
MODEL CONTRACT

FOR PUBLIC DEFENSE SERVICES

With Notes and References to National Standards

February 2000

**CRIMINAL COURTS TECHNICAL ASSISTANCE PROJECT
AMERICAN UNIVERSITY JUSTICE PROGRAMS OFFICE**

NATIONAL LEGAL AID AND DEFENDER ASSOCIATION



This Model Contract for Public Defense Services and related materials in this publication are available in electronic format, to facilitate adaptation by local jurisdictions. See www.nlada.org/defender.htm or contact NLADA, at (202) 452-0620 or defender@nlada.org.

Table of Contents

Preface and Acknowledgements	iv
Introduction	v
MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES	1
I. DURATION OF CONTRACT	1
II. DEFINITIONS	1
III. INDEPENDENT CONTRACTOR	3
IV. POLICY BOARD	3
V. AGENCY'S EMPLOYEES AND EQUIPMENT.	3
VI. MINIMUM QUALIFICATIONS FOR AGENCY ATTORNEYS	4
VII. PERFORMANCE REQUIREMENTS	5
VIII. VARIANCE	8
IX. ASSIGNMENT OF COMPLEX LITIGATION CASES.	8
X. ATTORNEY TRAINING.	9
XI. ATTORNEY EVALUATION	9
XII. COMPENSATION AND METHOD OF PAYMENT	9
XIII. REQUESTS FOR CONTRACT MODIFICATIONS	10
XIV. REPORTS AND INSPECTIONS.	11

XV.	ESTABLISHMENT AND MAINTENANCE OF RECORDS	12
XVI.	HOLD HARMLESS AND INDEMNIFICATION	13
XVII.	INSURANCE	13
XVIII.	EVALUATION GUIDELINES	15
XIX.	CORRECTIVE ACTION	15
XX.	TERMINATION AND SUSPENSION	16
XXI.	RESPONSIBILITY OF MANAGING DIRECTOR OF AGENCY	17
XXII.	ASSIGNMENT/SUBCONTRACTING	17
XXIII.	RENEGOTIATION	18
XXIV.	ATTORNEY’S FEES	18
XXV.	NOTICES	18
XXVI.	THE PARTIES' ENTIRE CONTRACT/WAIVER OF DEFAULT	18
XXVII.	NONDISCRIMINATION.	19
XXVIII.	CONFLICT OF INTEREST	19
	Worksheet A	21
	Digest of Cases	22
	NOTES AND REFERENCES	25

PREFACE and ACKNOWLEDGEMENTS

This Model Contract for Public Defense Services is a joint project of the National Legal Aid and Defender Association and the Criminal Courts Technical Assistance Project.

Founded in 1911, NLADA provides training, technical assistance, publications, planning, professional liability insurance, and public policy and media advocacy, to support providers of legal aid and indigent defense. Its Division of Defender Legal Services represents public defenders and other providers of legal services to the nine out of ten criminal defendants in America who are unable to pay for a lawyer. Among the Division's publications are a variety of comprehensive national standards governing indigent defense, the bimonthly periodical *Indigent Defense*, collaborative reports on adjudication partnerships and correctional options with the American Prosecutors Research Institute and the National Center for State Courts, a guide to the integration of indigent defense information technology systems with other criminal justice agencies' technology systems, and a forthcoming international manual on the development of indigent defense programs, designed for countries with little experience of free legal services for the poor.

The Criminal Courts Technical Assistance Project, operated by the American University Justice Programs Office, is a joint undertaking of the American University, NLADA, the Pretrial Services Resource Center, and the Justice Management Institute. Begun in 1997, the Project provides on-site and office-based technical assistance to criminal courts, prosecuting attorney offices, pretrial services and court services agencies, State Administrative Offices of the Courts, indigent defense agencies, and general government agencies responsible for criminal justice system policy development or funding, at the state and local levels of government. The Project is funded by the Bureau of Justice Assistance in the United States Department of Justice.

The Model Contract was issued by the CCTAP in October 1999 as one of eight resource documents for criminal justice agencies. It was adopted by the NLADA Defender Policy Group and the NLADA Board of Directors in December 1999.

In the preparation of this model contract, NLADA is indebted to Robert C. Boruchowitz, Director of the Defender Association in Seattle-King County, who has chaired NLADA's project to draft this model contract for two years, and who served as the Vice-Chair of the ABA Criminal Justice Section's Defense Services Committee and Chair of a subcommittee thereunder charged with reviewing the NLADA Contracting Guidelines for consistency with ABA standards and ethical codes prior to adoption of the NLADA guidelines by the ABA. He has been assisted in the drafting process by Kevin Black. Research support and side-by-side comparison charts of various state model contracts with the NLADA Guidelines were provided by former NLADA Associate Counsel Karen Jagielski. Lynn Thompson, former Executive Director of the Washington Defender Association, assisted with the notes and references. The draft has been subjected to review by the NLADA Defender Council, by Robert Spangenberg of The Spangenberg Group (an indigent defense research and technical assistance firm in West Newton, Massachusetts), and twice by the Association's Chief Defender Roundtable. The Model Contract has benefited greatly from the combined wisdom and experience reflected in the consideration and comments of those entities and individuals.

H. Scott Wallace
Director, Defender Legal Services

Clinton Lyons
President and Chief Executive Officer

INTRODUCTION

It is axiomatic that governments forced to provide an unpopular service such as free legal representation for indigent criminal defendants will often seek to do so at the lowest possible price.¹ A corollary trend has been the “privatization” of government services, toward the related goals of reducing the size of government and harnessing the competitive, profit-oriented efficiencies of private business enterprise.

When these two trends have collided with the ineluctable constitutional mandates of *Gideon v. Wainwright*² and *Argersinger v. Hamlin*³ to provide counsel to all indigent criminal defendants at risk of incarceration, the frequent result has been the “contracting out” of indigent defense services to the lowest bidder, with little or no attention to the scope or quality of services provided.

The temptation to cut costs at the expense of quality is natural and inevitable among government officials unfamiliar with the constitutional and ethical requirements of effective representation imposed upon attorneys in criminal cases. Even Congress, creator of an exemplary and well-funded system relying primarily on institutional defender programs, has been tempted by fixed-fee contracts.⁴ In response, the organized bar and the U.S. Department of Justice have led the way in establishing minimum national standards identifying the key components of effective defender systems and individual attorney performance.

Early National Standards

The earliest national standards did not directly address contracts for defender services, but enunciated various essential requirements which have served as the foundation for all current standards regarding indigent defense contracting. The National Advisory Commission on Criminal Justice Standards and Goals (NAC) was appointed by the Administrator of the Justice Department’s Law Enforcement Assistance Administration, to write standards implementing the report of the 1967 President’s Commission on Law Enforcement and the Administration of Justice (“The Challenge of Crime in a Free Society”). The NAC’s 1973 report targeted various critical needs in providing indigent defense services, such as the need for “experienced and well-educated” lawyers, and for more “professional staff resources, supporting resources and staff, and education.”⁵ It set goals of providing attorney compensation, support personnel, investigation, physical facilities and training at levels comparable to other adjudication system agencies, including the courts and prosecution. It also set attorney workload limits – e.g., no more than 150 felonies in any single year, or 400 misdemeanors, 200 juvenile cases, or 25 appeals – and recommended a “safety valve” when such limits are exceeded and threaten to

¹ William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L. J. 1, 60 (1997).

² 372 U.S. 335 (1965).

³ 407 U.S. 25 (1972).

⁴ In 1995, Congress completely defunded the 20 Post-Conviction Defender Organizations providing representation and support in federal post-conviction matters arising out of state death penalty cases, citing budgetary concerns, and ordered a feasibility study of providing such services through “flat-fee contracts.” Conference Report to accompany H.R. 2076 (an appropriations act), H. Rep. No. 104-378, at 138.

⁵ National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, “The Defense.”

result in the provision of inadequate representation: that the defender should refuse to accept or retain additional cases.⁶

Upon these standards were built what are still the leading indigent defense standards in the nation: the Guidelines for Legal Defense Systems in the United States, drafted over a period of two years by the National Study Commission on Defense Services and NLADA with support from the Law Enforcement Assistance Administration. The Commission's 1976 final report discussed the emergence of competitively bid contracts for indigent defense services around the country, and noted a variety of concerns:

Competitive bidding for the lowest price tends to produce the least amount of service. As a result, it may be prohibitive to conduct the amount of investigation or contract out the laboratory work necessary to prove a person's innocence. Greater pressures may be placed upon a defendant to plead guilty. Preliminary hearings may be waived in favor of cost effectiveness. The preparation and oral argument of motions in court may require more hours than are allotted in order to remain economically competitive. At stake is a person's liberty and the question of whether or not he has been justly accused. The lowest bidder may not provide the scope of services required for effective representation.⁷

Failure to fulfill the contractual obligation to provide representation in an unlimited number of cases for the fee fixed, the report observed, could expose the contracting defender to a lawsuit for breach of contract, exerting further pressure "to produce high quantity, low quality services."⁸

Accordingly, the Commission's guidelines expressly provide that "Contracts for defender services should not be let on the basis of competitive bidding," and that where contracts are utilized, they should specify the anticipated workload and provide a funding formula in the event that the anticipated workload is exceeded.⁹

NLADA's Contracting Guidelines

In the ensuing decade, much activity focused specifically on curtailing the abuses of competitively bid contracts. From 1980 to 1984, the National Legal Aid and Defender Association undertook a process of study and deliberation culminating in the promulgation of its *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services* (Contracting Guidelines). The Contracting Guidelines cover the key elements necessary to ensure quality of representation under an indigent defense services contract, as well as contracting procedures and oversight by an independent policy board. They address issues of attorney qualifications and compensation, supervision and evaluation, training, and adequate ancillary personnel such as social workers, mental health professionals, investigators, support staff, and forensic and other experts. Contracts must contain "a maximum allowable caseload for each full-time attorney," which in no event should exceed the NAC limits, beyond which the contractor may decline additional representations at no penalty. Cases requiring extraordinary time and preparation, such as capital cases, are to be counted and compensated separately. A special section is aimed at preventing financial conflicts of interest between attorneys and clients – e.g., a lump-sum contract where every dollar paid for an investigator or an expert effectively comes out of the attorney's pocket. Guideline III-13 requires that expenses for investigations,

⁶ NAC Standard 13.12.

⁷ Guidelines for Legal Defense Systems in the United States, p. 169.

⁸ *Id.* at 170.

⁹ Guideline 2.6.

expert witnesses, transcripts and other necessary services should be separately budgeted and should not decrease the contractor's income or compensation to attorneys or other personnel; it also requires that low compensation should never be allowed to cause the waiver of a client's rights, and allows an attorney to withdraw from a case where such a conflict is presented.

Relation to NLADA's Performance Guidelines

The NLADA resolution adopting the Contracting Guidelines recommends that indigent defense services provided under a contract must comport with the ABA Code of Professional Responsibility or "nationally recognized standards on providing indigent defense services." The universe of such nationally recognized standards expanded considerably in 1995, when NLADA, after a 10-year drafting and review process, promulgated its *Performance Guidelines for Criminal Defense Representation*.¹⁰ The Performance Guidelines detail the responsibilities of defense counsel in criminal cases from initial entry into the case through sentencing and post-conviction matters, and incorporate and cross-reference the ABA Code of Professional Responsibility and the ABA *Standards for Criminal Justice, Defense Function* (3rd Ed. 1991), as well as attorney performance standards based thereon from around the country. The NLADA Contracting Guidelines and the Performance Guidelines are intended to be read together. Contracts for indigent defense services must provide adequate resources to allow attorneys to perform each ethically required duty in individual cases, such as interviewing the client, investigation, discovery, motions, and a defense sentencing memorandum.

American Bar Association Action

The NLADA Contracting Guidelines were adopted by the ABA in 1985, together with a resolution opposing indigent defense services contracts awarded "on the basis of cost alone, or through competitive bidding, without reference to quality of representation," and recommending that contracting, when utilized, "should in addition to cost be based on qualitative criteria such as attorney workload maximums, staffing ratios, criminal law practice expertise, and training, supervisions and compensation guidelines."

In 1992, the ABA published its *Standards for Criminal Justice, Providing Defense Services* (3rd Ed.), incorporating additional provisions relating to indigent defense contracts. The standards provide that contracts "should ensure quality legal representation," and should never be awarded "primarily on the basis of cost." The standards' specific provisions are explicitly premised upon the NLADA Contracting Guidelines.

Implementation; Enforcement

Various states have implemented the NLADA and ABA guidelines in different ways, including model contracts,¹¹ rules for indigent defense contracts,¹² a standardized Request for

¹⁰ The black-letter *Performance Guidelines* are on-line at www.nlada.org/d-perform.htm. The full published volume, including commentary, annotations and footnotes, is available from NLADA.

¹¹ See, e.g., "Model Contract for Counsel Services for Indigent Defendants in North Dakota," and "Model Bid Award Specifications and Procedures for Indigent Defense Service Contracts In North Dakota," *North Dakota Judicial System: Indigent Defense Procedures and Guidelines*, North Dakota Legal Counsel for Indigents Commission, N.D. Sup. Ct. (1983), at 40-60; *Model Indigent Defense Services Contract*, Standing Committee on Legal Services to Indigent Defendants, Legal Services Section, the State Bar of California (1985); "Indigent Defense Legal Services Contract," Oregon, Fall 1998 (on file at NLADA).

Proposals of indigent defense contracts,¹³ or state versions of contracting standards.¹⁴ The NAC caseload limits are integrated into local indigent defense contracts in states such as Washington and Oregon.¹⁵ In 1984, the Arizona Supreme Court ruled that a contract system violated a defendant's right to counsel and due process under both the federal and state constitutions, and ordered the adoption of the NAC numerical caseload limits, including establishing a presumption of ineffectiveness when the limits are exceeded.¹⁶ The trend toward systemic litigation being successfully used to challenge excessive indigent defense caseloads and inadequate funding has intensified in recent years.¹⁷

But major problems still exist. No consistent process of enforcement or compliance exists at the national or state level. All that is required for low-bid contracting to flourish is for the principal players in a local criminal justice system to tolerate, or perhaps profit from it: legislative funding bodies uninterested in indigent defense issues other than cost, judges focused on moving dockets, prosecutors preoccupied with obtaining convictions, and criminal defense lawyers who can make a profit off a high-volume, low-service criminal practice, untroubled by the harm they are doing their clients or by their own ethical shortcomings.

One contract defender in Georgia takes 800 felonies per year (national standards call for a limit of 150), with the help of one part-time associate. The contract nets him approximately \$200,000 per year, and still leaves him time to spend 40 percent of his time as a private practitioner servicing paying clients.

County commissioners in McDuffie County, Georgia, decided in 1993 to reduce their annual indigent defense budget of \$46,000 by soliciting a low-bid contract, specifying neither performance standards, number of expected cases, nor attorney qualifications. Three bids were received, for \$44,000, \$42,000 and \$25,000, and the latter bid was accepted. The contract contains no provision for extra compensation if the number of cases handled is unexpectedly

¹² See, e.g., Ohio Public Defender Commission rules governing indigent defense contracting (Proposed Rule 120-01-12, December 1984); *Guidelines for Accreditation of Defender Agencies*, Seattle-King County Bar Association Indigent Defense Services Task Force (July, 1982).

¹³ See, e.g., "Request for Proposals for Indigent Defense Legal Services Contracts," Oregon State Court Administrator's Office, Indigent Defense Services Division (October 1996), on-line at <http://209.70.38.3/public.nsf/FreeForm/IndigentGuides?OpenDocument>.

¹⁴ See, e.g., "Standards for Public Defender Services: Objectives and Minimum Requirements for Providing Legal Representation to Poor Persons Accused of Crimes in Washington State," Washington Defender Association (October 1989), on-line at www.defensenet.org. A comprehensive index to all indigent defense standards in the country, prepared by The Spangenberg Group on behalf of the ABA, is on-line at <http://209.70.38.3/public.nsf/FreeForm/IndigentGuides?OpenDocument>.

¹⁵ *Indigent Defense Caseloads and Common Sense: An Update* (NLADA, 1992), at 19-24.

¹⁶ *State v. Smith*, 140 Ariz. 355 (1984); see also *Zarabia v. Bradshaw*, 195 Ariz. 1 (1996) (*en banc*) (lower court must hold a hearing if defender makes a colorable claim that caseload violates the standard; overturned Yuma County's method of appointing counsel without regard to abilities and experience). Attacks on contract systems were also upheld in California, in *People v. Barboza*, 627 P.2d 188 (1981), and *Gendron v. State Bar of California*, 673 P.2d 260 (1983), and in Louisiana, in *In re Singleton*, Disciplinary Board of the Louisiana Bar Association, No. 96-PDB-012 (finding a violation of inmate's right to appeal, in a contract attorney's two-year neglect of an appeal due to excessive caseloads). Excessive caseloads held to result in ineffective assistance of counsel: see, e.g., *City of Mount Vernon v. Weston*, 844 P.2d 438 (Wash. 1993); *State v. Peart*, 621 So.2d 780 (La. 1993).

