ABA Standards for Criminal Justice
Providing Defense Services
Third Edition

ABA Standards for Criminal Justice
Providing Defense Services
Third Edition

Library of Congress Catalog Card No. 92-73643
ISBN 0-89707-799-7

Project of the
American Bar Association
Criminal Justice Standards Committee
Criminal Justice Section
1800 M Street, NW
Washington, D.C. 20036
202/331-2260

Printed in the United States of America

ABA Standards for Criminal Justice Providing Defense Services Third Edition

James G. Exum, Jr., Chairperson
ABA Criminal Justice Standards Committee

Norman Lefstein
Task Force Chairperson; Chairperson, Criminal Justice Standards Committee 1989–1990

Sheldon Krantz
Chairperson, Section of Criminal Justice 1989–1990

Michael L. Bender
Chairperson, Section of Criminal Justice 1990–1991

Andrew L. Sonner
Chairperson, Section of Criminal Justice 1991–1992

Neal R. Sonnett
Chairperson, Section of Criminal Justice 1992–1993

Richard Wilson, Reporter

Black Letter Standards approved by ABA House of Delegates
August 8, 1990

Commentary completed
July 1992

ABA Criminal Justice Standards Committee

James G. Exum, Jr., Chairperson
Chief Justice, Supreme Court of North Carolina, Raleigh, North Carolina

Paul D. Borman
Chief Defender, Federal Defender Office, Detroit, Michigan

Albert J. Krieger
Private practitioner, Miami, Florida

Norman Lefstein
Dean, Indiana University Law School, Indianapolis, Indiana

Norman K. Maleng
District Attorney, Seattle, Washington

Vance W. Raye
Justice, Third District Court of Appeal, Sacramento, California

Michael D. Schrunk
District Attorney, Portland, Oregon

James Vorenberg
Professor of Law, Harvard Law School, Cambridge, Massachusetts

Patricia M. Wald
Judge, U.S. Court of Appeals, District of Columbia Circuit, Washington, D.C.

July 1992

Liaisons to the Criminal Justice Standards Committee

Mary Broderick
National Legal Aid and Defender Association

M.L. "Skip" Ebert, Jr.
National Association of Attorneys General

Kevyn Diann Gray
ABA Law Student Division

David A. Horowitz
ABA Judicial Administration Division

Robert M.A. Johnson
National District Attorneys Association

Dennis Saylor
U.S. Department of Justice

Irwin H. Schwartz
National Association of Criminal Defense Lawyers

Staff to the Criminal Justice Standards Committee

Susan W. Shaffer
Director

Linda M. Linnell
Administrative Assistant

During the preparation of the third edition of Providing Defense Services Standards, the following persons also served as members of the Criminal Justice Standards Committee: Albert J. Datz (Chair), private practitioner, Jacksonville, Florida; Charles L. Becton, private practitioner, Raleigh, North Carolina; William P. Curran, County Attorney, Clark County, Las Vegas, Nevada; Arthur C. "Cappy" Eads, District Attorney, Belton, Texas; Steven H. Goldberg, Dean, Pace University School of Law, White Plains, New York; and Alexander H. Williams III, Judge, Superior Court, Los Angeles, California. Thomas Foley, Ramsey County Attorney, St. Paul, Minnesota, also served for a substantial period of time as liaison to the Criminal Justice Standards Committee from the National District Attorneys Association.

Task Force:
Providing Defense Services Standards

Norman Lefstein, Chairperson
Dean, Indiana University Law School, Indianapolis, Indiana

Shirley S. Abrahamson
Justice, Supreme Court of Wisconsin, Madison, Wisconsin

Bennett H. Brummer
Public Defender, Miami, Florida

Ronald H. Clark
Chief Deputy, Criminal Division, King County Prosecuting Attorney's Office, Seattle, Washington

Samuel Dash
Professor, Georgetown University Law Center, Washington, D.C.

Charles R. English
Private practitioner, Chaleff, English & Catalano, Santa Monica, California

---

Richard Wilson, Reporter
Professor of Law, Washington College of Law, American University, Washington, D.C.

