

ELEVEN PRINCIPLES

of a Public Defense Delivery System

Adopted by the State Bar of Michigan Representative Assembly, April 2002



State Bar of Michigan
www.michbar.org

Michigan Public Defense Taskforce
www.mipublicdefense.org

Campaign for Justice
403 Seymour, Suite 201
Lansing, MI 48933
info@mijustice.org
www.mijustice.org

Eleven Principles of a Public Defense Delivery System¹

1 The public defense function, including the selection, funding, and payment of defense counsel,² is independent.

2 Where the caseload is sufficiently high,⁸ the public defense delivery system consists of both a defender office⁹ and the active participation of the private bar.

3 Clients are screened for eligibility,¹³ and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

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

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

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

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

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

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

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

11 When there is a defender office, one function of the office will be to explore and advocate for programs that improve the system and reduce recidivism.

Eleven Principles of a Public Defense Delivery System¹

With Commentary

1. The public defense function, including the selection, funding, and payment of defense counsel,² 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.³ To safeguard independence and to promote efficiency and quality of services, an independent board composed of attorneys and non-attorneys should oversee defender, assigned counsel, or contract systems.⁴ Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.⁵ Where there is a defender office, the selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.⁶ 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.⁷

2. Where the caseload is sufficiently high,⁸ the public defense delivery system consists of both a defender office⁹ and the active participation of the private bar. Historically, Michigan's private bar participation has included part time defenders, assigned counsel plan, or contracts for services.¹⁰ However, a "mixed system" of a defender office and an appointed counsel system provides the most effective and stable system over time. The defender office can provide a base for training programs, motion banks, investigators, and other support services. Substantial involvement of the private bar increases independence, provides support for and information about the system outside the defender office, and is a relief valve for conflicts and overload in the system. The appointment process of the attorneys should never be ad hoc,¹¹ but should be according to a coordinated plan directed by an administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.¹²

3. Clients are screened for eligibility,¹³ and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished and counsel notified of the appointment, usually within 24 hours of¹⁴ the arrest, detention or request.¹⁵

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.¹⁶ Counsel should have confidential access to the client for the full exchange of legal, procedural and factual information between counsel and client.¹⁷ To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses and other places where defendants must confer with counsel.¹⁸

5. Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.¹⁹ In the absence of

local standards, national caseload standards should not be exceeded,²⁰ 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.²¹

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

Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.²²

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.²³ The attorney assigned for the direct appeal should represent the client throughout the direct appeal. Except for emergencies, substitute or stand-in counsel should not be used as a routine method to handle additional cases. The client and the court are entitled to have the approved attorney prepare and handle the case.

8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. Public defense should participate as an equal partner in improving the justice system.²⁴ There should be parity of workload, salaries and other resources between prosecution and defense in criminal cases in which the accused has been provided counsel at public expense.²⁵ Assigned counsel should be paid a reasonable fee, taking overhead into consideration, and should be reimbursed for expenses.²⁶ Where they exist, contracts with private attorneys for public defense services must never be let primarily on the basis of cost; and should specify performance requirements and the anticipated workload, and provide for contingencies such as excess cases, high profile or complex cases,²⁷ and funding for expert and investigative services.²⁸

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.²⁹

10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.³⁰

11. When there is a defender office, one function of the office will be to explore and advocate for programs that improve the system and reduce recidivism. The defense attorney is in a unique place to assist clients, communities and the system by becoming involved in the design, implementation and review of local programs suited to both repairing the harm and restoring the defendant to a productive, crime free life in society.

NOTES

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

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

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

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

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

6 ABA, *supra* note 2, Standard 5-4.1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Support services include benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and expert witnesses. NSC, *supra* note 2, Guideline 3.4; ABA, *supra* note 2, Standards 5-4.1, 5-4.3; Contracting, *supra* note 2, Guideline III-10; Assigned Counsel, *supra* note 2, Standard 4.71; Appellate, *supra* note 20 (Performance); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1 (B) (iv). See NSC, *supra* note 2, Guideline 4.1 (includes numerical staffing ratios, e.g., there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). Cf. NAC, *supra* note 2, Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar.)

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

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

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

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

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