¹⁷ See, e.g., "Underfunded and Unconstitutional: Litigating Pretrial and Pre-appeal Ineffective Assistance of Counsel Claims," *Indigent Defense*, May/June 1997, at 1, (www.nlada.org/indig/mj97/p-under.htm); "Allegheny County Systemic Suit Settles," *Indigent Defense*, July/August 1998, at 14; "Georgia Systemic Suit Settles," *Indigent Defense*, July/August 1999, at 10. See Appendix A hereto, "Digest of Cases Related to Model Contract."

high, and no limitations on private practice of law; every dollar spent on experts, investigators or legal research reduces the contractor's income under the contract, and every hour devoted to indigent clients is one billable hour less for paying clients. Over a five year period, the contracting attorney handled 278 felony cases, trying only two cases before a jury, filing a total of seven motions, and entering guilty pleas in 94 percent of the cases. An investigation by the Southern Center for Human Rights found that the contract attorney frequently encourages his clients to plead guilty without consulting with them about their cases, without conducting any factual and legal investigation of the case, or explaining the charges against them, the possible defenses, or the possible sentences.¹⁸

One abuse recently came to national attention due only to the fortuity of an employment discrimination case filed by an attorney fired from a contract-defender firm because she insisted upon adequate trial-preparation time in a particularly complex case. The three-attorney firm has a flat fee contract under which it accepted over 5,000 cases in one year, retained a part-time investigator 10 hours per week (i.e., available for an average of 56 seconds per case), filed no discovery motions in any of the 5,000 cases, and took only 12 cases to trial. In a deposition in the employment discrimination case, the contractor expressed pride in his record of settling 70 percent of misdemeanors at arraignment (an average of up to 320 per month come into the office), because "I can read a police report faster than most people," and because "I look at the case, spend 30 seconds talking with the client about any possible defenses, and I tell him, you know, here is the offer." He acknowledges that there is an "inherent conflict" in the fact that every dollar spent on an investigator or an expert means one less dollar in compensation for him, but regards this as a "political reality."

"More and more counties and more and more states," he observes, "are going with the contract public defender system."¹⁹

Use of this Model Contract

Contracts for defender services which are not based on cost alone, but which recognize the constitutional obligation to provide effective representation for accused persons, need not result in the kind of abuses described above.

This model contract is designed to facilitate the implementation of the NLADA and ABA guidelines for promoting quality in a contract defender program, to give practical, usable form to the guidelines with minimal need for implementational drafting. It is intended to help ensure that indigent individuals accused of crime in a jurisdiction which has opted to contract for indigent defense services do not receive a lesser quality of justice than similarly situated individuals in a neighboring jurisdiction with an adequately funded and administered public defender or assigned counsel system. It should be utilized not only as the basis for a contract for indigent defense services, but as a point of reference for a Request for Proposals by a court or unit of government

¹⁸ Bright, "Glimpses at a Dream Yet to be Realized," *The Champion*, March 1998; letter from Center Director Steven B. Bright to McDuffie County Commission Chair, February 11, 1999.

¹⁹ Deposition of defendant Jack Suter in *Fitzmaurice-Kendrick v. Suter*, Civ. S-98-0925 (E.D. Cal.). The plaintiff, the misdemeanor attorney in his firm, had refused a judge's order to take a complex case with multiple felony and misdemeanor counts to trial on two business days' notice. After her firing, the firm's other associate pled the client guilty to all charges, but after the plaintiff's separation from the firm, she intervened to get the plea withdrawn based on the firm's failure to file a meritorious suppression motion and on ineffective assistance of counsel. The defendant then pled guilty to a single misdemeanor. See Pozner, "Life, Liberty and Low-Bid Lawyers," *Champion*, July 1999, at 9.

interested in contracting for indigent defense services. Like the Contracting Guidelines themselves, it is intended to provide “an approach to providing quality service which will prevent municipal liability.” It is not intended as a one-size-fits-all approach, but as a template capable of infinite variation to accommodate differences among jurisdictions in procedures, laws, legal practice, and the types of cases desired to be contracted out, while helping state and local governments, the courts, and the defender community, maintain a fundamental focus on the quality of legal services for low-income individuals, with some consistency across the nation.

It should be noted that statutes in some jurisdictions may limit the use of contracts for indigent defense services. In Texas, for example, under Article 26.05 of the Code of Criminal Procedure, the only alternative to a public defender office is a system of “appointed” counsel (without specifying whether counsel may be “appointed” by county officials as well as by judges), paid in accordance with a “schedule of fees” adopted by the county and the county’s judges. While this language may not flatly preclude contracting, it does present challenges in drafting both the contract and the schedule of fees to be consistent with one another. California law appears to present an even greater obstacle. The California Court of Appeal has interpreted Penal Code section 987.2 to prevent a county from diverting cases away from a public defender agency to a contract firm in order to save money. Where a public defender agency has been established, the court held in *Public Defender Association v. Board of Supervisors*, 88 Cal. Rptr. 2d 788 (Sept. 17, 1999), the statute mandates that the public defender “shall defend” every indigent defendant, except that contract counsel may be used where the public defender is “unavailable.” The public defender’s duties are “not optional; they are mandatory,” the court determined. “They cannot be diminished or privatized by the Board.” The court noted the irony that the county realized, only after the case had proceeded through litigation, that the public defender agency was actually more cost-effective than contracting.

CONTRACT FOR PUBLIC DEFENSE SERVICES

The [City, County, State], referred to as “the Contracting Authority,” and [law firm or non-profit organization], referred to hereafter as “the Agency,” agree to the provision of public defense services as outlined below for the period [date] to [date]. The Contracting Authority Administrator is [], and the Managing Director of the Agency is [].

Following are the underlying bases for the Contract:

- [City, County, State] has a constitutionally mandated responsibility to provide public defender services which is specifically defined in [local ordinance or statute], and/or a [statutory/judicially-required] duty to provide [specify juvenile, civil commitment, etc. services].
- The Contracting Authority desires to have legal services performed for eligible persons entitled to public representation in ____ [City, County, State] by the Agency, as authorized by law.
- The Agency agrees to provide, and the Contracting Authority agrees to pay for, competent, zealous representation to its clients as required by the controlling Professional Responsibility [Rules or Code].
- The Contracting Authority and the Agency agree that any and all funds provided pursuant to this Contract are provided for the sole purpose of provision of legal services to eligible clients of the Agency.

The parties agree as follows:

I. DURATION OF CONTRACT

This Contract shall commence on _____ and terminate on _____, unless extended or terminated earlier in a manner allowed by this Contract.

II. DEFINITIONS

The following definitions control the interpretation of this Contract:

- A. Eligible client means a defendant, parent, juvenile, or person who is facing civil commitment or any other person who has been determined by a finding by the Contracting Authority or Court to be entitled to a court-appointed attorney, pursuant to [relevant state statute, court rule, and constitutional provision].
- B. Case; Case Completion: A Case shall mean representation of one person on one charging document. In the event of multiple counts stemming from separate transactions, additional case credit will be recognized. Completion of a case is deemed to occur when all necessary legal action has been taken during the following period(s): In criminal cases, from arraignment through disposition, from arraignment through the necessary withdrawal of counsel after the substantial delivery of legal services, or from the entry of counsel into the case (where entry into the case occurs after arraignment through no fault of the Agency) through disposition or necessary withdrawal after the substantial delivery of legal services. Nothing in this definition prevents the Agency from providing necessary legal services to an eligible client prior to arraignment, but payment for such services will require a showing pursuant to the Extraordinary Expenses paragraph below. In other cases, [define according to type of case—juvenile, family, etc.].
- C. Disposition: Disposition in criminal cases shall mean: 1) the dismissal of charges, 2) the entering of an order of deferred prosecution, 3) an order or result requiring a new trial, 4) imposition of sentence, or 5) deferral of any of the above coupled with any other hearing on that cause number, including but not limited to felony or misdemeanor probation review, that occurs within thirty (30) days of sentence, deferral of sentence, or the entry of an order of deferred prosecution. No hearing that occurs after 30 days of any of the above will be considered part of case disposition for the purpose of this Contract except that a restitution hearing ordered at the time of original disposition, whether it is held within 30 days or subsequently, shall be included in case disposition. Disposition includes the filing of a notice of appeal, if applicable. Nothing in this definition prevents the Agency from providing necessary legal services to an eligible client after disposition, but payment for such services will require a showing pursuant to the Extraordinary Expenses paragraph below. Disposition in other cases shall mean: [define according to type of case—juvenile, family, etc.].
- D. Representational Services: The services for which the Contracting Authority is to pay the Agency are representational services, including lawyer services and appropriate support staff services, investigation and appropriate sentencing advocacy and social work services, and legal services including but not limited to interviews of clients and potential witnesses, legal research, preparation and filing of pleadings, negotiations with the appropriate prosecutor or other agency and court regarding possible dispositions, and preparation for and appearance at all court proceedings. The services for which the Contracting Authority is to pay the Agency do not include extraordinary expenses incurred in the representation of eligible clients. The allowance of extraordinary expenses at the cost of the Contracting Authority will be

determined by a court of competent jurisdiction in accordance with [relevant state statute, court rule, and constitutional provisions].

- E. Complex Litigation Cases: Complex Litigation refers to: 1) all Capital homicide cases, 2) all aggravated homicide cases, 3) those felony fraud cases in which the estimated attorney hours necessary exceeds one hundred seventy (170) hours, 4) cases which involve substantial scientific information resulting in motions to exclude evidence pursuant to controlling caselaw emanating from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and *Daubert v. Merrell Dow*, 113 S.Ct. 2786 (1993), or similar opinions, and 5) other cases in which counsel is able to show the appropriate court in an *ex parte* proceeding that proper representation requires designation of the case as complex litigation.
- F. Other Litigation Expenses: Other Litigation Expenses shall mean those expenses which are not part of the contract with the Agency, including expert witness services, language translators, laboratory analysis, and other forensic services. It is anticipated that payment for such expenses will be applied for in the appropriate courts by motion and granted out of separate funds reserved for that purpose. Payment for mitigation specialists in Capital cases is included in this category.
- G. Misappropriation of Funds: Misappropriation of funds is the appropriation of funds received pursuant to this Contract for purposes other than those sanctioned by this Contract. The term shall include the disbursement of funds for which prior approval is required but is not obtained.

III. INDEPENDENT CONTRACTOR

The Agency is, for all purposes arising out of this Contract, an independent contractor, and neither the Agency nor its employees shall be deemed employees of the Contracting Authority. The Agency shall complete the requirements of this Contract according to the Agency's own means and methods of work, which shall be in the exclusive charge and control of the Agency and which shall not be subject to control or supervision by the Contracting Authority, except as specified herein.

IV. POLICY BOARD

Oversight of the Agency in matters such as interpretation of indigent defense standards, recommendation of salary levels and reasonable caseloads, and response to community and client concerns, shall be provided by the Policy Board. The Policy Board shall be [appointed/designated] by the Contracting Authority and shall consist of [3-13] diverse members, a majority of which shall be practicing attorneys, and shall include representatives of organizations directly servicing the poor or concerned with the problems of the client community, provided that no single branch of government shall have a majority of votes, and the membership shall not include prosecutors, judges or law enforcement officials. The Agency will meet regularly with the Policy Board.

V. AGENCY'S EMPLOYEES AND EQUIPMENT

The Agency agrees that it has secured or will secure at the Agency's own expense, all persons, employees, and equipment required to perform the services contemplated/required under this Contract.

VI. MINIMUM QUALIFICATIONS FOR AGENCY ATTORNEYS

- A. Every Agency attorney shall satisfy the minimum requirements for practicing law in [state] as determined by the [state] Supreme Court. Seven hours of [each year's required or (where CLE is not otherwise required) yearly] continuing legal education credits shall be in spent in courses relating to criminal law practice or other areas of law in which the Agency provides legal services to eligible clients under the terms of this Contract. The Agency will maintain for inspection on its premises records of compliance with this provision.
- B. Each Agency attorney representing a defendant accused of a [____ (e.g. Class A)] felony, as defined in [relevant local statute], must have served at least two years as a prosecutor, a public defender, or assigned counsel within a formal assigned counsel plan that included training, or have demonstrably similar experience, and been trial counsel and handled a significant portion of the trial in 5 felony cases that have been submitted to a jury.
- C. Each staff attorney representing a juvenile respondent in a [____ (e.g. Class A)] felony, as defined in [relevant local statute], shall meet the qualifications of (B) above and demonstrate knowledge of the practices of the relevant juvenile court, or have served at least one year as a prosecutor, a public defender, or assigned counsel within a formal assigned counsel plan that included training, assigned to the prosecution or defense of accused persons in juvenile court, or have demonstrably similar experience, and handled at least 5 felony cases through fact finding and disposition in juvenile court.
- D. Each staff attorney representing a defendant accused of a [____ (e.g. Class B or C)] felony, as defined in [relevant local statute], or involved in a probation or parole revocation hearing, must have served at least one year as a prosecutor, a public defender, or assigned counsel within a formal assigned counsel plan that included training, or have demonstrably similar experience, and been sole trial counsel of record in five misdemeanor cases brought to final resolution, or been sole or co-trial counsel and handled a significant portion of the trial in two criminal cases that have been submitted to a jury alone or of record with other trial counsel and handled a significant portion of the trial in two criminal cases that have been submitted to a jury.

- E. Each attorney representing any other client assigned as a part of this Contract shall meet the requirements of (B) above or work directly under the supervision of a senior, supervising attorney employed by the Agency, who meets the requirements of (B) above. Such direct supervision shall continue until the attorney has demonstrated the ability to handle cases on his/her own. Should the caseload under this Contract require 10 or more FTE attorneys, the Agency will provide one FTE supervising attorney for every 10 FTE caseload attorneys.

- E. Notwithstanding the above, each Capital case assigned to the Agency will be staffed by two full time attorneys or FTE attorneys. The lead attorney shall have at least seven years of criminal law experience and training or experience in the handling of Capital cases; associate counsel shall have at least five years of criminal law experience

- F. Notwithstanding the above, each Capital case assigned to the Agency will be staffed by two full time attorneys or FTE attorneys. The lead attorney shall have at least seven years of criminal law experience and training or experience in the handling of Capital cases; associate counsel shall have at least five years of criminal law experience

- G. Notwithstanding the above, each Complex Litigation case assigned to the Agency other than a Capital case shall be staffed by one FTE attorney with at least seven years of criminal law experience, or the equivalent of one half-time (.5 FTE) attorney with seven years of criminal law experience and one half-time (.5 FTE) attorney with five years of criminal law experience.

- H. Failure on the part of the Agency to use staff with the appropriate amount of experience or to supervise appropriately its attorneys shall be considered a material breach of this Contract. Failure on the part of the Contracting Authority to provide adequate funding to attract and retain experienced staff and supervisor(s) shall be considered a breach of this Contract.

VII. PERFORMANCE REQUIREMENTS

The Agency agrees to provide the services and comply with the requirements of this Contract. The number of cases for which such services will be required is the amount specified on Worksheet A, subject to the variance terms specified in Section VII (Variance). Any material breaches of this agreement on the part of the Agency or the Contracting Authority may result in action as described in Section XVIII (Corrective Action) or Section XIX (Termination and Suspension).

The Agency agrees to provide representational services in the following types of cases: []

The Agency agrees to staff its cases according to the following provisions:

- A. Continuity of representation at all stages of a case, sometimes referred to as “vertical” representation, promotes efficiency, thoroughness of representation, and positive attorney/client relations. The Agency agrees to make reasonable efforts to continue the initial attorney assigned to a client throughout all cases assigned in this Contract. Nothing in this section shall prohibit the Agency from making necessary staff changes or staff rotations at reasonable intervals, or from assigning a single attorney to handle an aspect of legal proceedings for all clients where such method of assignment is in the best interest of the eligible clients affected by such method of assignment.

- C. The Agency agrees that an attorney will make contact with all other clients within 5 working days from notification of case assignment.

- D. Conflicts of interest may arise in numerous situations in the representation of indigent defendants. The Agency agrees to screen all cases for conflict upon assignment and throughout the discovery process, and to notify promptly the Contracting Authority when a conflict is discovered. The Agency will refer to the [state] Rules of Professional Conduct, as interpreted by [the (state or other relevant) Bar Association and /or] opinions of the state judiciary, and to the American Bar Association Standards for Criminal Justice in order to determine the existence and appropriate resolution of conflicts.