Liaisons to the Task Force

Thomas Foley
National District Attorneys Association

David Garfunkel
National Legal Aid and Defender Association

David A. Horowitz
ABA Judicial Administration Division

Albert J. Krieger
National Association of Criminal Defense Lawyers

Staff to the Task Force

Susan W. Shaffer
Director, Criminal Justice Standards Committee

Contents

PART V. TYPES OF PROCEEDINGS AND QUALITY OF REPRESENTATION

PART VI. STAGE OF PROCEEDINGS

PART VII. ELIGIBILITY FOR ASSISTANCE

PART VIII. OFFER AND WAIVER

INTRODUCTION

Background: The Process of Adoption of the Third Edition

The standards on provision of defense services emerge from a drafting effort of more than two years, begun with the work of an updating task force in the spring of 1988 and completed with the adoption of the standards at the ABA Annual Meeting in 1990. The Task Force on Prosecution and Defense Function/Providing Defense Services was appointed by the Criminal Justice Standards Committee, a standing committee of the Criminal Justice Section. The Task Force first met in May 1988 to chart direction. After review of a preliminary draft in November of that year, a second draft was prepared for review by the Criminal Justice Standards Committee in January 1989. After review by the Standards Committee, third and fourth working drafts were prepared and reviewed by the Task Force and the Standards Committee, respectively, during 1989.

The initial report of the Standards Committee was referred to the Criminal Justice Section Council for preliminary review at its fall meeting in 1989, after which the Standards Committee reviewed and approved a final working draft at a meeting in January 1990. At that point, the Standards Committee had been given the benefit of review by numerous outside organizations, several of which had active liaisons to the committee, as well as several substantive revisions recommended by the Criminal Justice Section Council. The approved draft of the Standards Committee was submitted to the Section Council for consideration once again at its meeting in April 1990. At that meeting, the revisions were overwhelmingly approved by the Council.

The adopted standards on defense services are the result of careful drafting and review by representatives of all segments of the criminal justice system—judges, prosecutors, defense counsel, court personnel and academics active in criminal justice teaching and research. Circulation of the standards to a wide range of outside expertise guaranteed a rich array of comment and criticism which has greatly strengthened the final product.

Major Changes in the Third Edition

The standards on provision of defense services have been revised by the ABA due to the significance of changes in this area of the law over the past decade. Indeed, changes have occurred both with regard to the

right to counsel for the legally indigent defendant and in structures and funding for defense services at the state and local levels.

In recent years there have been several national studies of defense services. These are the first studies conducted since 1973,[1] and they have revealed both the significant impact of the imposition of the death penalty on the provision of defense services and the growth of contract services as an alternative model for service delivery. Both of those issues have received extensive treatment in the third edition revisions.

The ABA made significant contributions over the last decade through important studies of defense services. Using data from a national survey, the ABA's Standing Committee on Legal Aid and Indigent Defendants published a study prepared by Professor Norman Lefstein entitled *Criminal Defense Services for the Poor: Methods and Programs for Providing Legal Representation and the Need for Adequate Financing* (1982). During 1988, the ABA Special Committee on Criminal Justice in a Free Society published *Criminal Justice in Crisis*, a substantial portion of which was devoted to defense services. These analytical reports provide a critical basis for informed amendment and update of standards on defense services.

Further growth in public defender caseloads has been occasioned both by the dramatic increases in charges in drug-related offenses and the increasing federal government intervention in the relationship between the accused and private counsel. In the latter area, federal prosecutors have issued grand jury subpoenas and used fee forfeiture provisions and cash reporting requirements to impact on the relationship between private defense attorneys and their clients.[2] These actions have resulted in either voluntary or compelled withdrawal of private counsel from representation, with concomitant increases in public expenditures for defense services in these cases.

The last decade has also seen an increasing trend toward state funding and organization of defense services. The standards dealing with structure and funding of defense services have proven to be flexible enough to respond to these trends, yet required revision to reflect experience with organization and funding at state and local levels.

The increase in caseloads and expenditures over the last decade has resulted in greater sophistication in the administration of defense services, and a wider range of policy issues which need to be addressed.

---

1. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE OTHER FACE OF JUSTICE (1973).
2. *See, e.g.*, Genego, *The New Adversary*, 54 BROOKLYN L. REV. 781 (1988).

Experience with this increasingly complex area of practice is reflected in amendments to standards dealing with caseloads, attorneys' fees, rotation of assignments, continuity of representation and impact litigation.

