BY THE COUNTY BAR ASSOCIATION; THE PRESIDING JUDGES OF THE SUPERIOR AND MUNICIPAL COURTS SHOULD APPOINT ONE MEMBER EACH; AND ONE MEMBER SHOULD BE APPOINTED BY THE BOARD OF SUPERVISORS. THE MEMBERS OF THE COMMISSION SHOULD SERVE STAGGERED TERMS. THE PURPOSE OF THE COMMISSION SHOULD BE TO PROVIDE ADVICE AND ASSISTANCE ON THE POLICIES, OPERATIONS AND BUDGET OF THE PUBLIC DEFENDER'S OFFICE. IN COUNTIES WITH AN APPOINTED PUBLIC DEFENDER SYSTEM, THE COMMISSION SHOULD INTERVIEW AND NOMINATE PUBLIC DEFENDER CANDIDATES FOR APPOINTMENT BY THE BOARD OF SUPERVISORS, AND WITH RESPECT TO ANY DISCIPLINARY CHARGES AGAINST THE PUBLIC DEFENDER, IT SHOULD CONDUCT HEARINGS AND MAKE FINDINGS AND RECOMMENDATIONS TO THE BOARD OF SUPERVISORS.

COMMENT:

The American Bar Association recommends that governance of a defender program through a board of trustees is "[a]n effective means of securing professional independence for defenders." (ABA Standard, 5-1.3.) The ABA has also stressed that "[t]he presence of a board serves to insulate the legal representation plan from unwarranted judicial and political interference." (*Id.*, Commentary.) Similarly, the National Legal Aid and Defender Association has stated that "[t]he most appropriate method of assuring independence modified with a proper mixture of supervision is to create a board of directors..." (NLADA Defender Standard, 3.1.)

**Part III Guidelines on Indigent Defense Services
Delivery Systems: Public Defender Systems**

1. ADVISORY COMMISSION (cont'd)

COMMENT: (cont'd)

In California, public defenders are either appointed by the Board of Supervisors or elected. (Govt. Code § 27703.) In the case of appointed public defenders, the statute provides that "he shall be appointed by the board of supervisors at its will." In recent years, there have been several instances of public defender firings or demotions in which it was claimed that boards of supervisors had acted arbitrarily or infringed upon the constitutional rights and the professional independence of those public defenders. (E.g., see Young v County of Marin (1987) 195 Cal.App.3d 863.)

These cases suggest that the "at-will" power of appointment over public defenders can have a chilling effect on the professional independence of public defenders. As the United States Supreme Court pointed out in Polk County v Dodson (1981) 454 U.S. 312, 321-322, "... a Public Defender is not amenable to administrative direction in the same sense as other employees of the State ... and by the nature of his function cannot be the servant of an administrative superior," and that under the "cannons of professional responsibility" he "... shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

The establishment of an Advisory Commission should help protect the professional independence of appointed public defenders.

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2. SELECTION AND REMOVAL OF CHIEF DEFENDER AND STAFF

SELECTION OF THE CHIEF DEFENDER AND THE STAFF SHOULD BE ON THE BASIS OF MERIT AND SHOULD BE FREE FROM POLITICAL, RACIAL, RELIGIOUS, SEXUAL, ETHNIC AND OTHER CONSIDERATIONS EXTRANEOUS TO PROFESSIONAL COMPETENCE. RECRUITMENT SHOULD INCLUDE SPECIAL EFFORTS TO EMPLOY ATTORNEY CANDIDATES FROM MINORITY GROUPS WHICH ARE SUBSTANTIALLY REPRESENTED IN THE DEFENDER PROGRAM'S CLIENT POPULATIONS. NEITHER THE CHIEF DEFENDER NOR STAFF SHOULD BE REMOVED EXCEPT UPON A SHOWING OF GOOD CAUSE.

COMMENT:

This guideline is based on ABA Standard, 5-3.1. (See also NSC Guidelines, 2.12.) As the commentary to the ABA Standard points out, "Independence of the chief defender and staff is fundamental to both the fact and appearance of zealous representation of the accused."