- E. It is agreed that the Agency will maintain average annual caseloads per full time attorney or full time equivalent (FTE) no greater than the following:

Felony Cases	150
Misdemeanor Cases	400
Juvenile Offender Cases	200
Juvenile Dependency Cases	60
Civil Commitment Cases	250
Contempt of Court Cases	225
Drug Court Cases	200
[Appeals	25]

These numbers assume that the attorney is assigned only cases that fit into one category. If, instead, a FTE attorney spends half of her time on felony cases and half of her time on misdemeanor cases, she would be expected to carry an annual caseload no greater than 75 felonies and 150 misdemeanors. If the same attorney works less than full time or splits her time between Contract cases and private business, that attorney would be expected to carry a maximum caseload proportional to the portion of her professional time which she devotes to Contract cases. All attorneys who split their time between Contract work and private business as well as work under this contract must report the quantity of hours they devote to private business to the Contracting Authority so that Agency caseload levels may be accurately monitored.

It is assumed that the level of competent assistance of counsel contemplated by this Contract cannot be rendered by an attorney who carries an average annual caseload substantially above these levels. Failure on the part of the Agency to limit its attorneys to these caseload levels is considered to be a material breach of this agreement.

Complex Litigation is considered to be outside of the normal caseload and is handled as described in Section VI. G. below.

- F. Adequate support staff is critical to an attorney's ability to render competent assistance of counsel at the caseload levels described above. The parties agree and expect that at a minimum the Agency will employ support staff services for its attorneys at a level proportionate to the following annual caseloads:

One full time Legal Assistant for every four FTE Contract attorneys
One full time Social Service Caseworker for every 450 Felony Cases
One full time Social Service Caseworker for every 600 Juvenile Cases
One full time Social Service Caseworker for every 1200 Misdemeanor Cases
One full time Investigator for every 450 Felony Cases
One full time Investigator for every 600 Juvenile Cases
One full time Investigator for every 1200 Misdemeanor Cases

In addition, attorneys must have access to mental health evaluation and recommendation services as required.

It is expected that support staff will be paid at a rate commensurate with their training, experience and responsibility, at levels comparable to the compensation paid to persons doing similar work in public agencies in the jurisdiction. The Agency may determine the means by which support staff is provided. The use of interns or volunteers is acceptable, as long as all necessary supervision and training is provided to insure that support services do not fall below prevailing standards for quality of such services in this jurisdiction.

- G. If the Agency is to be responsible for representing defendants in Complex Litigation cases, the following provisions apply. Complex Litigation cases occupy the full time or FTE of one attorney and the half time of one investigator prior to completion, except for Capital cases which typically require 2 FTE attorneys and the FTE of one investigator, as well as the services of a mitigation specialist. Aggravated homicide cases are considered Capital cases until such time as an irrevocable decision is made by the [Prosecuting Attorney/District Attorney] not to seek the death penalty in the case.

Complex Litigation cases remain pending until the termination of the guilt phase and penalty phase of the trial, or entry of a guilty plea. Upon entry of a verdict or guilty

plea, such cases are complete for the purposes of accepting additional Complex Litigation cases. Payment for post-conviction, pre-judgment representation shall be negotiated.

Other special provisions of this Contract which relate to Complex Litigation are found in Section V (Minimum Qualifications) and Section VIII (Assignment of Complex Litigation).

- H. Sexual Predator Commitment Cases: "Sexual predator commitment" cases shall be handled as Complex Litigation cases.
- I. The Agency may use legal interns. If legal interns are used, they will be used in accordance with [citation to State Admission to Practice Rules].
- J. The Agency agrees that it will consult with experienced counsel as necessary and will provide appropriate supervision for all of its staff.

Significant Changes

Significant increases in work resulting from changes in court calendars, including the need to staff additional courtrooms, shall not be considered the Agency's responsibility within the terms of this Contract. Any requests by the courts for additional attorney services because of changes in calendars or work schedules will be negotiated separately by the agency and Contracting Authority and such additional services shall only be required when funding has been approved by the Contracting Authority, and payment arranged by contract modification.

VIII. VARIANCE

The Agency and the Contracting Authority agree that the actual number of cases assigned under this contract may vary from the numbers agreed on Worksheet A by the following levels:

Monthly Variance	20%
Quarterly Variance	15%
Semi-Annual Variance	15%
Yearly Variance	5%

Any deviation in the number of cases assigned that is within the limits above shall not result in alteration of payment owed to the Agency by the Contracting Authority and shall not be the cause of renegotiation of this Contract except as provided in Section XII (Requests for Modifications). The Contracting Authority agrees to make good faith efforts to keep the number of cases assigned within the variance level. In no event shall the Agency be required to accept cases above the level of the variance, even for extra compensation, if doing so would imperil the ability of the Agency's attorneys to maintain

the maximum caseload standards provided in Section VI (Performance Requirements). The Contracting Authority shall provide the Agency with quarterly estimates of caseload to be assigned at least one month prior to the beginning of each calendar quarter and shall make available, upon request, the data and rationale which form the basis of such estimate(s).

IX. ASSIGNMENT OF COMPLEX LITIGATION CASES

[If assignment of Complex Litigation cases is contemplated by this Contract,] the Agency will designate a full time or FTE attorney for that purpose. Thereafter, the Agency shall accept all Complex Litigation cases assigned to it by Contracting Authority subject to the following special provisions:

- A. The Contracting Authority shall not assign further Complex Litigation cases while the Agency has a pending Complex Litigation case, unless the Agency has available qualified staff and the Contracting Authority provides the necessary resources.
- B. In the event the Agency attorney designated to handle Complex Litigation is not occupied with a Complex Litigation case, Contracting Authority may increase the assignment of other felony cases up to 12.5 per month.
- C. Should the services of an additional FTE attorney be required due to the pendency of a Capital case, the Contracting Authority and the Agency will negotiate a reduction in Agency caseload or provision of extra compensation to provide for the services of that attorney.
- D. Once a Complex Litigation case has proceeded for two months, Contracting Authority may request a review of the case, including but not limited to hours spent by the agency attorney(s) and the expected duration of the case. Such review may result in reclassification of the case or modification in payment structure to ensure that the requirements of Sections V.G. and VI. G above can be met.

X. ATTORNEY TRAINING

Ongoing professional training is a necessity in order for an attorney to keep abreast of changes and developments in the law and assure continued rendering of competent assistance of counsel. The Agency shall provide sufficient training, whether in-house or through a qualified provider of CLE, to keep all of its attorneys who perform work under this Contract abreast of developments in relevant law, procedure, and court rules. If an attorney is transferred to a particular type of case (*e.g.* a Capital case or other Complex litigation after having participated in the required seven hours of annual CLE required in Section V.A, the Agency shall require additional training in the particular type of case, as necessary.

XI. ATTORNEY EVALUATION

If the caseload in this Contract requires the services of two or more attorneys, the Agency director, or his/her designee, shall evaluate the professional performance of Agency attorneys annually. Evaluations should include monitoring of time and caseload records, review of case files, and in court observation. The Agency shall make available to Contracting Authority its evaluation criteria and evidence that evaluations were conducted, although all evaluations are to be confidential between the Agency's director and the Agency attorney.

XII. COMPENSATION AND METHOD OF PAYMENT

- A. For the term of this contract, the Contracting Authority shall pay the Agency a rate of \$_____ for the caseload specified on Worksheet A, plus or minus the variance agreed to in Section VII (Variance). Payments will be made on a monthly basis. It is possible that the actual amount of compensation will vary according to other terms of this Contract. The parties contemplate that attorneys working under this Contract will be compensated comparably to prosecutors of similar experience and responsibility.
- B. The Contracting Authority shall provide the Agency with a certification of case assignments 10 working days after the close of each calendar month. The Agency shall return the signed certification within 10 working days of receipt. The Contracting Authority will pay the Agency by the 8th working day of the following month.
- C. If services in addition to those called for by this Contract are required because of unexpected increases in annual caseload(s), the Contracting Authority shall provide supplemental funding to the Agency at a rate to be negotiated which is commensurate with the rate paid under this Contract (or, in the event that new categories of cases (*e.g.* Capital cases or other Complex Litigation) are added, commensurate with the rate prosecutors receive for similar work) and the actual cost to the Agency of providing the extra service. This provision in no way limits the right of the Agency to refuse to accept cases in excess of the agreed caseload and variance as described in Section VII (Variance).
- D. If the number of cases assigned by the Contracting Authority falls below the agreed caseload and variance, the Contracting Authority will remain liable for the full rate agreed unless it has complied with the provisions in Section XII (Request for Modifications).
- E. In the event of Agency failure to substantially comply with any items and conditions of this Contract or to provide in any manner the work or services as agreed to herein, the Contracting Authority reserves the right to withhold any payment until corrective action has been taken or completed. This option is in addition to and not in lieu of the Contracting Authority's right to termination as provided in Section XIX of this Contract.

XIII. REQUESTS FOR CONTRACT MODIFICATIONS

The Contracting Authority shall evaluate the number of cases assigned to the Agency and make projections as to the number of cases that will be assigned to the Agency in future months. These projections will be provided to the Agency on a quarterly basis as specified in Section VII (Variance). If the projection indicates that the cases assigned to the Agency will exceed the variance, the Contracting Authority will negotiate with the Agency for supplemental funding to cover the increased caseload, commensurate with the rate paid in this Contract and the actual cost of providing representation. The Agency shall have the right without penalty to refuse to accept additional cases beyond the agreed caseload and variance in order to preserve its ability to manage the caseloads of its attorneys as specified in Section VII (Variance).

If the Contracting Authority determines that forces beyond its control such as an unexpected decline in availability of cases for assignment will require the number of cases assigned to the Agency to drop below the agreed caseload and variance, the Contracting Authority may request renegotiation of the rate to be paid under this contract in writing no less than 30 days prior to the date that any change would become effective. Both parties agree in these circumstances to negotiate in good faith for a new rate proportionate to the rate paid under this Contract, taking into account the expenses incurred by the Agency and the Agency's opportunity to realize cost savings and devote resources to other work.

In addition, the Agency may submit a request for modification to the Contracting Authority in order to request supplemental funding if the Agency finds that the funding provided by the Contract is no longer adequate to provide the services required by the Contract. Such a request shall be based on an estimate of actual costs necessary to fund the cost of services required and shall reference the entire Agency budget for work under this Contract to demonstrate the claimed lack of funding. Contracting Authority shall respond to such request within 30 days of receipt. Should such supplemental funding not be approved, Contracting Authority shall notify the Agency within 30 days of the finding of the request that the supplemental funds shall not be available.

XIV. REPORTS AND INSPECTIONS

The Agency agrees to submit to the Contracting Authority the following reports at the times prescribed below. Failure to submit required reports may be considered a breach of this contract and may result in the Contracting Authority withholding payment until the required reports are submitted and/or invocation of the Corrective Action procedures in Section XVIII (Corrective Action).

A. Position Salary Profile

The Agency shall submit to the Contracting Authority on the last working day in January and by the 15th day of the first month of each subsequent quarter, a profile of Full-Time

Equivalent (FTE) positions for both legal and support staff who perform work on this Contract, distributed by type of case. The report will designate the name and salary for each FTE employee in a format to be provided. The Contracting Authority will not release this information except as required by law. If the employee splits his/her work between work under this Contract and other business, the report will indicate the amount of time that employee devotes to private matters compared to work under this Contract.

B. Caseload Reports

By the seventh day of the month, the Agency will report the number of cases completed in the past month, separated by category, to the Contracting Authority Administrator.

C. Expenditure Reports

Within 20 days of the last day of each calendar month, the Agency will certify to Contracting Authority a monthly report of the prior month's expenditures for each type of case handled, in the format to be provided. Expenditure reporting shall be on an accrual basis.

D. Annual Subcontract Attorney Use Report

If the Agency uses any subcontract attorneys in accordance with Section XXI (Assignment and Subcontracting), the Agency shall submit to Contracting Authority a summary report.

E. Bar Complaints

The Agency will immediately notify the Contracting Authority in writing when it becomes aware that a complaint lodged with the [state Bar Association/disciplinary body] has resulted in reprimand, suspension, or disbarment of any attorney who is a member of the Agency's staff or working for the Agency.

F. Inspections

The Agency agrees to grant the Contracting Authority full access to materials necessary to verify compliance with all terms of this Contract. At any time, upon reasonable notice during business hours and as often as the Contracting Authority may reasonably deem necessary for the duration of the Contract and a period of five years thereafter, the Agency shall provide to the Contracting Authority right of access to its facilities, including those of any subcontractor, to audit information relating to the matters covered by this Contract. Information that may be subject to any privilege or rules of confidentiality should be maintained by the Agency in a way that allows access by the Contracting Authority without breaching such confidentiality or privilege. The Agency agrees to maintain this information in an accessible location and condition for a period of not less than five years following the termination of this Contract, unless the Contracting Authority agrees in writing to an earlier disposition. Notwithstanding any of the above provisions of this

paragraph, none of the Constitutional, statutory, and common law rights and privileges of any client are waived by this agreement. The Contracting Authority will respect the attorney-client privilege.

XV. ESTABLISHMENT AND MAINTENANCE OF RECORDS

- A. The Agency agrees to maintain accounts and records, including personnel, property, financial, and programmatic records, which sufficiently and properly reflect all direct and indirect costs of services performed in the performance of this Contract, including the time spent by the Agency on each case.
- B. The Agency agrees to maintain records which sufficiently and properly reflect all direct and indirect costs of any subcontracts or personal service contracts. Such records shall include, but not be limited to, documentation of any funds expended by the Agency for said personal service contracts or subcontracts, documentation of the nature of the service rendered, and records which demonstrate the amount of time spent by each subcontractor personal service contractor rendering service pursuant to the subcontract or personal service contract.
- C. The Agency shall have its annual financial statements relating to this Contract audited by an independent Certified Public Accountant and shall provide the Contracting Authority with a copy of such audit no later than the last working day in July. The independent Certified Public Accountant shall issue an internal control or management letter and a copy of these findings shall be provided to the Contracting Authority along with the annual audit report. All audited annual financial statements shall be based on the accrual method of accounting for revenue and expenditures. Audits shall be prepared in accordance with Generally Accepted Auditing Standards and shall include balance sheet, income statement, and statement of changes in cash flow.
- D. Records shall be maintained for a period of 5 years after termination of this Contract unless permission to destroy them is granted by the Contracting Authority.

XVI. HOLD HARMLESS AND INDEMNIFICATION

- A. The Contracting Authority assumes no responsibility for the payment of any compensation, wages, benefits, or taxes by the Agency to Agency employees or others by reason of the Contract. The Agency shall protect, indemnify, and save harmless the Contracting Authority, their officers, agents, and employees from and against any and all claims, costs, and losses whatsoever, occurring or resulting from Agency's failure to pay any compensation, wages, benefits or taxes except where such failure is due to the Contracting Authority's wrongful withholding of funds due under this Contract..

- B. The Agency agrees that it is financially responsible and liable for and will repay the Contracting Authority for any material breaches of this contract including but not limited to misuse of Contract funds due to the negligence or intentional acts of the Agency, its officers, employees, representatives or agents.
- C. The Contracting Authority shall indemnify and hold harmless the Agency and its officers, agents, and employees, or any of them, from any and all claims, actions, suits, liability, loss, costs, expenses, and damages of any nature whatsoever, by reason of or arising out of any action or omission of the Contracting Authority, its officers, agents, and employees, or any of them, relating or arising out of the performance of this Contract. In the event that any suit based upon such a claim, action, loss, or damage is brought against the Agency, the Contracting Authority shall defend the same at its sole cost and expense and if a final judgment is rendered against the Agency and the Contracting Authority and their respective officers, agents, and employees, or any of them, the Contracting Authority shall satisfy the same.

XVII. INSURANCE

Without limiting the Agency's indemnification, it is agreed that the Agency shall maintain in force, at all times during the performance of this Contract, a policy or policies of insurance covering its operation as described below.

A. General Liability Insurance

The Agency shall maintain continuously public liability insurance with limits of liability not less than: \$250,000 for each person, personal injury, \$500,000 for each occurrence, property damage, liability, or a combined single limit of \$500,000 for each occurrence, personal injury and/or property damage liability.

Such insurance shall include the Contracting Authority as an additional insured and shall not be reduced or canceled without 30 days' prior written notice to the Contracting Authority. The Agency shall provide a certificate of insurance or, upon written request of the Contracting Authority, a duplicate of the policy as evidence of insurance protection.

B. Professional Liability Insurance

The Agency shall maintain or ensure that its professional employees maintain professional liability insurance for any and all acts which occur during the course of their employment with the Agency which constitute professional services in the performance of this Contract.

For purposes of this Contract, professional services shall mean any services provided by a licensed professional.