The most significant addition to the third edition standards is a new Part III on contract defense services. This new part acknowledges the significant growth of the contract model as a means for delivery of defense services, while stopping short of endorsement of the use of contracts as the primary delivery system in the jurisdiction. The ABA recognized the difficulties inherent in using contracts for defense services when, at the Annual Meeting in 1985, the ABA House of Delegates recommended that contracts not be awarded on the basis of cost alone, and that jurisdictions choosing to use contracts do so in accordance with both the National Legal Aid and Defender Association's *Guidelines for Negotiating and Awarding Governmental Contracts for Defense Services*, and Chapter 5 of the second edition *ABA Standards for Criminal Justice*. The new part contains three new standards on the use of contracts for the delivery of defense services. In addition, the possible inclusion of a contract component in the system for defense services necessitated additional reference to contracts for services in many of the more general provisions on defense services.

Another area of signicant amendment in the third edition is that of defense services in capital cases. At the time of the adoption of the second edition, the death penalty had only recently been given new and carefully circumscribed approval by the United States Supreme Court.[3] In 1989, at its Midyear Meeting, the ABA House of Delegates adopted *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*. Those guidelines have been incorporated by reference into the standards through standard 5-1.2(d). In addition, standards 5-3.3(b)(vi), 5-5.1, 5-5.3(b), 5-6.1, and 5-6.2 all contain new language dealing with the issues raised by representation by appointed counsel in capital cases.

There are other siginficant additions in the third edition. A new standard 5-5.4 is added to encourage permission for defender programs to engage in impact litigation. Significant amendments are made to standard 5-1.2, Systems for legal representation; 5-1.6, Funding; 5-2.2, Eligibility to serve (for assigned counsel); 5-2.3, Rotation of assignments (for assigned counsel); 5-2.4, Compensation and expenses (for assigned

3. Gregg v. Georgia, 428 U.S. 153 (1976).

counsel); 5-5.3, Workload (for public defenders); 5-6.1, Initial provision of counsel; 5-7.2, Reimbursement, notice and imposition of contribution (for the defendant); 5-7.3, Determination of eligibility (of the defendant); 5-8.1, Providing counsel to persons in custody; and 5-8.2, In-court waiver (of counsel).

The third edition changes recognize the significant growth in defense services over the past decade, as well as the profound changes in interpretation of the constitutional right to counsel and the scope of the criminal sanction, as viewed by the United States Supreme Court. These new changes should serve as a useful tool to both the policy-maker and the litigator who seeks legal and ethical guidance on the provision of defense services in state and federal courts.

PART I.

GENERAL PRINCIPLES

Standard 5-1.1. Objective

The objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel pursuant to this chapter. The bar should educate the public to the importance of this objective.

History of Standard

This standard is unchanged from the second edition. "Quality representation" is the appropriate standard by which to measure counsel's performance; the phrase continues to suggest full compliance with the amended third edition ABA Defense Function Standards.

Related Standards

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 1.1 (1989).

ABA Standards for Criminal Justice 4-1.2(b) (3d ed. 1993).

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.13(3) (1973).

National Legal Aid and Defender Association, National Study Commission on Defense Services 1.1 (1976).

Commentary

The United States Supreme Court continues to adhere to the fundamental principle that flows consistently through its Sixth Amendment jurisprudence on the right to counsel: all criminal defendants, regardless of wealth or poverty, are entitled to representation by counsel at a fair trial.[1] The Court has clarified the constitutional standard for

1. Gideon v. Wainwright, 372 U.S. 353 (1963).

performance by counsel as the provision of "reasonably effective assistance" to the accused.[2]

On the other hand, during the past decade the Supreme Court made significant changes in interpretation of other provisions of the U.S. Constitution dealing with the criminal process, particularly the Fourth and Fifth Amendments. Increasingly complex resolutions of these issues have made the quality of representation by counsel all the more important to accused and convicted persons.

The central issue in defense services has not been whether representation is an entitlement but what the nature and extent of that representation will be. As the decade passed, the picture regarding defense services became increasingly clear, primarily because new and more comprehensive national data were available; data which were unknown previously. Major new national studies and surveys were conducted by the federal government.[3] Following the suggestion of this standard, the American Bar Association took seriously its obligation of public education.[4] The National Legal Aid and Defender Association, too, played a significant role in the improvement of defense services by the adoption of comprehensive standards dealing with appellate offices, contracts for defense services, capital cases and assigned counsel systems.[5]

---

2. Strickland v. Washington, 466 U.S. 668 (1984). The Court held that the defendant must prove that performance was deficient under this standard and that the defense was prejudiced badly enough that the outcome would have been different without counsel's errors. Moreover, the decisions of counsel are entitled to a strong presumption of validity.

3. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY (September 1986); BUREAU OF JUSTICE STATISTICS BULLETIN, CRIMINAL DEFENSE FOR THE POOR, 1986 (September 1988); NATIONAL INSTITUTE OF JUSTICE, NATIONAL ASSESSMENT PROGRAM: FINAL SURVEY RESULTS FOR PUBLIC DEFENDERS (Institute for Law and Justice, Oct. 1990).

4. *See, e.g.*, LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR (for The ABA Standing Committee on Legal Aid and Indigent Defendants, May, 1982); AMERICAN BAR ASSOCIATION, *GIDEON* UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING (Nov. 1982); SPANGENBERG AND SMITH, AN INTRODUCTION TO INDIGENT DEFENSE SYSTEMS (for the ABA Standing Committee on Legal Aid and Indigent Defendants, Bar Information Program, 1986); ABA POSTCONVICTION DEATH PENALTY REPRESENTATION PROJECT, MANUAL FOR ATTORNEYS REPRESENTING DEATH-SENTENCED PRISONERS IN POSTCONVICTION PROCEEDINGS (1987); SPECIAL COMMITTEE ON CRIMINAL JUSTICE IN A FREE SOCIETY, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION, CRIMINAL JUSTICE IN CRISIS (Nov. 1988).

5. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STANDARDS AND EVALUATION DESIGN FOR APPELLATE DEFENDER OFFICES (1980); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES (1984); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STANDARDS FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY

Analysis of the newly available information is sobering. The principal author of the government reports concluded that defense services programs are "in a state of crisis" because the defender system is being overlooked by legislatures and courts attempting to respond to public outcry against growing crime rates.[6] The ABA's Dash Committee report, written to respond to the growing crisis in the criminal justice system, was similarly pessimistic. "In the case of the indigent defendant," it concluded, "the problem is not that the defense representation is too aggressive but that it is too often inadequate because of underfunded and overburdened public defender offices."[7]

Thus, whatever the standard by which to measure the performance of counsel, even the minimum constitutional mandate of "reasonably effective assistance" cannot be met when the defender system is not structurally sound or is deprived of the resources necessary for quality performance by each and every attorney who provides defense services in individual cases.

Standard 5-1.2. Systems for legal representation

(a) The legal representation plan for each jurisdiction should provide for the services of a full-time defender organization when population and caseload are sufficient to support such an organization. Multi-jurisdictional organizations may be appropriate in rural areas.

(b) Every system should include the active and substantial participation of the private bar. That participation should be through a coordinated assigned-counsel system and may also include contracts for services. No program should be precluded from representing clients in any particular type or category of case.

(c) Conditions may make it preferable to create a statewide system of defense.

CASES (1988); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS (1989). The death penalty standards were adopted by the ABA, with some amendments, as GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989). They are incorporated by reference in standard 5-1.2(d).

6. Spangenberg, *We Are Still Not Defending the Poor Properly*, 3 CRIM. JUST. 11 (Fall 1989).

7. SPECIAL COMMITTEE ON CRIMINAL JUSTICE IN A FREE SOCIETY, ABA CRIMINAL JUSTICE SECTION, CRIMINAL DEFENSE IN CRISIS 9 (Nov. 1988).

(d) Where capital punishment is permitted in the jurisdiction, the plan should take into account the unique and time-consuming demands of appointed representation in capital cases. The plan should comply with the ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.*

History of Standard

In the second edition, this standard stated that in each jurisdiction there should be both organized defense services and assignments to private attorneys. The significant changes in this standard recognize the continued growth, diversity and acceptance of defender systems during the past decade.

The title of this section was changed by substituting the word "systems" for the less comprehensive term "plan," in keeping with the expanded number of topics addressed in the section. The standard was divided into four subsections.