The requirement of "good cause" for removal of a public defender is consistent with the language of Polk County v Dodson, *supra* 454 US 312, 321-322, quoted above. It also conforms with the recommendation of the State Bar Standing Committee on Delivery of Legal Services to Criminal Defendants that California Government Code § 27703 ("at-will" appointment of public defender) be amended to require a showing of "good cause" before removal of a public defender. (Report on the Independence of the Criminal Defense Bar and Standards Relating to Professional Competence of Appointed Counsel (August 1980).)

The Standing Committee's proposed amendment defined "good cause" to include a conviction of a felony or crime involving moral turpitude, "[p]ersistent failure or inability to perform the duties of office," "[d]isability that seriously interferes with the performance of duties...", "[w]illful misconduct in office," "[h]abitual intemperance in the use of intoxicants or drugs," or "[c]onduct prejudicial to the administration of justice which brings the office of Public Defender into disrepute."

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3. COMPENSATION

THE CHIEF DEFENDER AND STAFF SHOULD BE COMPENSATED AT THE RATE COMMENSURATE WITH THEIR EXPERIENCE AND SKILL SUFFICIENT TO ATTRACT CAREER PERSONNEL AND COMPARABLE TO THAT PROVIDED FOR THEIR COUNTERPARTS IN PROSECUTORIAL OFFICES.

COMMENT:

Inadequate compensation detracts from "[t]he ability to attract and retain qualified lawyers." (Commentary, ABA Standards, 5.3.1.)

If the salaries paid to the chief prosecutor and staff are not adequate, then the defender's salary should be comparable to that of the presiding judge and the earnings of attorneys in private practice.

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4. PRIVATE PRACTICE RESTRICTION

WHENEVER POSSIBLE, DEFENDER OFFICES SHOULD BE STAFFED WITH FULL-TIME ATTORNEYS WHO SHOULD BE PROHIBITED FROM ENGAGING IN THE PRIVATE PRACTICE LAW. IN COUNTIES WITH POPULATIONS OF LESS THAN 1.3 MILLION RESIDENTS, IN WHICH THE CASELOAD IS FOUND INSUFFICIENT TO JUSTIFY FULL TIME STAFF, REGIONAL, MULTI-COUNTY DEFENSE SERVICE SYSTEMS SHOULD BE ESTABLISHED.

COMMENT:

The difficulties identified as likely to be encountered with part-time defender practice include: draining energies to increase income, calendar scheduling problems, detracting from the development of needed criminal defense skills, and maintenance of low salaries based on an assumption that they can be supplemented through private practice. (See Commentary, ABA Standards, 5-3.2.)

This guideline is consistent with Government Code § 27705 which bans private practice for chief defenders in counties of the first, second and third class. (Populations of 1.3 million and above.) The formation of regional defense service offices in rural jurisdictions where the caseload may not be sufficient to justify full-time personnel, is suggested by the ABA Standards on the basis of experience in a number of statewide public defender programs in other jurisdictions. (See also, Government Code § 27700, which permits multiple county public defender offices.)

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5. STANDARDS OF REPRESENTATION

THE PUBLIC DEFENDER SHALL HAVE THE OBLIGATION TO FURNISH QUALITY REPRESENTATION TO CLIENTS CONSISTENT WITH CONSTITUTIONAL AND PROFESSIONAL STANDARDS, TO-WIT, PROVIDING THE SERVICES OF A "REASONABLY COMPETENT ATTORNEY ACTING AS A DILIGENT, CONSCIENTIOUS ADVOCATE." THE PUBLIC DEFENDER SHALL INSURE THAT INDIVIDUAL DEPUTY PUBLIC DEFENDERS UNDERTAKE THE FOLLOWING RESPONSIBILITIES: 1) CAREFUL FACTUAL AND LEGAL INVESTIGATION; 2) PROMPT ACTION TO PROTECT A CLIENT'S LEGAL RIGHTS; 3) INFORMING THE CLIENT OF CASE DEVELOPMENTS; 4) (FOR CASES TO BE TRIED) PREPARING FOR JURY SELECTION, EXAMINATION OF WITNESSES, SUBMISSION OF INSTRUCTIONS AND PRESENTATION OF ARGUMENT; 5) KNOWING AND EXPLORING SENTENCING ALTERNATIVES; 6) ADVISING CLIENTS CONCERNING THEIR RIGHTS OF APPEAL; AND 7) MAINTAINING CLIENT CONFIDENCES AND SECRETS.