Such professional liability insurance shall be maintained in an amount not less than \$1,000,000 combined single limit per claim/aggregate. The Agency further agrees that it

shall have sole and full responsibility for the payment of any funds where such payments are occasioned solely by the professional negligence of its professional employees and where such payments are not covered by any professional liability insurance, including but limited to the amount of the deductible under the insurance policy. The Agency shall not be required to make any payments for professional liability, if such liability is occasioned by the sole negligence of the Contracting Authority. The Agency shall not be required to make payments other than its judicially determined percentage, for any professional liability which is determined by a court of competent jurisdiction to be the result of the comparative negligence of the Agency and the Contracting Authority.

Such insurance shall not be reduced or canceled without 30 days' prior written notice to the Contracting Authority. The Agency shall provide certificates of insurance or, upon written request of the Contracting Authority, duplicates of the policies as evidence of insurance protection.

C. Automobile Insurance

The Agency shall maintain in force at all times during the performance of this contract a policy or policies of insurance covering any automobiles owned, leased, hired, borrowed or used by any employee, agent, subcontractor or designee of the Agency to transport clients of the Agency.

Such insurance policy or policies shall specifically name the Contracting Authority as an additional insured. Said insurance coverage shall be primary insurance with respect to the Contracting Authority, and any insurance, regardless of the form, maintained by the Contracting Authority shall be excess of any insurance coverage which the Agency is required to maintain pursuant to this contract.

Automobile liability as stated herein shall be maintained at \$500,000 combined single limit per accident for bodily injury and property damage.

D. Workers' Compensation

The Agency shall maintain Workers' Compensation coverage as required by the [state statutory reference].

The Agency shall provide a certificate of insurance or, upon written request of the Contracting Authority, a certified copy of the policy as evidence of insurance protection.

XVIII. EVALUATION GUIDELINES

The Contracting Authority will review information obtained from the Agency to monitor Agency activity, including attorney caseloads, support staff/attorney ratios for each area of cases, the experience level and supervision of attorneys who perform Contract work,

training provided to such attorneys, and the compensation provided to attorneys and support staff to assure adherence.

XIX. CORRECTIVE ACTION

If the Contracting Authority reasonably believes that a material breach of this Contract has occurred, warranting corrective action, the following sequential procedure shall apply:

1. The Contracting Authority will notify the Agency in writing of the nature of the breach.
2. The Agency shall respond in writing within five (5) working days of its receipt of such notification, which response shall present facts to show no breach exists or indicate the steps being taken to correct the specified deficiencies, and the proposed completion date for bringing the Contract into compliance.
3. The Contracting Authority will notify the Agency in writing of the Contracting Authority's determination as to the sufficiency of the Agency's corrective action plan. The determination of the sufficiency of the Agency's corrective action plan will be at the discretion of the Contracting Authority and will take into consideration the reasonableness of the proposed corrective action in light of the alleged breach, as well as the magnitude of the deficiency in the context of the Contract as a whole. In the event the Agency does not concur with the determination, the Agency may request a review of the decision by the Contracting Authority Executive. The Contracting Authority agrees that it shall work with the Agency to implement an appropriate corrective action plan.

In the event that the Agency does not respond to the Contracting Authority's notification within the appropriate time, or the Agency's corrective action plan for a substantial breach is determined by the Contracting Authority to be insufficient, the Contracting Authority may commence termination of this Contract in whole or in part pursuant to Section XIX (Termination and Suspension).

In addition, the Contracting Authority reserves the right to withhold a portion of subsequent payments owed the Agency which is directly related to the breach of the Contract until the Contracting Authority is satisfied the corrective action has been taken or completed as described in Section XI (Compensation and Method of Payment).

XX. TERMINATION AND SUSPENSION

- A. The Contracting Authority may terminate this Contract in whole or in part upon 10 days' written notice to the Agency in the event that –
 1. The Agency substantially breaches any duty, obligation, or service required pursuant to this Contract;

2. The Agency engages in misappropriation of funds; or
3. The duties, obligations, or services herein become illegal, or not feasible.

Before the Contracting Authority terminates this Contract pursuant to Section XIX. A.1, the Contracting Authority shall provide the Agency written notice of termination, which shall include the reasons for termination and the effective date of termination. The Agency shall have the opportunity to submit a written response to the Contracting Authority within 10 working days from the date of the Contracting Authority's notice. If the Agency elects to submit a written response, the Contracting Authority Administrator will review the response and make a determination within 10 days after receipt of the Agency's response. In the event the Agency does not concur with the determination, the Agency may request a review of the decision by the Contracting Authority Executive. In the event the Contracting Authority Executive reaffirms termination, the Contract shall terminate in 10 days from the date of the final decision of the Contracting Authority Executive. The Contract will remain in full force pending communication of the Contracting Authority Executive to the Agency. A decision by the Contracting Authority Executive affirming termination shall become effective 10 days after it is communicated to the Agency.

- B. The Agency reserves the right to terminate this Contract with cause with 30 days written notice should the Contracting Authority substantially breach any duty, obligation or service pursuant to this Contract. In the event that the Agency terminates this Contract for reasons other than good cause resulting from a substantial breach of this Contract by the Contracting Authority, the Agency shall be liable for damages, including the excess costs of the procurement of similar services from another source, unless it is determined by the Contracting Authority Administrator that (i) no default actually occurred, or (ii) the failure to perform was without the Agency's control, fault or negligence.
- C. In the event of the termination or suspension of this Contract, the Agency shall continue to represent clients that were previously assigned and the Contracting Authority will be liable for any payments owed for the completion of that work. The Agency will remit to the Contracting Authority any monies paid for cases not yet assigned or work not performed under the Contract. The Contracting Authority Administrator may request that the Agency attempt to withdraw from any case assigned and not completed. Should a court require, after the Agency has attempted to withdraw, the appearance of counsel from the Agency on behalf of any client previously represented by the Agency where such representation is no longer the obligation of the Agency pursuant to the terms of this Contract, the Contracting Authority will honor payment to the Agency upon judicial verification that continued representation is required.

- D. In the event that termination is due to misappropriation of funds, non-performance of the scope of services, or fiscal mismanagement, the Agency shall return to the Contracting Authority those funds, unexpended or misappropriated, which, at the time of termination, have been paid to the Agency by the Contracting Authority.
- E. Otherwise, this Contract shall terminate on the date specified herein, and shall be subject to extension only by mutual agreement of both parties hereto in writing.
- G. Nothing herein shall be deemed to constitute a waiver by either party of any legal right or remedy for wrongful termination or suspension of the Contract. In the event that legal remedies are pursued for wrongful termination or suspension or for any other reason, the non-prevailing party shall be required to reimburse the prevailing party for all attorney's fees.

XXI. RESPONSIBILITY OF MANAGING DIRECTOR OF AGENCY

The managing director of the Agency shall be an attorney licensed to practice law in the State of _____. The managing director of the Agency shall be ultimately responsible for receiving or depositing funds into program accounts or issuing financial documents, checks, or other instruments of payment provided pursuant to this Contract.

XXII. ASSIGNMENT/SUBCONTRACTING

- A. The Agency shall not assign or subcontract any portion of this Contract without consent of the Contracting Authority. Any consent sought must be requested by the Agency in writing not less than five days prior to the date of any proposed assignment or sub-contract, provided that this provision shall not apply to short-term personal service contracts with individuals to perform work under the direct supervision and control of the Agency. Short-term personal service contracts include any contract for a time period less than one year. Any individuals entering into such contracts shall meet all experience requirements imposed by this Contract. The Contracting Authority shall be notified of any short-term contracts which are renewed, extended or repeated at any time throughout the Contract.
- B. The term "Subcontract" as used above shall not be read to include the purchase of support services that do not directly relate to the delivery of legal services under the Contract to clients of the Agency.
- C. The term "Personal Service Contract" as used above shall mean a contract for the provision of professional services which includes but is not limited to counseling services, consulting services, social work services, investigator services and legal services.

XXIII. RENEGOTIATION

Either party may request that the provisions of this Contract be subject to renegotiation. After negotiations have occurred, any changes which are mutually agreed upon shall be incorporated by written amendments to this Contract. Oral representations or understandings not later reduced to writing and made a part of this agreement shall not in any way modify or affect this agreement.

XXIV. ATTORNEYS' FEES

In the event that either party pursues legal remedies, for any reason, under this agreement, the non-prevailing party shall reimburse costs and attorneys' fees of the prevailing party.

XXV. NOTICES

Whenever this Contract provides for notice to be provided by one party to another, such notice shall be:

1. In writing; and
2. Directed to the Chief Executive Officer of the Agency and the director/manager of the Contracting Authority department/division specified on page 1 of this Contract.

Any time limit by which a party must take some action shall be computed from the date that notice is received by said party.

XXVI. THE PARTIES' ENTIRE CONTRACT/WAIVER OF DEFAULT

The parties agree that this Contract is the complete expression of the terms hereto and any oral representations of understanding not incorporated herein are excluded. Both parties recognize that time is of the essence in the performance of the provisions of this Contract.

Waiver of any default shall not be deemed to be a waiver of any subsequent default. Waiver of a breach of any provision of this Contract shall not be deemed to be a waiver of any other subsequent breach and shall not be construed to be a modification of the terms of this agreement unless stated to be such through written mutual agreement of the parties, which shall be attached to the original Contract.

XXVII. NONDISCRIMINATION

During the performance of this Contract, neither the Agency nor any party subcontracting with the Agency under the authority of this Contract shall discriminate on the basis of race, color, sex, religion, national origin, creed, marital status, age, sexual orientation, or the presence of any sensory, mental, or physical handicap in employment or application for employment or in the administration or delivery of services or any other benefit under this agreement.

The Agency shall comply fully with all applicable federal, state, and local laws, ordinances, executive orders, and regulations which prohibit such discrimination.

XXVIII. CONFLICT OF INTEREST

A. Interest of Members of Contracting Authority and Agency

No officer, employee, or agent of the Contracting Authority, or the State of _____, or the United States Government, who exercises any functions or responsibility in connection with the planning and implementation of the program funded herein shall have any personal financial interest, direct or indirect, in this Contract, or the Agency.

B. Interests of Agency Directors, Officers, and Employees

The following expenditures of Contract funds shall be considered conflict of interest expenditures and prima facie evidence of misappropriation of Contract funds without prior disclosure and approval by the Administrator of the Contracting Authority:

1. The employment of an individual, either as an employee of the Agency or as an independent consultant, who is either: (a) related to a director of the Agency; (b) employed by a corporation owned by a director of the Agency, or relative of a director of the Agency. This provision shall not apply when the total salary to be paid to the individual pursuant to his employment agreement or employment contract would be less than \$1500 per annum.
2. The acquisition or rental by the Agency of real and/or personal property owned or rented by either: (a) an Agency officer, (b) an Agency director, (c) an individual related to an Agency officer or Agency director, or (d) a corporation owned by the Agency, an Agency director, an Agency officer, or relative of an Agency officer or director.

Agreed:

Agency

Contracting Authority

Date: _____

Date: _____

Worksheet A

The Agency agrees to accept the following cases from the Contracting Authority for the duration of this Contract for the rates shown, subject to the terms of this Agreement:

<u>Case Type</u>	<u>Annual Caseload</u>	<u>Monthly Caseload</u>	<u>Payment</u>
Adult Felony			
Adult Misdemeanor			
Juvenile Offender			
Juvenile Dependency			
Civil Commitment			
Misdemeanor Appeal			
[Specialty Courts; Other]			
<u>Total:</u>			

The Agency agrees to provide the following other services for the Contracting Authority for the rate shown, subject to the terms of this agreement:

<u>Service</u>	<u>Payment</u>
Complex Litigation	
24 Hour Advisory Service	
In Custody Arraignments	
[Other]	
<u>Total:</u>	

Digest of Cases on Indigent Defense Caseloads and Funding

State ex rel. Wolff v. Ruddy, 617 S.W.2d 64 (Mo. 1981), cert. den. 454 U.S. 1142 (1982). Application for Writ of Prohibition to prohibit appointment of counsel without prospect of payment for time or expenses denied; “temporary guidelines” established to prevent “depriv[ation] of a reasonable defense by reason of lack of available funds” including dismissal where the state fails to pay “reasonable and necessary costs” of representation or where appointed counsel cannot be obtained.

State v. Robinson, 123 N.H. 665, 465 A.2d 1214 (1983)
Rule limiting attorney’s fees in a misdemeanor case to \$500 “may result in unfairness and unreasonableness” and was amended to allow higher payment “for good cause shown in exceptional circumstances.” Failure to reimburse separately for full cost of reasonable costs and expenses of litigation held to be a taking in violation of the state and federal constitutions.

Corenevsky v. Superior Court, 36 Cal.3d 307, 682 P.2d 360 (1984)
Court affirmed order for payment of appointed counsel’s expenses for ancillary services in potential capital murder case in which the death penalty was not sought, including jury selection expert and funding for two law clerks. Court affirmed contempt order against county auditor for refusing to disburse payment for these expenses, but held that dismissal was “premature.”

State v. Smith, 140 Ariz. 355, 681 P.2d 1374 (1984)
Court disapproved of the “excessive, if not crushing” caseloads handled by the public defender and faulted the system for not taking into account workload in awarding bids, failing to pay support costs, disregarding the competence of the attorney, and disregarding the complexity of each case. Although ineffective assistance was not found in the instant case, the court recognized an inevitable tradeoff between time spent on one case and other clients, and observed that overburdening defense counsel “can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done” to clients. Until caseloads are reduced, the court applied a prospective rebuttable presumption of ineffective assistance. The court referred to and relied on NLADA’s Guidelines for Negotiating and Awarding Indigent Defense Contracts (tentative draft, 1983).

State v. Hanger, 146 Ariz. 473, 706 P.2d 1240 (1985)
Affirmation of trial judge’s decision to dismiss criminal charges with prejudice where, during jury selection of what was anticipated to be a three- to four-month trial, the county announced that it did not intend to pay any further defense costs or fees. The majority supported the need for reliable periodic payments “when the magnitude of the case so dictates.”

People v. Knight, 194 Cal. App. 337, 239 Cal. Rptr. 413 (1987)
No conflict was found in contract with private attorneys for juvenile representation where lawyers received a flat fee regardless whether or not a case went to trial, the lawyers were allowed to maintain private practice on the side, and a limit was placed on investigator’s fees. Court emphasized lack of factual record that would support the inference of conflict.

State ex rel. Stephan v. Smith, 242 Kan. 336, 747 P.2d 816 (1987)

Thorough opinion denying writ of mandamus to attorney general to set aside judicial order to pay attorneys \$68 an hour instead of statutory scheme requiring \$30 with fee caps and a required contribution of 12% of expenses by the attorney. Held that this scheme violates the Equal Protection Clause insofar as it relates to differential burdens placed on attorneys due to geographic differences and on attorneys generally compared to other licensed professions. It also violates the Takings Clause, and the state constitutional mandate for uniform services throughout the state. Record did not establish that ineffective assistance of counsel had actually been provided.

Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988), cert den. 495 U.S. 957 (1989).

Civil class action suit to enjoin administration of an indigent defense system which is insufficient to protect the interests of the accused is not barred by the Eleventh Amendment. Personal action by state officials named in suit is not required if the officials are ultimately responsible. Maintenance of civil suit does not require proof that class members were prejudiced by the deprivation of effective counsel in individual cases.

Hatten v. State, 561 So.2d 562 (Fla. 1990)

Writ of mandamus granted to *pro se* prisoner whose appeal was delayed for more than two years due to “excessive backlog of cases” at the Appellate Division of Public Defender. The public defender was ordered to file brief within thirty days or file motion “to withdraw because of conflict created by excessive caseload[,]” necessitating appointment of alternate counsel.

In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit, 561 So.2d 1130 (Fla. 1990). In another installment of a series of cases that address the “tremendous backlog” of appellate cases in Florida (estimated as high as 1700 cases), the court ordered the Public Defender to withdraw from cases that it could not handle without “conflict” due to caseload pressure, and ordered massive employment of the private sector on a “one-shot” basis to rectify the existing backlog, subject to granting of habeas corpus petitions by felons after 120 days if funds are not appropriated for that purpose.

State v. Lynch, 796 P.2d 1150 (Okla. 1990)

Two appointed lawyers required to split a maximum fee of \$3500 in a capital case appealed to assert their right to just compensation. The Court found that the continuation of private bar appointments is required by justice, pragmatism and the “constitutional rights of indigent defendants” and held that the state constitution requires “adequate, speedy, and certain compensation.”

Arnold v. Kemp, 306 Ark. 294, 813 S.W.2d 770 (1991)

In appeal of a \$1,000 contempt fine levied against two lawyers who refused appointment under a statutory scheme that would limit their compensation to \$100 for expenses and \$350 for fees, the court adopted the rationale of *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987) (both Takings Clause and Equal Protection violations), reversing a 1980 case to the contrary.