Subsection (a) adds a new phrase at the end of the first sentence and a new second sentence. The new language acknowledges that many small- to moderate-sized jurisdictions do not have sufficient qualified lawyers or resources to create a full-time defender office. The language is taken from second edition commentary which suggested that "[i]n rural areas with small caseloads, it may be appropriate for the defender organization to have small staffs and to be given responsibility for larger geographical divisions." The commentary also suggested that the term "jurisdiction" in this chapter may be either "the state or a smaller geographical entity," a choice left to the states. The "multi-jurisdictional organizations" here, however, refer to jurisdictions within a state.

A new phrase was added at the beginning of the first sentence of a new subsection (b). A new second sentence recognizes the use of contractual services as one of the appropriate means to assure substantial private bar participation in the delivery of defense services, while maintaining the Standards' commitment to a "mixed" model of public defender offices and assigned counsel panels, with the public defender office as the "primary" delivery system. The assigned counsel panel is still preferred as the primary means to assure participation by the private bar, while contracts for services are seen as a permissible component of the panel if under its administration.

Language regarding the use of contracts for services as an alternative system is added to a number of standards here, where appropriate. A

new Part III carefully defines the circumstances in which contracts may be used and sets new standards for the maintenance of quality in the use of this type of defender system.

Subsection (c) adds a sentence which is an adaptation of similar language found in Standard 3-2.2(b), dealing with the organization of prosecutorial services. It acknowledges the continuing national trend toward the organization of defense services at the state level. Such programs have generally fared better than locally funded programs in resource allocation and quality of services in recent years.

Subsection (d) is the first of several references to the special burdens created for the provision of quality defense services by cases in which the death penalty is a possibility or is imposed. The number of individuals on death row due to capital prosecutions, convictions and appeals in this country has risen exponentially since the U.S. Supreme Court gave its approval to the penalty in 1976. Those individuals are virtually all represented by public defenders, assigned or contract counsel, or volunteer *pro bono* attorneys. The second sentence to subsection (d) refers to extensive ABA guidelines for counsel in capital cases adopted by the ABA House of Delegates in 1989.

Related Standards

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 1.1, 3.1, 11.2 (1989).

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.5 (1973).

National Legal Aid and Defender Association, National Study Commission on Defense Services 2.1, 2.2 (1976).

National Legal Aid and Defender Association, Standards for Defender Services I.2.a (1976).

Commentary

The Three Potential Components of a Defender System

The principal components of existing systems for provision of defense services are three: the public defender program (which, in the federal system, includes a program of community defenders), the administered or *ad hoc* assigned counsel panel and the contract for services. The components have grown in complexity over the last decade; it is sometimes difficult to distinguish one from the other. In each of three subse-

quent parts, these components of a defender system are more carefully defined and described, and the appropriate structure and financing of each component is detailed.

This edition recognizes the existence and use of a new type of delivery system: contracts for defense services. This is due to immense growth in their use during the past two decades. A 1973 national survey of defense services did not mention contracts for services. In the most recent national data, however, contracts for services accounted for about 11 percent of all defender services in the country, and several states, including Arizona, Idaho, Kentucky, North Dakota, Oregon and Washington, provided the majority of representation in serious criminal matters through the use of contracts for services.[1]

However, as is noted in Part III, contracts for services should be implemented with an overriding concern for quality, not cost. Some of the initial contract programs grew out of a legitimate concern by governments for containing the costs incurred when public defender offices were forced to declare conflicts of interest and reject potential clients, sometimes in large percentages. Other programs, unfortunately, adopted the use of flat-fee contracts with competitive bidding by potential providers of services, based solely on a concern for the cheapest possible system. These programs, as the experience of the past decade shows, have conspicuously failed to provide quality representation to the accused,[2] and in many cases, have resulted in even higher costs to the jurisdiction than if another model had been chosen. In a resolution adopted in 1985, the American Bar Association condemned the use of contracts which are awarded only on the basis of cost.