COMMENT:

The acknowledgment of the attorney's professional responsibilities serve as a reminder to both the attorneys and their government employers. (See People v Pope (1979) 23 Cal.3d 412; Strickland v Washington (1984) 466 U.S. 2668, 104 S.Ct. 2052, 80 L.Ed.2d 674.)

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6. FACILITIES

DEFENDER PROGRAMS SHOULD BE PROVIDED WITH PROFESSIONAL OFFICES, LIBRARY AND OFFICE EQUIPMENT COMPARABLE TO THAT OF PRIVATE LAW OFFICES OF SIMILAR SIZE, AND IN NO EVENT LESS THAN THE QUALITY OF THE OFFICES, LIBRARY AND EQUIPMENT OF THEIR COUNTERPARTS IN PROSECUTORIAL OFFICES OF SIMILAR SIZE. THE OFFICES SHOULD BE LOCATED IN PLACES CONVENIENT TO THE COURTS AND FURNISHED IN A MANNER APPROPRIATE TO THE DIGNITY OF THE LEGAL PROFESSION.

COMMENT:

Appropriate facilities are necessary for efficiency, privacy, client confidence and the retention of career personnel. (ABA Standards, 5-3.3.) Section 27708 of the California Government Code also requires that the public defender be provided with "suitable rooms for the use of the public defender and office furniture and supplies with which to properly conduct the business of his office."

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7. WORKLOAD

PUBLIC DEFENDER OFFICES SHOULD NOT ACCEPT WORKLOADS THAT, BY REASON OF EXCESSIVE SIZE, WILL INTERFERE WITH THE PROVISION OF QUALITY REPRESENTATION OR WILL LEAD TO THE BREACH OF PROFESSIONAL OBLIGATIONS. WHEN THE PUBLIC DEFENDER DETERMINES, IN THE EXERCISE OF HIS OR HER BEST PROFESSIONAL JUDGMENT, THAT THE ACCEPTANCE OF ADDITIONAL CASES OR CONTINUED REPRESENTATION IN PREVIOUSLY ACCEPTED CASES WILL LEAD TO REPRESENTATION LACKING IN QUALITY OR WILL LEAD TO THE BREACH OF PROFESSIONAL OBLIGATIONS, THE PUBLIC DEFENDER MUST TAKE STEPS AS MAY BE DEEMED APPROPRIATE TO REDUCE THE PENDING OR PROJECTED WORKLOAD AND/OR SEEK ADDITIONAL FUNDING.

COMMENT:

Excessive workloads are "[o]ne of the most significant impediments to furnishings of quality defense services for the poor." (Commentary, ABA Standard 5-4.3.) Furthermore, it has been observed that "too often in defender organizations attorneys are asked to provide representation in too many cases," which leads to "attorney frustration, disillusionment by clients, and weakening of the adversary system." (Ibid.)

A public defender, like other attorneys, is under a professional duty "...not to accept '[e]mployment ... when he is unable to render competent service ...' or to handle cases 'without preparation adequate in the circumstances.'" (Ibid., citing EC 2-30 and DR 6-101(a)(2), Code of Professional Responsibility.) ABA Defense Function Standards, 4-1.2(d) also recommends that "... attorneys not accept more employment than they can reasonably discharge."