City of Mount Vernon v. Weston, 68 Wash. App. 411, 844 P.2d 438 (1993)

Denial of motion to withdraw from case set for appeal by the public defender was an abuse of discretion given undisputed evidence of high caseloads carried by the public defender and erroneous factual assumptions made by the judge.

State v. Peart, 621 So.2d 780 (La. 1993)

Rebuttable presumption of ineffective assistance of counsel applied in New Orleans public defender office in recognition of the overwhelming caseload carried by attorneys in that division. Client's attorney was carrying 70 active felony cases, regularly failed to meet with his incarcerated clients for 30 to 70 days, and had at least one serious case set for trial on every trial date during the period. Support staff was inadequate to provide ancillary services in most cases. Court held that an individualized assessment was nevertheless required as to whether the assistance received was actually ineffective in each case.

Kennedy v. Carlson, 544 N.W.2d 1 (Minn. 1996)

Chief Public Defender for Fourth Judicial District was denied declaratory judgment in action alleging that the legislature's failure to fund public defender at acceptable levels resulted in excessive caseloads which threatened to deprive his clients of effective assistance of counsel in violation of the Sixth Amendment. Defender estimated that he would need to increase staff by 50% to meet the "aspirational" caseload goals adopted in consultation with the Spangenberg Group. Held that the claim was not justiciable because Defender could not show any actual or imminent injury to itself or any particular client, citing numerous testimonials to the quality of representation provided.

MODEL CONTRACT FOR INDIGENT DEFENSE SERVICES

Notes and References

I. DURATION OF CONTRACT

NOTE: A multi-year contract provides some security for both the government and the defender services provider. It also reduces the amount of time spent in negotiations. The duration of both a contract and a chief defender's tenure similarly serve the goals of independence and stability.

Related Standards

American Bar Association Standards for Criminal Justice, Providing Defense Services, Third Edition, 1992, Standard 5-3.3(b)(i) (Elements of the contract for services).

Contracts for services should include ... the term of the contract and the responsibility of the contractor for completion of cases undertaken within the contract term.

Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, National Legal Aid and Defender Association, 1984.

Guideline III-4: Term of Contract. Contracts for legal defense services should be awarded for at least two year terms. Removal of the Contractor short of the agreed term should be for good cause only.

Commentary: For purposes of establishing independence and stability, a two year contract period is an absolute minimum, although many contracts are now only a year in duration. The ABA Standards adopt no recommended term, but do acknowledge the four - six year term for chief defenders recommended by NSCDS [National Study Commission on Defense Services]. [see Commentary to ABA Defense Services Standard 5-4.1, text accompanying n.6]. The two-year minimum specified here is identical to recommendations in earlier drafts and of the California Bar Subcommittee, Guideline 1, p. 3. The NAC [National Advisory Commission on Criminal Justice Standards and Goals, 1973] recommends a four-year term for chief public defenders.

This Guideline does not abrogate the Contractor's or an individual attorney's responsibility to complete any and all cases in which representation has begun under terms of the contract.

American Bar Association Standards for Criminal Justice, Providing Defense Services, Third Edition, 1992.

Standard 5-4.1, commentary: Independence of the chief defender and staff is fundamental to both the fact and appearance of zealous representation of the accused.

National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts: The Defense, 1973

Standard 13.8: The method employed to select public defenders should insure that the public defender is as independent as any private counsel who undertakes the defense of a fee-paying criminally accused person. The most appropriate selection method is nomination by a selection board and appointment by the Governor. [see Model Contract section IV and accompanying notes]....

A public defender should serve for a term of not less than four years and should be permitted to be reappointed.

II. DEFINITIONS

A. Indigent

Related Standards

American Bar Association Standards, Providing Defense Services (3rd. ed.) Standard 5-7.1.

Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship. Counsel should not be denied because of a person's ability to pay part of the cost of representation, because friends or relatives have resources to retain counsel, or because bond has been or can be posted.

National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States, 1976, Standard 1.5.

Effective representation should be provided to anyone who is unable, without substantial hardship to himself or to his dependents, to obtain such representation. This determination should be made by ascertaining the liquid assets of the person which exceed the amount needed for the support of the person or his dependents and for the payment of current obligations. If the person's liquid assets are not sufficient to cover the anticipated costs of representation as indicated by the prevailing fees charged by competent counsel in the area, the person should be considered eligible for publicly provided representation. The accused's assessment of his own financial ability to obtain competent representation should be given substantial weight.

National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts: The Defense, (1973) Standard 13.2, Payment for Public Representation.

An individual provided public representation should be required to pay any portion of the cost of the representation that he is able to pay at the time. Such payment should be no more than an amount that can be paid without causing substantial hardship to the individual or his family. Where any payment would cause substantial hardship to the individual or his family, such representation should be provided without cost.

B. Case and Case Completion

NOTE: One charging document could include many charges alleging offenses committed over a long period of time. This “case” in fact would require many hours of attorney time. The contract should make provisions for cases requiring extraordinary amounts of work. In a small volume contract, a few cases taking an extraordinary amount of time can cripple the defender unless extra compensation and resources are provided.

D. Representational Services

NOTE: Non-lawyer services necessary and appropriate under ethical guidelines establishing defender performance requirements, to be furnished in connection with a defender’s ordinary caseload, should be budgeted and accounted for separately within the contract, in order to avoid a financial conflict of interest between the lawyer and a client. A contract should never create a situation where every dollar spent by a lawyer on the services of an investigator, a social worker, an expert, a sentencing advocate or a paralegal, is one less dollar in the lawyer’s pocket.

Related Standards

Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, National Legal Aid and Defender Association, 1984, Guideline III-13, Conflicts of Interest.

The contract should avoid creating conflicts of interest between Contractor or individual defense attorney and clients. Specifically:

- a) expenses for investigations, expert witnesses, transcripts and other necessary services for the defense should not decrease the Contractor's income or compensation to attorneys or other personnel; and
- b) contracts should not, by their provisions or because of low fees or compensation to attorneys, induce an attorney to waive a client’s rights for reasons not related to the client's best interest; and
- c) contracts should not financially penalize the Contractor or individual attorneys for withdrawing from a case which poses a conflict of interest to the attorney.

Comment: The occasional necessity of paying extraordinary expenses creates a conflict for public defender programs, retained counsel, and contract attorneys alike. Expenses cut down on "profit" or drain funds budgeted for salaries or other program expenses. The most satisfactory means of reducing the conflict for the attorney who must elect between the expense of the service and his or her own pecuniary interest is to obtain payment from other funds. (See, Model Contract - North Dakota, par. 13, pp. 46.) If such expenses must be paid by a Contractor from the price of the

contract, then an adequate budget for necessary expenses is necessary to minimize the conflict which exists.

Performance Guidelines for Criminal Defense Representation, National Legal Aid and Defender Association, 1995.

Guideline 4.1 Investigation

- a. Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible.

Guideline 8.1 Obligations of Counsel in Sentencing

- b. Among counsel's obligations in the sentencing process are:
 1. where a defendant chooses not to proceed to trial, to ensure that a plea agreement is negotiated with consideration of the sentencing, correctional, and financial implications;...
 6. to consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and warranted.

E. Complex Litigation Cases

NOTE: The definition in this model contract relies on experience which indicates that cases far outside the normal range must to be compensated in a different way. A limit of 170 hours is suggested as one which is exceeded very rarely, but which, when exceeded, has the potential to quickly overwhelm budget and staffing projections for large numbers of “ordinary” cases requiring 10-50 hours work. The goal of predictability in a contract cannot be a basis for forcing the defense services provider to take all cases no matter how extraordinary. It is possible, as this model proposes, to plan for staffing extraordinary cases, particularly if there is a history on which to draw. In any event, provisions for adequate compensation and resources are necessary.

Related Standards

American Bar Association Standards, Providing Defense Services, Standard 5-3.3 (b)(vi).

Contracts for services should include ... minimum levels of experience and specific qualification standards for contracting attorneys, including special provisions for complex matters such as capital cases.

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, 1984, Guideline III-11: Special Case Compensation.

The contract should provide for reasonable compensation over and above the normal contract price for cases which require an extraordinary amount of time and preparation,

including, but not limited to, capital cases. Services which require special fees should be defined in the contract.

F. Extraordinary Expenses

Related Standards

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, 1984, Guideline III-11: Special Case Compensation.

The contract should provide for reasonable compensation over and above the normal contract price for cases which require an extraordinary amount of time and preparation, including, but not limited to, capital cases. Services which require special fees should be defined in the contract.

National Legal Aid and Defender Association, Standards for the Appointment and Performance of Counsel in Death Penalty Cases, Standard 10.1, Compensation.

Capital counsel should be compensated for actual time and service performed. The objective should be to provide a reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extraordinary responsibilities inherent in death penalty litigation.

III. INDEPENDENT CONTRACTOR

Related Standards

American Bar Association Standards, Providing Defense Services (3rd. ed.) Standard 5-1.3(a), Professional Independence.

The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs.

National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts: The Defense, (1973) Standard 13.9, Performance of Public Defender Function.

The public defender should seek to maintain his office and the performance of its function free from political pressures that may interfere with his ability to provide effective defense services.

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, 1984, Guideline II-1: Purposes.

The Contracting Authority should appoint a Policy Board if it has appointment powers, or should request that an appropriate authority appoint a Policy Board if it lacks the power of appointment itself. Policy Boards should be constituted to ensure the independence of the contractor.

IV. POLICY BOARD

NOTE: An independent oversight board is the principal device for promoting the most critical element of an indigent defense services program: its insulation from pressures and interests other than an attorney's ethical obligation to provide zealous and quality representation to their clients.

Related Standards

American Bar Association Standards, Providing Defense Services (3rd. ed.)

Standard 5-3.2. Contracting parties and procedures. The contracting authority should ensure the professional independence of the contractor by means of a board of trustees, as provided in standard 5-1.3.

Standard 5-1.3(b), Professional Independence. An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board. Provisions for size and manner of selection of boards of trustees should assure their independence. Boards of trustees should have the power to establish general policy for the operation of defender, assigned-counsel and contract-for-service programs consistent with these standards and in keeping with the standards of professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction.

Commentary [to Standard 5-4.1]: Independence of the chief defender and staff is fundamental to both the fact and appearance of zealous representation of the accused. As noted in standard 5-1.3, one means of assuring independence for a defender organization is to create a board of trustees with overall responsibility for the general policies of the program and selection of the chief defender.... What is not deemed satisfactory is for the chief defender to be chosen by judges, because that method fails to guarantee that the program will remain free of "judicial supervision." Even with the best of motives by both judges and defenders, the appearance of justice is tarnished when the judiciary selects the chief defender or exercises control over the hiring of staff.

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, 1984.

PART II POLICY BOARD

Guideline II-1, Purposes: The Contracting Authority should appoint a Policy Board if it has appointment powers, or should request that an appropriate authority appoint a Policy Board if it lacks the power of appointment itself. Policy Boards should be constituted to ensure the independence of the Contractor and to provide the Contracting Authority with expertise and support in such matters as criminal defense functions, determination of attorneys fees and salary levels, determination of reasonable caseload standards, interpretation of standards governing the provision of public defense services, response to community and client concerns, and implementation of the contract defense system.

Guideline II-2, Members: The Policy Board should consist of from three to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which groups should be represented.

Policy Board members should be appointed using the following criteria:

- a) Appointees should be persons who will ensure the independence of Contractor.
- b) Policy Board members should represent a diversity of factions in order to insure insulation from partisan politics.
- c) No single branch of government should have a majority of votes on the Policy Board.
- d) Private organizations directly serving the poor should be a source for Board members.
- e) Organizations concerned with the problems of the client community should be represented on the Policy Board.
- f) A majority of persons on the Board should be practicing attorneys.
- g) The Policy Board should not include judges, prosecutors, or law enforcement officials.

Guideline II-3, Duties: Duties of the Policy Board shall be to:

- a) advise the contracting Authority about, and approve, the terms and minimum requirements of any contract for defense services;
- b) advise the Contracting Authority on fee schedules, rate of reimbursement, prevailing attorneys fees and other issues related to the cost of public defense services;
- c) supervise the contract bidding and award process, if not retained by the Contracting Authority;
- d) select the contract defender or contract defender to whom contract will be let, if not retained by the Contracting Authority; and
- e) establish and apply minimum qualifications for lawyers whose services are provided by the Contractor, if this function is not assigned to the contractor as a condition of the contract.

National Study Commission on Defense Services, Guidelines for Legal Defense Systems, Standard 2.10, The Defender Commission.

- c. The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director.

- d. The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics.
- e. No single branch of government should have a majority of votes on the Commission.
- f. Organizations concerned with the problems of the client community should be represented on the Commission.
- g. A majority of the Commission should consist of practicing attorneys.
- h. The Commission should not include judges, prosecutors, or law enforcement officials.

Performance Guidelines for Criminal Defense Representation, National Legal Aid and Defender Association, 1995, Guideline 1.1.

Role of Defense Counsel

- i. The paramount obligation of criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the criminal process. Attorneys also have an obligation to abide by ethical norms and act in accordance with the rules of the court.

American Bar Association Standards, Defense Function (3rd. ed.) Standard 4-1.2, The Function of Defense Counsel.

(b) The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.

VI. MINIMUM QUALIFICATIONS FOR AGENCY ATTORNEYS

NOTE: This provision in the model contract recognizes that the more serious and difficult the type of case, the more experience the attorney must have. Different states have different classifications of crimes, but the contract should always provide that the minimum requirements to handle a case increase with the severity and complexity of the case.

Related Standards

American Bar Association Standards, Providing Defense Services (3rd. ed.) Standard 5-3.3 (b)(vi) (Elements of contract for services).

Contracts for services should include ... minimum levels of experience and specific qualification standards for contracting attorneys, including special provisions for complex matters such as capital cases.

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, 1984, Guideline III-7: Minimum Professional Qualifications.

The contract should specify minimum qualifications for staff lawyers. These qualifications should be developed by the Advisory Board which screens contract applications. If defense

services are to be provided in more than one category of cases, the contract should specify different minimum qualifications for each category of cases for which the Contractor will provide.

National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts: The Defense, (1973) Standard 13.15, commentary.

Minimum experience in criminal litigation should be required, (on the assigned counsel panel) and the (list of qualified attorneys) might appropriately be categorized according to their level of experience.

National Legal Aid and Defender Association, Performance Guidelines for Criminal Defense Representation, 1995, Guideline 1.2, Education, Training and Experience of Defense Counsel.

(a) To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction. Counsel has a continuing obligation to stay abreast of changes and developments in the law....

(b) Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation.

National Legal Aid and Defender Association, Standards for the Appointment and Performance of Counsel in Death Penalty Cases, 1987.

Standard 1.1, Objective. The objective in providing counsel in cases in which the death penalty is sought should be to ensure that quality legal representation is afforded to defendants eligible for the appointment of counsel during all stages of the case.

Standard 2.1, Number of Attorneys Per Case. In cases where the death penalty is sought, two qualified attorneys should be assigned to represent the defendant. In cases where the death penalty has been imposed, two qualified appellate attorneys should be assigned to represent the defendant. In cases where appellate proceedings have been completed or are not available and the death penalty has been imposed, two qualified post conviction attorneys should be assigned to represent the defendant.

Standard 5.1, Attorney Eligibility. The appointing authority should distribute assignments in capital cases to attorneys who possess the following qualifications:

I. TRIAL

A. Lead trial counsel assignments should be distributed to attorneys who:

1. are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and
2. are experienced and active trial practitioners who have at least five years litigation experience in the field of criminal defense; and
3. have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion, as well as prior experience as

lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials and an additional five were felony jury trials; and

4. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and
5. are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and
6. have attended and successfully completed, within one year of their appointment, a training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and
7. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

B. Trial co-counsel assignments should be distributed to attorneys who:

1. are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and
2. who qualify as lead counsel under paragraph (A) of this standard or meet the following requirements:
 - (a) are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and
 - (b) have prior experience as lead counsel or co-counsel in no fewer than three jury trials of serious and complex cases which were trials in which the charge was murder or aggravated murder; or alternatively, of the three jury trials, at least one was a murder or aggravated murder trial and one was a felony jury trial; and
 - (c) are familiar with the practice and procedure of the criminal courts of the jurisdiction; and
 - (d) have completed within one year of their appointment at least one training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and
 - (e) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

National Legal Aid and Defender Association, Standards for the Administration of Assigned Counsel Systems, 1989

Standard 2.9. (a) The Assigned Counsel Program shall identify and enforce adherence to, minimum standards for the performance of counsel and shall assist counsel in meeting, and striving to exceed, those standards.

(b) Assigned counsel shall meet, and strive to exceed, minimum standards for the performance of counsel.