The American Bar Association does not endorse the use of contracts for services as a viable, separate, "stand-alone" component for the delivery of defense services. Instead, the structure proposed here creates a hierarchy of models. The primary component in every jurisdiction

1. BUREAU OF JUSTICE STATISTICS BULLETIN, CRIMINAL DEFENSE FOR THE POOR, 1986 at 3 (Sept. 1988).

2. The most dramatic example of this is the decision of the Arizona Supreme Court in State v. Smith, 140 Ariz. 355, 681 P.2d. 1374 (1984), in which it was held that the contract bidding system used by Mohave County "so overworks the attorneys that it violates . . . the right of a defendant to due process and right to counsel as guaranteed by the Arizona and United States Constitutions." While it applied the holding prospectively, the court held that if the same procedures for selection and compensation of counsel under the suspect contracts were used again, a rebuttable inference of ineffectiveness of counsel would be created. Other examples are discussed in Part III, *infra*.

should be a public defender office, where conditions permit. The secondary component is an administered assigned counsel panel, which assures an appropriate level of participation by the private bar. Bar participation also may occur through a contract for services, which may be part of the larger, coordinated system. This structure should guarantee adequate independence, oversight and quality control for the use of contracts.

The Advantages of a Public Defender Program

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

There also are definite purposes served by retaining the presence of substantial private bar participation in the system for criminal defense. Just as private attorneys often can learn from the full-time lawyers of defender organizations, there are many private attorneys, qualified by training and experience, who can contribute substantially to the knowledge of defenders. In addition, a "mixed" system of representation consisting of both private attorneys and full-time defenders offers a "safety valve," so that the caseload pressures on each group are less likely to be burdensome.

In some cities, where a mixed system has been absent and public defenders have been required to handle all of the cases, the results have been unsatisfactory. Caseloads have increased faster than the size of staffs and necessary revenues, making quality legal representation exceedingly difficult. Furthermore, the involvement of private attorneys in defense services assures the continued interest of the bar in the welfare of the criminal justice system. Without the knowledgeable and active support of the bar as a whole, continued improvements in the nation's justice system are rendered less likely.

Finally, private attorney representation in criminal cases is essential because of new and stricter policies within defense services programs regarding conflicts of interest, primarily in representation of codefen-

dants.[3] In some cases, these policies can result in the declaration of conflicts of interest in more than 25 percent of all cases assigned to a public defender program. Such declarations contributed greatly to the initial growth of contract programs, as noted above.

This edition makes more emphatic the notion that centralization of services need not eliminate flexibility to respond to local conditions. In some jurisdictions, the use of multi-county systems in which a full-time defender travels to several counties may be appropriate. Such systems are in use in Colorado, Kansas, Nevada and New Mexico.

Standard 5-1.2 is consistent with the recommendation of the National Advisory Commission, which urges that in each jurisdiction there should be both "a full-time public defender" program and "substantial participation of the private bar."[4] The Standards for Defender Services prepared by the National Legal Aid and Defender Association recommend that "[a] full-time defender organization should be available for all communities, rural or metropolitan, as the preferred method of supplying legal services . . ."[5]

State Versus Local Organization of Services

In the second edition, the commentary noted that this section took no position on whether services should be organized at the state or local levels. New subsection (c) in this edition moderates that position with-

3. These policies flow, in significant measure, from the cautions regarding multiple representation expressed in decisions of the U.S. Supreme Court, including Holloway v. Arkansas, 435 U.S. 475 (1978), Cuyler v. Sullivan, 446 U.S. 335 (1980), Burger v. Kemp, 483 U.S. 776, and Wheat v. United States, 486 U.S. 153 (1988). Those decisions, while not making multiple representation a per se error, have led to even more restrictive policies in a number of state courts. *See, e.g.*, People v. Macerola, 47 N.Y.2d 257, 417 N.Y.S.2d 908, 391 N.E.2d 990 (1979) (". . . the trial judge has an independent obligation to insure that two or more defendants represented by the same attorney are aware of the potential risks involved in joint representation."); Cole v. White, 376 S.E.2d 599 (W.Va. 1988) (An inquiry is required by the court in all cases in which codefendants are jointly represented by the same attorney or attorneys who are associated in the practice of law, under W. VA. R. CRIM. PROC. 44(c)). Many defender offices, responding to the increasingly strict handling of conflicts of interest by the courts, have adopted *per se* policies of conflict declaration. *See* Broderick and Cohen, *When Public Defenders Have Conflicts of Interest*, 2 CRIM. JUST. 18 (Spring 1987) and ABA STANDARDS FOR CRIMINAL JUSTICE 4-3.5 (3d ed. 1993).

4. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 13.5 (1973).

5. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STANDARDS FOR DEFENSE SERVICES I.2.a (1976).

out endorsing the statewide model as the best means for service provision.