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7. WORKLOAD (cont'd)

COMMENT: (cont'd)

The responsibility for determining when workloads are excessive is that of the defender program, itself. "Only the lawyers themselves know how much must be done to represent their clients and how much time the preparation is likely to take." (Commentary, ABA Standards, 5-4.3.) Caseload guidelines can be useful and feedback from defender attorneys should be encouraged. When it is determined that the defender caseload is excessive, a variety of options are suggested by the ABA commentary, including: refusal to accept additional cases, transfer of existing cases to assigned counsel, and litigation. The right, if not obligation, of a public defender to take such steps was recognized in Ligda v Superior Court (1970) 5 Cal.App.3d 811, 827-828, 85 Cal.Rptr 744, 754-755, as follows:

When it is determined that the defender caseload is excessive, a variety of options are suggested by the ABA commentary, including: refusal to accept additional cases, transfer of existing cases to assigned counsel, and litigation. The right, if not obligation, of a public defender to take such steps was recognized in Ligda v Superior Court (1970) 5 Cal.App.3d 811, 827-828, 85 Cal.Rptr 744, 754-755, as follows:

"When a public defender reels under a staggering workload ... he should proceed to place the situation before the judge, who upon a satisfactory showing, can relieve him, and order the employment of private counsel (Pen.Code §987a) at public expense. Such relief, of necessity, involves the constitutional injunction to afford a speedy trial to a defendant. Boards of Supervisors face the choice of either funding the costs of assignment of private counsel and often, increasing the costs of feeding, housing and controlling a prisoner during postponement of trials; or of making provision of funds and personnel for a public defender's office adequate for the demands placed upon it."

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8. SUPPORT STAFF AND RESOURCES

THE STAFF OF THE DEFENDER PROGRAM SHOULD INCLUDE ADEQUATE SUPPORT PERSONNEL TO PROVIDE AN EFFECTIVE DEFENSE AT ALL PHASES OF A CASE, INCLUDING PRETRIAL RELEASE AND SENTENCING, AS WELL AS TRIAL. SUCH STAFF SHOULD INCLUDE OR HAVE ACCESS TO SOCIAL WORKERS, INVESTIGATORS, PARALEGALS, INTERPRETERS, AND SECRETARIAL-CLERICAL PERSONNEL. AN ADEQUATE BUDGET SHOULD ALSO BE AVAILABLE TO EMPLOY EXPERT WITNESSES AS REQUIRED.

COMMENT:

Adequate supporting services are necessary for quality legal representation. (ABA Standard 5-1.4.) This includes "personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and at sentencing, and trained investigators to interview witnesses and to assemble demonstrative evidence." (*Ibid.*) Interpreters are also required to communicate with non-English speaking clients and witnesses.

The assistance of experts, such as psychiatrists or handwriting analysts should also be available to ensure quality representation. Requiring the attorney to conduct his own factual investigations, in lieu of a trained investigator, increases the cost to the system and makes it extremely difficult, if not impossible, for the attorney to impeach any witnesses he has interviewed should their testimony conflict with that interview.

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9. TRAINING AND SUPERVISION

COMPREHENSIVE, SYSTEMATIC TRAINING AND EDUCATION AND RESEARCH CAPABILITY SHOULD BE PROVIDED FOR ALL DEFENDER ATTORNEYS AND SUPPORT STAFF TO FOSTER THE KNOWLEDGE AND SKILLS REQUIRED FOR COMPETENT REPRESENTATION. ADEQUATE SUPERVISION SHOULD BE PROVIDED TO ENSURE MAINTENANCE OF QUALITY STANDARDS TOGETHER WITH PERIODIC EVALUATIONS OF PERFORMANCE BASED UPON RELEVANT, OBJECTIVE CRITERIA. FUNDING SHOULD ALSO BE PROVIDED FOR ATTENDANCE AT PROFESSIONAL TRAINING SEMINARS.

COMMENT:

The practice of criminal law has been described as "a complex and difficult legal area," and requires careful development of "trial practice skills." (Commentary, ABA Standards, 5-1.4.) Mistakes can lead to wrongful convictions and loss of liberty. (See e.g., Holliday v Jones (1989) 214 Cal.App.3d 465, 262 Cal.Rptr 661.)