Standard 4.1, Establishment and General Operation of Assigned Counsel Roster. (b) The Board, or at its direction the Administrator, shall establish standards detailing the

qualifications attorneys must have before being assigned cases at each level under paragraph (a), as described in Standard 4.1.1

Standard 4.1.1, Qualifications of Attorneys. (a) The attorney qualifications established pursuant to Standard 4.1(b) shall include criteria reflecting the experience and training required for assignment in cases of different levels of seriousness, and a requirement that attorneys have the proficiency and commitment necessary to provide the quality representation mandated by Standard 2.1.

Georgia Indigent Defense Council. "Guidelines of the Indigent Defense Council for the Operation of Local Indigent Defense Programs." October 1989, Guideline 2.4, Panel Attorney Program.

- (c) More difficult or complex cases shall be assigned to attorneys with sufficient levels of experience and competence to afford adequate representation;
- (d) Less experienced attorneys should be assigned cases which are within their capabilities, but should be given the opportunity to expand their experience under supervision.

Indiana Public Defender Commission, "Standards for Indigent Defense Services in Non-Capital Cases: With Commentary." January 1995, Standard E, Appointment of Counsel.

- 2. Class A or B Felony. To be eligible to serve as appointed counsel in a case where the accused is charged with a Class A or B felony, an attorney shall;
 - a. be an experienced and active trial practitioner with at least two (2) years of criminal litigation experience; and
 - b. have prior experience as lead or co-counsel in at least two (2) felony jury trials which were tried to completion.
- 3. Class C Felony. To be eligible to serve as appointed counsel in a case where the accused is charged with a Class C felony, an attorney shall:
 - a. be an experienced and active trial practitioner with at least one (1) year of criminal litigation experience; or
 - b. have prior experience as lead or co-counsel in at least three (3) criminal jury trials which were tried to completion.
- 5. Other criminal cases. To be eligible to serve as lead counsel in other criminal cases, an attorney shall have prior experience as lead or co-counsel in at least one (1) case of the same class or higher which was tried to completion.

Nebraska Commission on Public Advocacy, "Standards for Indigent Defense Services in Capital and Non-Capital Cases." May 1996, Standard III C 3, Counsel Eligibility Standards.

The following classes of attorneys are created to set the minimum standards for counsel in capital and non-capital cases at trial, appellate, and post-conviction stages.

Class A: Counsel qualified as lead counsel in capital cases.

Class B: Counsel qualified as co-counsel in capital cases.

Class C: Counsel qualified to serve as counsel in serious violent felonies and drug defense cases.

- Class D: Counsel qualified as appellate lead counsel.
- Class E. Counsel qualified as appellate co-counsel.
- Class F. Counsel qualified as post-conviction counsel.

Washington Defender Association Standards for Public Defense Services, 1990, Standard 14, Qualifications of Attorneys.

1. In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services should meet the following minimum professional qualifications:
 - a. Satisfy the minimum requirements for practicing law in Washington as determined by the Washington State Supreme Court; and
 - b. Complete seven hours of continuing legal education within each calendar year in courses relating to their public defense practice.
2. Trial attorney's qualifications according to severity or type of case:
 - a. Death Penalty Representation. Each attorney acting as lead counsel in a death penalty case shall meet the following requirements:
 - (i) The minimum requirements set forth in Section 1; and
 - (ii) at least five years criminal trial experience; and
 - (iii) have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion; and
 - (iv) have served as lead or co-counsel in at least one jury trial in which the death penalty was sought; and
 - (v) have completed at least one death penalty defense seminar within the previous two years.
 - b. Adult Felony Cases - Class A. Each staff attorney representing a defendant accused of a Class A felony as defined in RCW 9A.20.020 shall meet the following requirements:
 - (i) Minimum requirements set forth in Section 1, and
 - (ii) Either:
 - a. has served two years as a prosecutor; or
 - b. has served two years as a public defender; or
 - c. has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in five felony cases that have been submitted to a jury.
 - c. Adult Felony Cases - Class B Violent Offense or Sexual Offense. Each attorney representing a defendant accused of a Class B violent offense or sexual offense as defined in RCW 9A.20.020 shall meet the following requirements:
 - (i) Minimum requirements set forth in Section 1, and
 - (ii) Either:
 - a. has served one year as prosecutor; or
 - b. has served one year as public defender; and
 - c. has been trial counsel alone or with other counsel an handled a significant portion of the trial in two Class C felony cases that have been submitted to a jury.

d. Adult Felony Cases - All other Class B Felonies, Class C Felonies, Probation or Parole Revocation. Each staff attorney representing a defendant accused of a Class B felony not defined in c above or a Class C felony, as defined in RCW 9A.20.020, or involved in a probation or parole revocation hearing shall meet the following requirements:

(i) Minimum requirements set forth in Section 1, and

(ii) Either:

a. has served one year as a prosecutor; or

b. has served one year as a public defender; or

c. has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in two criminal cases that have been submitted to a jury; and

(iii) Each attorney shall be accompanied at his or her first felony trial by a supervisor.

e. Juvenile Cases - Class A. Each attorney representing a juvenile accused of a Class A felony shall meet the following requirements:

(i) Minimum requirements set forth in Section 1, and

(ii) Either:

a. has served one year as a prosecutor; or

b. has served one year as a public defender; or

c. has been trial counsel alone of record in five juvenile Class B and C felony trials and

(iii) Each attorney shall be accompanied at his or her first juvenile trial by a supervisor.

f. Juvenile Cases - Classes B and C. Each attorney representing a juvenile accused of a Class B or C felony shall meet the following requirements:

(i) Minimum requirements as set forth in Section 1; and

(ii) Either:

a. has served one year as a public defender; or

b. has been trial counsel alone in five misdemeanor cases brought to a final resolution; and

c. has been trial counsel alone in five misdemeanor cases brought to a final resolution; and

(iii) Each attorney shall be accompanied at his or her first juvenile trial by a supervisor.

g. Misdemeanor Cases. Each attorney representing a defendant in a matter concerning a gross misdemeanor or condition of confinement, shall meet the requirements as outlined in Section 1.

h. Dependency Cases. Each attorney representing a client in a dependency matter shall meet the following requirements:

(i) minimum requirements as outlined in Section 1; and

(ii) Attorneys handling termination hearings shall have six months dependency experience or have significant experience in handling complex litigation.

i. Civil Commitment Cases. Each attorney representing a respondent shall meet the following requirements:

- (i) Minimum requirements set forth in Section 1; and
- (ii) Each staff attorney shall be accompanied at his or her first 90 or 180 day commitment hearing by a supervisor; and
- (iii) Shall not represent a respondent in a 90 or 180 day commitment hearing unless he or she has either:
 - a. served one year as a prosecutor, or
 - b. served one year as a public defender, or
 - c. been trial counsel in five civil commitment probable cause hearings.

j. In order to advance from one qualification category to the next, an attorney must participate in a supervised trial of the next higher category.

3. Appellate Representation. Each attorney who is counsel for a case on appeal to the Washington Supreme Court or to the Washington Court of Appeals shall meet the following requirements:

- a. The minimum requirements as outlined in Section 1; and
- b. Either:
 - (i) has filed a brief with the Washington Supreme Court or any Washington Court of Appeals in at least one criminal case within the past two years; or
 - (ii) has equivalent appellate experience, including filing appellate briefs in other jurisdictions, at least one year as an appellate court or federal court clerk, extensive trial level briefing or other comparable work.
 - (iii) Attorneys with primary responsibility for handling a death penalty appeal shall have at least five years' criminal experience, preferably including at least one homicide trial and at least six appeals from felony convictions.

4. Legal Interns.

- a. Legal interns must meet the requirements set out in APR 9.
- b. Legal interns shall receive training pursuant to APR 9 and Standard Nine, Training.

VII. PERFORMANCE REQUIREMENTS

Related Standards

American Bar Association Standards for Criminal Justice, Providing Defense Services, Third Edition, 1992, Standard 5-3.3(b)(i) (Elements of the contract for services).

Contracts for services should include ... the categories of cases in which the contractor is to provide services.

A. Continuity of Representation

Related Standards

National Study Commission on Defense Services, Guidelines for Legal Defense Systems, Standard 5.11, Continuity of Representation

Defender offices should provide for continuous and uninterrupted representation of eligible clients from initial appearance through sentencing up to, but not including, the appellate and post-conviction stages by the same individual attorney. Defender offices should urge changes in court structure and administration to reduce fragmentation and to facilitate continuous representation.

If necessary, the procedures for early representation, including initial contact, should permit a limited exception to continuous representation. However, the defender office should implement procedures for early case assignment and for informing the client of the name of the attorney who will represent him after the initial period covered by the exception.

American Bar Association Standards, Providing Defense Services (3rd. ed.) Standard 5-6.2, Duration of Representation.

Counsel should be provided at every stage of the proceedings, including sentencing, appeal, certiorari and post-conviction review. In capital cases, counsel also should be provided in clemency proceedings. Counsel initially provided should continue to represent the defendant throughout the trial court proceedings and should preserve the defendant's right to appeal, if necessary.

National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts: The Defense, (1973) Standard 13.1 Availability of Publicly Financed Representation in Criminal Cases.

Public representation should be made available to eligible defendants (as defined in Standard 13.2) in all criminal cases at their request, or the request of someone acting for them, beginning at the time the individual either is arrested or is requested to participate in an investigation that has focused upon him as a likely suspect. The representation should continue during trial court proceedings and through the exhaustion of all avenues of relief from conviction.

National Legal Aid and Defender Services, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, 1984, Guideline III-23.

The contract shall specify that the contractor has the responsibility to complete any and all cases once representation is commenced under terms of the contract. Representation commenced by the Contractor in trial court shall be continued through all trial court proceedings if provided by the contract; representation commenced by or taken to an appeals court by the Contractor shall be continued until the appeals process is terminated by an action of the appeals court which is accepted as final on the merits by defense counsel and his or her client.

B. In-Custody Attorney Contact

Related Standards

American Bar Association Standards, The Defense Function (3rd. ed.), Standard, 4-3.6, Prompt Action to Protect the Accused.

Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. Defense counsel should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.

American Bar Association Standards, Providing Defense Services (3rd. ed.).

Standard, 5-6.1, Initial provision of counsel. Upon request, counsel should be provided to persons who have not been charged or taken into custody but who are in need of legal representation arising from criminal proceedings. Counsel should be provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest. In capital cases, two qualified trial attorneys should be assigned to represent the defendant. The authorities should promptly notify the defender, the contractor for services, or the official responsible for assigning counsel whenever the person in custody requests counsel or is without counsel.

Standard, 5-8.1, Providing counsel to persons in custody.

(a) A person taken into custody or otherwise deprived of liberty should immediately be informed, preferably by defense counsel, of the right to legal representation. An offer of counsel should be made in words easily understood, and it should be stated expressly that one who is unable to pay for representation is entitled to counsel.

(b) Custodial authorities should provide access to a telephone, the telephone number of the defender, assigned counsel or contract for services program, and any other means necessary to establish communication with a lawyer.

(c) The defender, assigned counsel or contract for services program should ensure that information on access to counsel is provided to persons in custody. An attorney or representative from the appropriate program should be available to respond promptly to a person in custody who requests the services of counsel.

National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts: The Defense, (1973) Standard 13.3, Initial Contact with Client.

The first client contact and initial interview by the public defender, his attorney staff, or appointed counsel should be governed by the following:

1. The accused, or a relative, close friend, or other responsible person acting for him, may request representation at any stage of any criminal proceedings. Procedures should exist whereby the accused is informed of this right, and of the method for exercising it. Upon such request, the public defender or appointed counsel should contact the interviewee.
2. If, at the initial appearance, no request for publicly provided defense services has been made, and it appears to the judicial officer that the accused has not made an informed waiver of counsel and is eligible for public representation, an order should be entered by the judicial officer referring the case to the public defender, or to appointed counsel. The public defender or appointed counsel should contact the accused as soon as possible following entry of such an order.

National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States, 1976, Standard 1.2, Time of Entry.

Effective representation should be available for every eligible person as soon as:

- a. The person is arrested or detained, or
- b. The person reasonably believes that a process will commence which might result in a loss of liberty or the imposition of a legal disability of a criminal or punitive nature, whichever occurs earliest.

D. Conflicts of Interest

Related Standards

American Bar Association Standards for Criminal Justice, Providing Defense Services, Third Edition, 1992, Standard 5-3.3(b)(vii) (Elements of the contract for services).

Contracts for services should include ... a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses.

American Bar Association Standards, The Defense Function (3rd. ed.) Standard 4-3.5, conflict of interest.

- (a) Defense counsel should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.
- (b) Defense counsel should disclose to the defendant at the earliest feasible opportunity any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of counsel to represent him or her or counsel's continuing representation. Such disclosure should include communication of information reasonably sufficient to permit the client to appreciate the significance of any conflict or potential conflict of interest.

(c) Except for preliminary matters such as initial hearings or applications for bail, defense counsel who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily defense counsel should decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear either that no conflict is likely to develop at trial, sentencing, or at any other time in the proceeding or that common representation will be advantageous to each of the codefendants represented and, in either case, that:

(i) the several defendants give an informed consent to such multiple representation; and

(ii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that defense counsel sometimes encounters in defending multiple clients.

(d) Defense counsel who has formerly represented a defendant should not thereafter use information related to the former representation to the disadvantage of the former client unless the information has become generally known or the ethical obligation of confidentiality otherwise does not apply.

(e) In accepting payment of fees by one person for the defense of another, defense counsel should be careful to determine that he or she will not be confronted with a conflict of loyalty since defense counsel's entire loyalty is due the accused. Defense counsel should not accept such compensation unless:

(i) the accused consents after disclosure;

(ii) there is no interference with defense counsel's independence of professional judgment or with the client-lawyer relationship; and

(iii) information relating to the representation of the accused is protected from disclosure as required by defense counsel's ethical obligation of confidentiality.

Defense counsel should not permit a person who recommends, employs, or pays defense counsel to render legal services for another to direct or regulate counsel's professional judgment in rendering such legal services.

(f) Defense counsel should not defend a criminal case in which counsel's partner or other professional associate is or has been the prosecutor in the same case.

(g) Defense counsel should not represent a criminal defendant in a jurisdiction in which he or she is also a prosecutor.

(h) Defense counsel who formerly participated personally and substantially in the prosecution of a defendant should not thereafter represent any person in the same or a substantially related matter. Defense counsel who was formerly a prosecutor should not use confidential information about a person acquired when defense counsel was a prosecutor in the representation of a client whose interests are adverse to that person in a matter.

(i) Defense counsel who is related to a prosecutor as parent, child, sibling or spouse should not represent a client in a criminal matter where defense counsel knows the government is represented in the matter by such prosecutor. Nor should defense counsel who has a significant personal or financial relationship with a prosecutor represent a client in a

criminal matter where defense counsel knows the government is represented in the matter by such prosecutor, except upon the consent by the client after consultation regarding the relationship.

(j) Defense counsel should not act as surety on a bond either for the accused represented by counsel or for any other accused in the same or a related case.

(k) Except as law may otherwise expressly permit, defense counsel should not negotiate to employ any person who is significantly involved as an attorney or employee of the government in a matter in which defense counsel is participating personally and substantially.

National Legal Aid and Defender Association, Standards for the Administration of Assigned Counsel Systems, 1989, Standard 3.1.C, Assigned Counsel for Conflicts Only.

Jurisdictions which choose to utilize a defender office and/or contracting entity as the primary method of providing defense services to eligible persons, and rely on assignment of private counsel for cases which pose a conflict of interest to the primary entity (or entities), shall establish a coordinated plan for the assignment of counsel in those conflict cases.

E. Caseloads

NOTE: The caseload maximums suggested in the model contract are derived from those of the National Advisory Commission on Criminal Justice Standards and Goals. Much has changed, however, in the practice of indigent defense in the quarter century since those standards were promulgated, increasing the complexity, and raising the stakes in many types of cases, and in many different ways. Because of these changes, there is an increasing recognition that “caseload” is an insufficient measure of the work and staffing requirements on defender programs, and an increasing impetus toward measuring “workload” instead, by assigning weights to different types of proceedings and dispositions according to the number of hours and classes of personnel required. Materials have been developed by NLADA (see e.g., *Case Weighting Systems: A Handbook for Budget Preparation*, 1985) and the Spangenberg Group for programs to calculate budgets based on their “weighted” caseloads, but to date, no national workload standards have been developed. Each jurisdiction should consider adapting caseload measurements by the addition of a case credit system. In King County, Washington, for example, a homicide is presumptively two case credits, and dependency review hearings are counted as partial case credits. Caseloads for drug courts, mental health courts, and other “specialty” courts should be separately negotiated, recognizing that they can impose substantial burdens on the defenders.

Related Standards

American Bar Association Standards for Criminal Justice, Providing Defense Services, Third Edition, 1992, Standard 5-3.3(b)(v) (Elements of the contract for services).