As was noted in the second edition, the national trend in defender services continues toward statewide organization. In the 1986 survey, twenty-four jurisdictions were organized on a centralized basis.[6] As of 1989, an additional eight jurisdictions had taken action to focus the organization of defense services at the state level.[7]

There is, however, a noteworthy distinction between new state programs adopted in the last decade and those adopted in prior years. The principal difference lies in the flexibility of the model. Instead of a staff of full-time defenders employed by a central state office, a number of states have adopted a model providing for administration of the defender program through legislation or court rule creating an independent state commission for defense services and uniform standards for the adoption of local models. Staffing of the program is through a small central staff at the state level while decisions as to choice of delivery system are left to the counties: public defender, assigned counsel, contract or combination systems may be chosen as appropriate. In this model, all of the salient standards of this chapter regarding professional independence, support services, training and other issues can be handled through the central office, which is insulated from local pressures to reduce budgets or refuse payments because the state system is protected by an independent board of directors similar to that suggested in standard 5-1.3. Such systems, for example, have been successfully implemented in the last decade in Kansas and West Virginia.[8]

This hardly suggests that the statewide defender office is obsolete. Several statewide offices have shown their ability to grow and change

---

6. Alaska, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Rhode Island, Vermont, West Virginia, Wisconsin and Wyoming. CRIMINAL DEFENSE FOR THE POOR, 1986, *supra*, note 1, at 2, Table 1.

7. Georgia, Indiana, Iowa, Massachusetts, Minnesota, Missouri, Oregon, and Tennessee. Spangenberg, *We Are Still Not Defending the Poor Properly*, 4 CRIM. JUST. 11 (Fall 1989). Finally, the direction in 1989 was clearly toward the creation of state-wide commissions and task forces to improve defense services. Such commissions existed in 14 states in 1989: Alabama, Arizona, California, Illinois, Maine, Michigan, Missouri, Nebraska, North Carolina, Oklahoma, Pennsylvania, South Carolina, Virginia, and Washington. *Id.* at 44-45.

8. KAN. STAT. ANN. §§ 22-4501(d), 22-4519, 22-4522, 22-4523 (1988); W. VA. CODE §§ 29-21-3, 29-21-6(c), 29-21-7(a), 29-21-8, 29-21-13(a), 29-21-15(1), (2) (Supp. 1990).

with the times while maintaining financial stability. Notable in this regard are the systems in Colorado, Massachusetts, New Jersey and Wisconsin.[9]

In rural areas with small criminal caseloads, it may be appropriate for the defender organization to have small staffs and to be given responsibility for larger geographical divisions. In addition to providing representation of clients, the defenders in rural areas also should aid private attorneys in discharging their assigned-counsel or contractual duties.[10]

Capital Cases

Thirty-seven states and the federal government now permit the imposition of the death penalty for certain homicides. At present, more than 2,500 individuals are under sentence of death, many of whom have not yet completed their first appeal of right. More than 160 people have been executed, but the rate of conviction for capital crimes greatly exceeds the number of executions each year. Virtually all of the persons charged with or convicted of capital crimes are represented either by court-appointed counsel or by volunteer attorneys, and after the first appeal of right, far too many are unrepresented by counsel at all.[11]

New language on the death penalty is added in this section and throughout the third edition Standards for Defense Services. Any system in which the death penalty is an option for prosecutors is faced with unique obligations, not merely in quantity of work but in quality as well. In addition to the demands in time and energy required to provide quality representation in these one-of-a-kind trials and appeals, defenders

9. COLO. REV. STAT. § 21-1-101 (1986); MASS. ANN. LAWS. ch. 211D, §§ 4,5 (Law. Co-op. 1986), MASS. ANN. LAWS. ch. 211D, § 1, 6 (Law. Co-op. 1986 & Supp. 1991); N.J. REV. STAT. §§ 2A:158A-3, 2A:158A-4 (1985), N.J. REV. STAT. §§ 2A:158A-7, 2A:158A-22 (1985 & Supp. 1990); WISC. STAT. §§ 977.01, 977.08 (1985), WISC. STAT. § 977.05 (1985 & Supp. 1990), WISC. STAT. § 977.02 (Supp. 1990).