To ensure against such errors, advanced as well as beginning training should be provided on substantive legal subjects and trial techniques. In-service training should be provided to keep attorneys abreast of developments in criminal law, criminal procedure and forensic sciences. The program should also maintain a briefbank, circulate in-house memoranda and require attorneys to read appellate slip opinions, looseleaf services and legal periodicals, and to attend local and statewide training programs. Whenever feasible, attorneys should be encouraged to attend national training programs on trial advocacy.

To ensure the maintenance of quality representation, the defender program should also develop a system of monitoring of time and caseload records, review and inspection of case files and transcripts, in-court observation and periodic conferences. (See NSC Guidelines, 5.4.)

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10. FINANCIAL ELIGIBILITY

THE PUBLIC DEFENDER SHOULD PROVIDE LEGAL ASSISTANCE UPON REQUEST, AS AUTHORIZED BY LAW, TO PERSONS WHO ARE FINANCIALLY UNABLE TO OBTAIN ADEQUATE REPRESENTATION OR WHO CANNOT DO SO WITHOUT SUBSTANTIAL HARDSHIP TO THEMSELVES OR THEIR FAMILIES. REPRESENTATION SHOULD NOT BE DENIED BECAUSE FRIENDS OR RELATIVES HAVE RESOURCES ADEQUATE TO RETAIN COUNSEL OR BECAUSE BOND HAS BEEN OR CAN BE POSTED. THE PUBLIC DEFENDER SHOULD ADOPT AND PUBLICLY DISSEMINATE WRITTEN ELIGIBILITY GUIDELINES BASED ON CURRENT COST-OF-LIVING STANDARDS IN THE COMMUNITY AND THE COSTS OF RETAINING COMPETENT PRIVATE COUNSEL IN THE VARIOUS CATEGORIES OF CASES IN WHICH THE PUBLIC DEFENDER PROVIDES REPRESENTATION. THESE GUIDELINES SHOULD BE ANNUALLY UPDATED.

COMMENT:

Section 27706 of the Government Code authorizes the public defender to provide representation upon request in certain categories of cases to persons who are "not financially able to employ counsel" Similarly, Penal Code § 987 authorizes the courts to appoint counsel if the defendant is "unable to employ counsel." No statutory guidelines currently exist on eligibility for public defender or assigned counsel.

It has been pointed out that such "general language" fosters "considerable disparities in eligibility determinations among the states and sometimes within the same state." (Commentary, ABA Standards, 5-6.1.) It is therefore essential that there be detailed guidelines for determining financial eligibility.

The financial resources of friends or relatives should not be considered as a matter of fairness, if not constitutionality. The fact of a defendant's ability to post bond should not be considered so that the defendant will not be forced "to choose between receiving legal representation and the chance to be at liberty pending trial," especially [s]ince a person's freedom prior to trial often is essential to the preparation of an adequate defense...." (*Ibid.*)

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11. ANNUAL REPORT

THE PUBLIC DEFENDER SHOULD PREPARE AN ANNUAL REPORT COVERING THE LATEST FISCAL PERIOD. THE REPORT SHOULD INCLUDE: 1) THE NUMBER OF CASES IN WHICH REPRESENTATION WAS PROVIDED BY CASE CATEGORY; 2) THE NUMBER OF ATTORNEYS AND SUPPORT STAFF EMPLOYED; 3) THE TOTAL AND CATEGORIZED EXPENDITURES; 4) A COMPARISON OF WORKLOAD, STAFFING, AND EXPENDITURES WITH THOSE OF THE PREVIOUS PERIOD; 5) AN ESTIMATE OF ANTICIPATED WORKLOAD, STAFFING AND COSTS FOR THE COMING FISCAL PERIOD; AND 6) AN EVALUATION OF THE SERVICES BEING PROVIDED BY THE OFFICE AND AN ASSESSMENT OF THE NEEDS OF THE OFFICE TO ACHIEVE OR MAINTAIN COMPETENT SERVICES.

COMMENT:

Section 27710 of the Government Code requires that the public defender "keep a record of all services rendered by him and ... file with the board or boards of supervisors annually a written report of his services."

This guideline would provide a standardized reporting format which could be used for comparing data on public defender services throughout the state. The self-evaluation requirement would identify deficiencies to be corrected.