Contracts for services should include ... allowable workloads for individual attorneys, and measures to address excessive workloads, consistent with standard 5-5.3.

National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts: The Defense, 1973, Standard 13.12., Workload of Public Defenders

The caseload of a public defender office should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.

For purposes of this standard, the term case means a single charge or set of charges concerning a defendant (or other client) in one court in one proceeding. An appeal or other action for post-judgment review is a separate case. If the public defender determines that because of excessive workload the assumption of additional cases or continued representation in previously accepted cases by his office might reasonably be expected to lead to inadequate representation in cases handled by him, he should bring this to the attention of the court. If the court accepts such assertions, the court should direct the public defender to refuse to accept or retain additional cases for representation by his office.

National Survey of Indigent Defense Systems, Interim Report, National Legal Aid and Defender Association, prepared for U.S. Department of Justice, Bureau of Justice Statistics, 1998.

Constitutional guarantees to indigent defendants extend beyond the provision of a lawyer. The Supreme Court, in cases such as *Ake v. Oklahoma*, 470 U.S. 68 (1985), also ruled that poor people are entitled to necessary expert and investigative services - all of which place additional obligations on the defender offices required to provide those services....

Other changes have taken place [since 1982] in the legislative, judicial, prosecutorial, correctional and administrative wings of the criminal justice system, including:

1. Increases in the length of prison sentences, and the number of crimes carrying mandatory prison terms.
2. Determinate sentencing through sentencing guidelines.
3. Lowering of the age for prosecuting juveniles as adults, and increases in the number of such prosecutions.
4. Dramatic increases in the number of persons arrested and prosecuted for non-felony and "quality of life" crimes.
5. New, and often severe, collateral consequences of criminal convictions through civil matters, such as immigration status, housing, licensing, fines and benefits entitlement.
6. The growth of forfeiture, both civil and criminal.
7. Increasing federalization of state crimes, resulting in broader concurrent exposure to prosecution in parallel criminal justice systems.
8. Legislative elimination or reduction of parole and probation.
9. Legislative creation of many new "predator" and repeat-offender statutes.
10. Legislative expansions of the death penalty, increased capital prosecutions, and the accelerated pace of executions.

11. The establishment and subsequent defunding of capital resource centers, and other offices that previously provided defenders with assistance in death penalty cases.
12. Reduced availability of habeas corpus and other post-conviction remedies.
13. Imposition of restrictive time limits for filing of appeals, habeas corpus and post-conviction petitions.
14. Increased funding for prosecutors and police, with a concurrent increase in the number of specialized prosecution units defenders must contend with, such as domestic violence, sexual assault and narcotics task forces.
15. Development of new fields of scientific and other areas of expertise used in criminal prosecution and defense.
16. Development of new specialized courts, often designed as "adjudication partnerships," such as drug courts, juvenile gun courts, or domestic violence courts.
17. The emergence of alternative justice-system models, such as community justice and restorative justice.

These system changes have had a profound effect on the agencies that provide indigent defense services.

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, 1984, Guideline III-6, Allowable Caseloads.

The contract should specify a maximum allowable caseload for each full-time attorney, or equivalent, who handles cases through the contract. Caseloads should allow each lawyer to give every client the time and effort necessary to provide effective representation. Attorneys employed less than full-time on handling a mix of cases should handle a proportional caseload.

American Bar Association Standards, Providing Defense Services (3rd. ed.) Standard 5-5.3, Workload.

- (a) Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Special consideration should be given to the workload created by representation in capital cases.
- (b) Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments. Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.

American Bar Association Disciplinary Rule 6-101:

- (a) A lawyer shall not:
 - (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a person who is competent to handle it.
 - (2) Handle a legal matter without preparation adequate in the circumstances.
 - (3) Neglect a legal matter entrusted to him.

American Bar Association Standards, The Defense Function (3rd. ed.) Standard 4-1.3(d), Delays; Punctuality; Workload.

Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations. Defense counsel should not accept employment for the purpose of delaying trial.

National Legal Aid and Defender Association, Standards for the Appointment and Performance of Counsel in Death Penalty Cases, 1989, Standard 6.1. Workload.

Attorneys accepting appointments pursuant to these Standards should provide each client with quality representation in accordance with constitutional and professional Standards. Capital counsel should not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

National Legal Aid and Defender Association, Standards for the Administration of Assigned Counsel Systems, 1989, Workload of Attorneys.

- (a) The Board, or at its direction the Administrator, shall develop standards relating to caseload/workload size limits for attorneys who desire to receive appointments from the Program, and procedures through which attorneys whose workloads have become excessive can be relieved of caseload responsibilities that they cannot competently meet.
- (b) The Administrator shall provide notice to attorneys eligible for assignments of the caseload/workload standards and procedures established by the Board, and of the attorney's obligation not to accept more work than they can effectively handle.
- (c) The Administrator shall keep records of assignments made to individual attorneys in a manner that allows the Administrator to avoid assigning an excessive number of cases to any attorney.

National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States, 1976.

Standard 5.1, Establishing Maximum Pending Workload Levels for Individual Attorneys. In order to achieve the prime objective of effective assistance of counsel to all defender clients, which cannot be accomplished by even the ablest, most industrious attorneys in the face of

excessive workloads, every defender system should establish maximum caseloads for individual attorneys in the system.

Caseloads should reflect national standards and guidelines. The determination by the defender office as to whether or not the workloads of the defenders in the office are excessive should take into consideration the following factors:

- (a) objective statistical data;
- (b) factors related to local practice; and
- (c) an evaluation and comparison of the workloads of experienced, competent private defense practitioners.

Standard 5.3, Elimination of Excessive Caseloads. Defender office caseloads and individual defender attorney workloads should be continuously monitored, assessed and predicted so that, wherever possible, caseload problems can be anticipated in time for preventive action.

Whenever the Defender Director, in light of the system's established workload standards, determines that the assumption of additional cases by the system might reasonably result in inadequate representation for some or all of the system's clients, the defender system should decline any additional cases until the situation is altered.

When faced with an excessive caseload, the defender system should diligently pursue all reasonable means of alleviating the problem, including:

- a. Declining additional cases and, as appropriate, seeking leave of court to withdraw from cases already assigned;
- b. Actively seeking the support of the judiciary, the Defender Commission, the private bar, and the community in the resolution of the caseload problem;
- c. Seeking evaluative measures from the appropriate national organization as a means of independent documentation of the problem;
- d. Hiring assigned counsel to handle the additional cases; and Initiating legal causes of action.

An individual staff attorney has the duty not to accept more clients than he can effectively handle and should keep the Defender Director advised of his workload in order to prevent an excessive workload situation. If such a situation arises, the staff attorney should inform the court and his client of his resulting inability to render effective assistance of counsel.

American Bar Association Standards, Providing Defense Services (3rd. ed.) Standard 5-5.2, Collateral proceedings.

Counsel should be provided in all proceedings arising from or connected with the initiation of a criminal action against the accused, including but not limited to extradition, mental competency, post-conviction relief, and probation and parole revocation, regardless of the designation of the tribunal in which they occur or classification of the proceedings as civil proceedings as civil in nature.

Washington Defender Association, Standards for Public Defense, 1989, Standard Three.

The contract or other employment agreement shall specify the types of cases for which representation shall be provided and the maximum number of cases which each attorney shall be expected to handle. The caseload of public defense attorneys should allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation.

The caseload of a full-time public defense attorney or assigned counsel shall not exceed the following:

- 150 Felonies per attorney per year; or
- 300 Misdemeanors per attorney per year; or
- 250 Juvenile Offender cases per attorney per year; or
- 60 Juvenile dependency clients per attorney per year; or
- 250 Civil Commitment cases per attorney per year; or
- 25 Appeals to appellate court hearing a case on the record and briefs per attorney per year.

A case is defined by the Office of the Administrator for the Courts as: A filing of a document with the court naming a person as defendant or respondent.

Caseload limits should be determined by the number and type of cases being accepted and on the local prosecutor's charging and plea bargaining practices. In jurisdictions where assigned counsel or contract attorneys also maintain private law practices, the contracting agency should ensure that attorneys not accept more cases than they can reasonably discharge. In these situations, the caseload ceiling should be based on the percentage of time the lawyer devotes to public defense.

F. Adequate Support Staff

NOTE: Adequate support staff is an important means of controlling costs in a defender office, since these positions perform work that otherwise must be done by attorneys, at higher compensation levels. Additionally, as courts implement problem-solving strategies both in specialty courts (e.g., drug courts, mental health courts) and in day-to-day case processing, social service staff are increasingly valuable in reducing costs in other parts of the criminal justice system – e.g., through the lower cost of placement and supervision in an appropriate community-based treatment facility as an alternative to jail time.

The support staff ratios recommended in this provision are based on the recommendations of the National Study Commission on Defense Services in 1976. They should be considered firm minimum levels, in light of the increased complexity and demands of indigent defense practice in the quarter century since then (see National Survey of Indigent Defense Systems, Interim Report, *supra*). These ratios are not the same as caseloads. The provision calling for one social service caseworker for every 450 felony cases, for example, does not mean that each social service caseworker should handle 450 felonies each year; of every 450 felonies assigned to the office, there will be some number not requiring assessment, placement or sentencing advocacy services by a social worker.

Small offices should engage support services in proportion to their size. In no circumstances should the attorney be forced to choose between his/her own income and providing necessary

support services. The contract should provide that payment for support staff should be in addition to compensation which is intended to cover attorney salary and benefits.

NLADA and ABA standards require that every case be investigated. A defense attorney should not enter a guilty plea without, at a minimum, contacting the main witness(es) in the case. A guilty plea should never be entered on the basis of a police report alone.

Related Standards

American Bar Association Standards for Criminal Justice, Providing Defense Services, Third Edition, 1992, Standard 5-3.3(b)(x), (xii) (Elements of the contract for services).

Contracts for services should include ... sufficient support services and reasonable expenses for investigative services, expert witnesses and other litigation expenses ... [and] provision of or access to an appropriate library.

National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States, 1976, 4.1, Task Allocation in the Trial Function: Specialists and Supporting Services.

Defender organizations should analyze their operations for opportunities to achieve more effective representation, increased cost effectiveness and improved client and staff satisfaction through specialization. The decision to specialize legal and supporting staff functions should be made whenever the use of specialization would result in substantial improvements in the quality of defender services and cost savings in light of the program's management and coordination requirements; provided that, attorney tasks should never be specialized where the result would be to impair the attorney's ability to represent a client from the beginning of a case through sentencing. Proper attorney supervision in a defender office requires one full-time supervisor for every ten staff lawyers, or one part-time supervisor for every five lawyers.

Social workers, investigators, paralegal and paraprofessional staff as well as clerical/secretarial staff should be employed to assist attorneys in performing tasks not requiring attorney credentials or experience and for tasks where supporting staff possess specialized skills.

Defender offices should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every three staff attorneys in an office. Every defender office should employ at least one investigator.

Professional business management staff should be employed by defender offices to provide expertise in budget development and financial management, personnel administration, purchasing, data processing, statistics, record-keeping and information systems, facilities management and other administrative services if senior legal management are expending at least one person-year of effort for these functions or where administrative and business management functions are not being performed effectively and on a timely basis.

National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts: The Defense, 13.14 (1976) Supporting Personnel and Facilities.

Public defender offices should have adequate supportive services, including secretarial, investigation, and social work assistance.

In rural areas (and other areas where necessary), units of local government should combine to establish regional defenders' offices that will serve a sufficient population and caseload to justify a supporting organization that meets the requirements of this standard.

The budget of a public defender for operational expenses other than the costs of personnel should be substantially equivalent to, and certainly not less than, that provided for other components of the justice system with whom the public defender must interact, such as the courts, prosecution, the private bar, and the police. The budget should include:

1. Sufficient funds to provide quarters, facilities, copying equipment, and communications comparable to those available to private counsel handling a comparable law practice.
2. Funds to provide tape recording, photographic and other investigative equipment of a sufficient quantity, quality, and versatility to permit preservation of evidence under all circumstances.
3. Funds for the employment of experts and specialists, such as psychiatrists, forensic pathologists, and other scientific experts in all cases in which they may be of assistance to the defense.
4. Sufficient funds or means of transportation to permit the office personnel to fulfill their travel needs in preparing cases for trial and in attending court or professional meetings.

American Bar Association Standards, The Defense Function (3rd. ed.), Standard 4-4.1 (duty to investigate), 4-8.1 (duties at sentencing), 4-6.1 (duty to explore diversion from criminal justice process).

American Bar Association Standards. Providing Defense Services (3rd. ed.) 5-1.4, Supporting services.

The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for an effective defense participation in every phase of the process.

Performance Guidelines for Criminal Defense Representation, National Legal Aid and Defender Association, 1995

Guideline 4.1 Investigation

- j. Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible.

Guideline 8.1 Obligations of Counsel in Sentencing

- k. Among counsel's obligations in the sentencing process are:
1. where a defendant chooses not to proceed to trial, to ensure that a plea agreement is negotiated with consideration of the sentencing, correctional, and financial implications;...
 7. to consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and warranted.

National Legal Aid and Defender Association, Standards for the Administration of Assigned Counsel Systems, 4.6, Support Services.

The Assigned Counsel Program shall ensure that the many support services necessary for the effective defense of clients are available to assigned counsel at every phase of the cases to which counsel are assigned.

National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States, 1976, 4.4 Use of Law Students.

Although law schools throughout the nation should be encouraged to establish closely supervised clinical criminal law, courses in cooperation with local defender offices, it is deplorable that law students are now filling gaps that should be filled by the practicing bar. Law student programs should not be viewed as a long-term answer to the problem of adequately meeting the needs of defendants in the criminal justice system.

Law students utilized as supporting personnel in defender agencies should be carefully supervised, given a broad range of experience and, where appropriate, adequately compensated for their work.

Law students functioning as subcounsel in criminal matters should be thoroughly prepared in criminal law and procedure, ethics, and court practice before being permitted to handle actual courtroom appearances.

A law student should be permitted to handle as lead counsel motions, hearings, and trials only after the student has been certified under a student practice rule and provided that the supervising lawyer has determined that, to the best of his knowledge and belief, the student will not bias either the court or the jury against the defendant. The student should not be permitted to handle the case unless the client has consented in writing to student representation; however, the consent of the trial judge should not be required. The client's consent should be indicated on the court record prior to any courtroom proceeding.

Law students should not conduct initial substantive client interviews without the presence of a supervising lawyer.

Law students should not handle as lead counsel criminal cases in which the charges against the accused involve complex legal, evidentiary, or tactical decisions, or where there is a likelihood of a substantial deprivation of liberty upon conviction.

The requirement of close supervision necessitates that the supervising lawyer have a complete understanding of the case, be available to the student prior to any court appearance for consultation and be physically present and immediately available for consultation during the time the student is presenting a matter in court.

G. Complex litigation cases

NOTE: In most states and federal court, capital cases require two counsel. Under federal law and under state court rules, attorneys should be “learned in the law of capital punishment.” Most such requirements are based upon the ABA and NLADA standards.

Related Standards

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, 1984, Guideline III-11: Special Case Compensation.

The contract should provide for reasonable compensation over and above the normal contract price for cases which require an extraordinary amount of time and preparation, including, but not limited to, capital cases. Services which require special fees should be defined in the contract.

National Legal Aid and Defender Association, Standards for the Appointment and Performance of Counsel in Death Penalty Cases, 1987.

Standard 6.1. Workload. Attorneys accepting appointments pursuant to these Standards should provide each client with quality representation in accordance with constitutional and professional Standards. Capital counsel should not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

Standard 8.1, Supporting Services. The legal representation plan for each jurisdiction should provide counsel appointed pursuant to these Standards with investigative, expert, and other services necessary to prepare and present an adequate defense. These should include not only those services and facilities needed for an effective defense at trial, but also those that are required for effective defense representation at every stage of the proceedings, including the sentencing phase.

Standard 11.1, Establishment of Performance Standards. The appointing authority should establish Standards of performance for counsel appointed in death penalty cases.

The Standards of performance should include, but should not be limited to the specific Standards set out in Standards 11.3 through 11.9.

The appointing authority should refer to the Standards of performance when assessing the qualification of attorneys seeking to be placed on the roster from which appointments in death penalty cases are to be made (Standard 4.1) and in monitoring the performance of attorneys to determine their continuing eligibility to remain on the roster (Standard 7.1).

Standard 11.2 , Minimum Standards Not Sufficient. Minimum Standards that have been promulgated concerning representation of defendants in criminal cases generally, and the level of adherence to such Standards required for non-capital cases should not be adopted as sufficient for death penalty cases.

American Bar Association Guidelines for Death Penalty Cases, 1989, 1.1, 3.1

VIII. VARIANCE

NOTE: This provision represents a practical approach to periodic variations in criminal caseloads. Rather than forcing the contract parties to renegotiate should the caseload be slightly higher or lower than anticipated, it permits some flexibility, some shared risk, in exchange for the saved time and energy of renegotiating over a small number of cases. It preserves the concept that there should be a maximum number of cases handled for the agreed-upon compensation, and provides some stability and predictability for both parties.

IX. ASSIGNMENT OF COMPLEX LITIGATION CASES

Related Standards

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, 1984, Guideline III-11: Special Case Compensation.

The contract should provide for reasonable compensation over and above the normal contract price for cases which require an extraordinary amount of time and preparation, including, but not limited to, capital cases. Services which require special fees should be defined in the contract.

National Legal Aid and Defender Association, Defender Training and Development Standards, 1997.

Standard 7.1 - Death Penalty Defense. Defender organizations should provide employees responsible for the representation of death penalty clients with all training necessary for high quality service to the client at every stage of the process: pretrial, trial, penalty phase, appeal and post-conviction.

Standard 7.2 - Complex and Specialized Practice Areas. Defender organizations should provide special training to employees responsible for the representation of clients with complex or especially difficult cases, as well as for those employees handling specialized areas of practice.

X. ATTORNEY TRAINING

Related Standards

American Bar Association Standards for Criminal Justice, Providing Defense Services, Third Edition, 1992, Standard 5-3.3(b)(xi) (Elements of the contract for services).

Contracts for services should include ... supervision, evaluation, training and professional development.

National Legal Aid and Defender Association, Defender Training and Development Standards 1997

Standard 1.1 - Training is Essential. The defender organization must provide training opportunities that insure the delivery of zealous and quality representation to clients.

Standard 1.2 - Written Training Plan. Every defender organization must have a clear, written plan, which includes specific goals and objectives, for offering training opportunities to all employees.

Standard 1.3 - Adequate Financial Resources. Defender organizations must have adequate governmental funding for the resources to provide high quality training opportunities consistent with these standards.

National Advisory Commission on Criminal Justice Standards, Courts, 1973, Standard 13.16, Training and Education of Defenders.

The training of public defenders and assigned counsel panel members should be systematic and comprehensive. Defenders should receive training at least equal to that received by the prosecutor and the judge. An intensive entry-level training program should be established at State and national levels to assure that all attorneys, prior to representing the indigent accused, have the basic defense skills necessary to provide effective representation.

A defender training program should be established at the national level to conduct intensive training programs aimed at imparting basic defense skills. Each State should establish its own defender training program to instruct new defenders and assigned panel members in substantive law procedure and practice.

Every defender office should establish its own orientation program for new staff attorneys and for new panel members participating in provision of defense services by assigned counsel.

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984) Guideline III-17: Professional Development.

The contract should provide funds and sufficient staff-time to permit systematic and comprehensive training of attorneys and professional staff. Resources for training should be no less than is provided to prosecutors and judges in the jurisdiction, and should include continuing legal education programs, attendance at local training programs, and the

opportunity to review training and professional publications and tapes. Where appropriate and where the size of the contract program requires, all attorneys should be required to attend an intensive, entry-level training program.

National Legal Aid and Defender Association, Standards for the Administration of Assigned Counsel Systems (1989).

Standard 4.3.1, Entry-Level Training. The Administrator shall be responsible for preparing, in accordance with Board specifications, an entry-level training program. Entry-level training shall be mandatory for all attorneys unless they come under exceptions specified by the Board, or the Administrator acting at its direction.

Standard 4.3.2, In-Service Training.

- (a) The Board shall establish regulations requiring attorneys to attend a specified number of training units per year in order to remain on a Program roster.
- (b) The Administrator shall be responsible for preparing, in accordance with Board directives, periodic in-service training programs to provide systematic, comprehensive instruction in substantive law and courtroom skills. He or she shall also determine, upon request, whether training offered by entities other than the Program may be counted toward the training units required by the Board.
- (c) The Administrator shall ensure that attorneys remaining on a Program roster have attended the number of training units required by the Board.
- (d) The Board and Administrator shall encourage attorneys to participate in training sessions beyond the mandatory units.

American Bar Association Standards, The Defense Function (3rd. ed.) Standard 4-1.6 (a) (lawyer's duty to obtain formal training).

American Bar Association Standards, Providing Defense Services (3rd. ed.) Standard 5-1.5

The legal representation plan should provide for the effective training, professional development and continuing education of all counsel and staff involved in providing defense services. Continuing education Programs should be available, and public funds should be provided to enable all counsel and staff to attend such programs.

XI. ATTORNEY EVALUATION

Related Standards

American Bar Association Standards for Criminal Justice, Providing Defense Services, Third Edition, 1992, Standard 5-3.3(b)(xi) (Elements of the contract for services).

Contracts for services should include ... supervision, evaluation, training and professional development.

National Study Commission on Defense Services, Guidelines for Legal Defense Systems (1976), Standard 5.4, Supervision and Evaluation of Defender System Personnel.

The professional performance of defender staff attorneys should be subject to systematic supervision and evaluation based upon publicized criteria. Supervision and evaluation efforts should be individualized, and should include monitoring of time and caseload records, review and inspection of case files and transcripts, in-court observation and periodic conferences.

National Study Commission on Defense Services, Guidelines for Legal Defense Systems (1976), Standard 5.5, Monitoring and Evaluation of Assigned Counsel Program Personnel

All evaluations of panel attorneys should be conducted by the administrator of the program. The results of evaluations should be reported to the attorney upon request of the attorney or in the discretion of the administrator.

A system of performance evaluations based upon personal monitoring by the administrator, augmented by regular inputs from judges, prosecutors, other defense lawyers and clients should be developed. Periodic review of selected cases should be made by the administrator.

The criteria of performance utilized in evaluations should be those of a skilled and knowledgeable criminal lawyer.

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984), Guideline III-16: Supervision and Evaluation.

The contract should establish a procedure for internal systematic supervision and evaluation of the performance of the Contractor's staff based upon publicized criteria. Supervision and evaluation efforts should include monitoring of time and caseload records, review and inspection of transcripts, an evaluation of attorney case activity, in-court observations, and periodic conferences.

A system of performance evaluations should be based upon personal monitoring by the Contractor's Director or Chief Attorney and should be augmented by regular, formalized comments by judges, prosecutors, other defense lawyers, and clients. The criteria of performance employed should be those of a skilled and knowledgeable criminal lawyer.

National Advisory Commission on Criminal Justice Standards and Goals, Courts (1973), Standard 13.9 Performance of Public Defender Function

Policy should be established for and supervision maintained over a defender to insure that the duties of the office are discharged with diligence and competence.

XII. COMPENSATION AND METHOD OF PAYMENT

Related Standards

American Bar Association Standards for Criminal Justice, Providing Defense Services, Third Edition, 1992, Standard 5-3.3(b)(ix) (Elements of the contract for services).

Contracts for services should include ... reasonable compensation levels and a designated method of payment.

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984), Guideline III-10: Compensation.

The contract shall provide that the Contractor compensate:

(a) its staff, employees, subcontractors and retained forensic experts at rates commensurate with their training, experience and responsibilities and with compensation paid to persons doing similar work in public agencies in the jurisdiction, and

(b) attorneys at a minimum rate which reflects the following factors:

1. The customary compensation in the community for similar services rendered by privately retained counsel to a paying client or by government or other publicly-paid attorneys to a public client;
2. the time and labor required to be spent by the attorney; and
3. the degree of professional ability, skill and experience called for and exercised in the performance of the services.

National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States (1976) Standard 3.1 Assigned Counsel Fees and Supporting Services.

Assigned counsel should be adequately compensated for services rendered. Fees should be related to the prevailing rates among the private bar for similar services. These rates should be reviewed periodically and adjusted accordingly.

Funds should be available in a budgetary allocation for the services of investigators, expert witnesses and other necessary services and facilities.

In developing a fee schedule, the effect of the fee schedule upon the quality of representation should be considered. Fee structures should be designed to compensate attorneys for effort, skill and time actually, properly and necessarily expended in assigned cases.

Fee schedules, whether provided by statute or policy, should be designed to allow hourly in-court and out-of-court rates up to a stated maximum for various classes of cases, with provision for compensation in excess of the scheduled maximum in extraordinary cases.

National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States (1976) Standard 3.2 Defender System Salaries.

The Defender Director's compensation should be set at a level which is commensurate with his qualifications and experience, and which recognizes the

responsibility of the position. The Director's compensation should be comparable with that paid to presiding judges, is professionally appropriate when compared with the private bar, and is in no event less than that of the chief prosecutor.

The starting levels of compensation for staff attorneys should be adequate to attract qualified personnel. Salary levels thereafter should staff and should in no event be less than that paid in the prosecutor's office. Compensation should be professionally appropriate when analyzed or compared with the compensation of the private bar.

In order to attract and retain qualified supporting personnel, compensation should be comparable to that paid by the private bar and related positions in the private sector and should in no event be less than that paid for similar positions in the court system.

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984), Guideline, III-14, Payment.

The contract should provide that payments to the Contractor be made monthly or at times agreed to by the parties without regard to the number of cases closed in the period.

National Legal Aid and Defender Association, Standards for the Appointment and Performance of Counsel in Death Penalty Cases, Standard 10.1, Compensation.

Capital counsel should be compensated for actual time and service performed. The objective should be to provide a reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extraordinary responsibilities inherent in death penalty litigation.

XIV. REPORTS AND INSPECTIONS

Related Standards

American Bar Association Standards, Providing Defense Services (3rd. ed.) 5-3.3 Elements of the contract for services (b)(xiv).

Contracts for services should include ... a system of case management and reporting.

National Study Commission on Defense Services, Guidelines for Legal Defense Systems, 5.2 Statistics and Record-keeping.

Every defender office should maintain a central filing and record system with daily retrieval of information concerning all open cases. The system should include, at a minimum, an alphabetical card index system with a card containing detailed and current information on every open case, and a docket book or calendar which contains future court appearance activities.

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984), Guideline III-15, Financial Records.

The contract shall provide that the Contractor shall retain financial records, submit financial reports, and produce an Annual financial evaluation or audit.

B. Caseload Reports

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984), Guideline III-22, Management System.

The contract shall provide that the Contractor shall maintain a case reporting and management information system, data from which shall be available to, or provided to, the Contracting Authority and Policy Board. Any such system shall be maintained independently from client files so as to disclose no confidential or privileged information. The case reporting and management information system shall be used to provide the Contractor, the Contracting Authority and the Policy Board with caseload information sufficient to assure compliance with Guidelines III-3, III-5, III-14, and III-16 particularly.

National Study Commission on Defense Services, Guidelines for Legal Defense Systems, (1976) 5.2 Statistics and Record Keeping.

Every defender office should maintain a central filing and record system with daily retrieval of information concerning all open cases. The system should include, at a minimum, an alphabetical card index system with a card containing detailed and current information on every open case, and a docket book or calendar which contains future court appearance activities.

Every Defender Director should receive, on a weekly or monthly basis, detailed caseload and dispositional data, broken down by type of case, type of function, disposition, and by individual attorney workload.

C. Expenditure Reports

(see B above)

E. Bar Complaints

American Bar Association Standards, The Defense Function (3rd. ed.), Standard 4-1.5, Advisory Councils on Professional Conduct.

F. Inspections

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984), Guideline III-15, Financial Records.

The contract shall provide that the Contractor shall retain financial records, submit financial reports, and produce an Annual financial evaluation or audit.

XV. ESTABLISHMENT AND MAINTENANCE OF RECORDS

Related Standards

American Bar Association Standards, Providing Defense Services (3rd. ed.) Standard 5-3.3 (b)(xiv) (Elements of the contract for services).

Contracts for services should include ... a system of case management and reporting.

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984)

Guideline III-21, Retention of Files: The contract shall provide that the Contractor provide for retention of client files in a manner that affords protection of the client's confidentiality interests (*see* Guideline III-17) for a specified period of time after the conclusion of the case at least equal to the period provided in rules governing all other lawyers' files in the jurisdiction but in no event less than five (5) years.

Guideline III-22, Management System: The contract shall provide that the Contractor shall maintain a case reporting and management information system, data from which shall be available to, or provided to, the Contracting Authority and Policy Board. Any such system shall be maintained independently from client files so as to disclose no confidential or privileged information. The case reporting and management information system shall be used to provide the Contractor, the Contracting Authority and the Policy Board with caseload information sufficient to assure compliance with Guidelines III-3, III-5, III-14, and III-16 particularly.

National Study Commission on Defense Services, Guidelines for Legal Defense Systems, 5.2, Statistics and Record-keeping.

Every defender office should maintain a central filing and record system with daily retrieval of information concerning all open cases. The system should include, at a minimum, an alphabetical card index system with a card containing detailed and current information on every open case, and a docket book or calendar which contains future court appearance activities.

XVI. HOLD HARMLESS AND INDEMNIFICATION

Related Standards

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984), Guideline III-20. Insurance.

The contract may require that the Contractor provide malpractice insurance for attorneys representing the Contractor hold the government or Contracting Authority harmless for the attorneys' representation of defendants.

XVII. INSURANCE

(see XVI above)

XVIII. EVALUATION GUIDELINES

Related Standards

American Bar Association Standards for Criminal Justice, Providing Defense Services, Third Edition, 1992, Standard 5-3.3(b)(xi) (Elements of the contract for services).

Contracts for services should include ... supervision, evaluation, training and professional development.

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984), Guideline III-16: Supervision and Evaluation.

The contract should establish a procedure for internal systematic supervision and evaluation of the performance of the Contractor's staff based upon publicized criteria. Supervision and evaluation efforts should include monitoring of time and caseload records, review and inspection of transcripts, an evaluation of attorney case activity, in-court observations, and periodic conferences.

A system of performance evaluations should be based upon personal monitoring by the Contractor's Director or Chief Attorney and should be augmented by regular, formalized comments by judges, prosecutors, other defense lawyers, and clients. The criteria of performance employed should be those of a skilled and knowledgeable criminal lawyer.

National Study Commission on Defense Services, Guidelines for Legal Defense Systems.

Guideline 5.4, Supervision and Evaluation of Defender System Personnel. The professional performance of defender staff attorneys should be subject to systematic supervision and evaluation based upon publicized criteria. Supervision and evaluation efforts should be individualized, and should include monitoring of time and caseload records, review and inspection of case files and transcripts, in-court observation and periodic conferences.

Guideline 5.5, Monitoring and Evaluation of Assigned Counsel Program Personnel. All evaluations of panel attorneys should be conducted by the administrator of the program. The results of evaluations should be reported to the attorney upon request of the attorney or in the discretion of the administrator.

A system of performance evaluations based upon personal monitoring by the administrator, augmented by regular inputs from judges, prosecutors, other defense lawyers and clients should be developed. Periodic review of selected cases should be made by the administrator.

The criteria of performance utilized in evaluations should be those of a skilled and knowledgeable criminal lawyer.

XIX. TERMINATION AND SUSPENSION

Related Standards

American Bar Association Standards, Providing Defense Services (3rd. ed.) Standard 5-3.3(b)(xv) (Elements of the contract for services).

Contracts for services should include ... the grounds for termination of the contract by the parties.

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984)

Guideline III-4, Term of Contract. Contracts for legal defense services should be awarded for at least two year terms. Removal of the Contractor short of the agreed term should be for good cause only.

Guideline III-5, Definition of "Good Cause." The contract shall define "good cause" as is required for removal of the Contractor (Guideline III-4) as: failure by the Contractor to comply with the terms of the contract to an extent that the delivery of services to clients by the Contractor is impaired or rendered impossible, or a willful disregard by the Contractor of the rights and best interests of clients under this contract such as leaves them impaired. The individual actions of the Contractor or any one attorney taken in connection with one case alone shall not necessarily constitute "good cause" for removal.

National Study Commission on Defense Services, Guidelines for Legal Defense Systems, Standard 2.12, Qualification of the Defender Director and Conditions of Employment.

The director should not be removed from office in the course of a term without a hearing procedure at which good cause is shown.

XXVI. NONDISCRIMINATION

NOTE: This standard addresses non-discrimination both in client representation and in the selection of public defenders and their staffs.

Related Standards

American Bar Association Standards, Providing Defense Services (3rd ed.), Standard 5-4.1, Chief Defender and Staff.

Selection of the chief defender and staff should be made on the basis of merit. Recruitment of attorneys should include special efforts to employ women and members of minority groups.

Washington Defender Association, Standards for Public Defense Services, 1989, Standard Seventeen, Non-Discrimination.

Neither the Contracting Authority, in its selection of an attorney, firm or agency to provide public defense representation, nor the attorneys selected, in their hiring practices or in their representation of clients, shall discriminate on the grounds of race, color, religion, national origin, age, marital status, sex, sexual orientation or handicap. Both the contracting authority and the contractor shall comply with all federal, state, and local non-discrimination requirements.