10. See commentary to standard 5-3.2.

11. The absence of counsel, and the concomitant need for volunteer attorneys, arises from the decision of the U.S. Supreme Court in Murray v. Giarratano, 109 S.Ct. 2765 (1989), which holds that a state prisoner under sentence of death has no constitutionally protected right to counsel beyond the first appeal of right in the state courts. Congress responded to the crisis created in the federal courts by this ruling through the creation of new institutions and higher fees for counsel representing persons seeking relief from state sentences of death through state or federal habeas corpus. Sixteen state back-up centers were designed to provide assistance and direct services for state prisoners seeking state or federal habeas corpus relief, and the federal judicial conference has approved fee rates of up to $125 per hour in such cases. The back-up centers were made part of the structure of the Criminal Justice Act, at 18 U.S.C. § 3006A (g)(2)(B) (1992).

often feel a strong moral sense of responsibility for their clients' lives, thus adding a burden of emotional investment as well. The ABA Death Penalty Guidelines specifically state that "minimum standards that have been promulgated concerning representation of defendants in criminal cases generally . . . should not be adopted as sufficient for death penalty cases."[12]

A recent national survey of attorneys working in capital cases indicated that they spend an average of 400 to 500 hours in the preparation and trial of a capital case.[13] A 1989 study of the California State Public Defender, which provides significant representation in California capital appeals, reveals that attorneys there spend an average of four times as much time on capital representation as on cases with any other penalty, including those with life imprisonment without parole.[14] In Florida, with one of the highest death row populations in the nation, the Florida Public Defender Association has set standards which suggest that an attorney should handle only five capital trials a year.[15] Studies in Maryland, Kansas and Virginia suggest that the trial of a capital case takes approximately 3.5 times longer than those in non-capital murders.[16] These data lead to the inexorable conclusion that the impact of capital representation on a defender system is not only significant; it can be devastating.

American Bar Association resolutions have frequently and consistently taken positions supporting the provision of quality representation by counsel in capital cases. As early as 1979, the Association went on record supporting the adoption of a rule by the United States Supreme Court to provide for appointment of counsel to prepare petitions for discretionary review of state court convictions of legally indigent persons sentenced to death. In 1985, the Association again acted to guarantee quality representation by urging the appointment of two counsel for the trial of death penalty cases with a legally indigent accused. In 1990, the Association urged the federal courts to adopt a comprehensive plan to assure representation and adequate compensation for attorneys in

12. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 11.2(A) (1986).

13. All surveys and studies referred to here are summarized in Wilson and Spangenberg, *State Post-Conviction Representation of Defendants Sentenced to Death*, 72 JUDICATURE 331, 336–337 (1989).

14. *Id.*

15. *Id.*

16. *Id.*

federal habeas corpus review of state death penalty proceedings.[17]

The most significant and relevant action on the death penalty came in 1989, when, at its Midyear Meeting, the Association adopted its own comprehensive *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, and urged that such guidelines be adopted by any entity providing counsel in capital cases. These guidelines are incorporated by reference into the third edition standards. The 34 comprehensive standards which make up the guidelines become part of the black letter provisions here by virtue of the language in subsection (d). They provide guidance not only to counsel in capital cases but to legislatures and policy-makers seeking direction in the provision of counsel in death penalty cases.[18]

Need for a Plan and Reports on Operations

It is also recommended that the overall program for providing defense services be embodied in a written plan. For example, the resources of a defender program and the extent to which it plans to provide representation should be clearly defined. Furthermore, consistent with standards 5-2.1 and 5-3.3, the plan should explain the system to be used in distributing assignments to private attorneys through the panel and contracts for services. Publication of the terms of the plan ensures that the bar is aware of the process by which counsel is being provided and promotes public confidence in the defender and assigned-counsel programs, which is essential if they are to be financed adequately and operate effectively.

In addition, those responsible for the administration of defense services programs, including contracts for services, should render periodic reports on operations, and these reports should be made available to the funding source, to the courts, to the bar, and to the public. Regular reports help to maintain public confidence in the integrity of the services provided and are a standard feature of most public agencies. The

17. AMERICAN BAR ASSOCIATION, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES 49–76 (August 1990).

18. Two states, Indiana and Ohio, have adopted eligibility standards for the provision of defense services in capital cases. INDIANA RULES OF CRIMINAL PROCEDURE, CRIMINAL RULE 24 (Oct. 1991); OHIO SUPREME COURT RULES OF SUPERINTENDENCE FOR COURTS OF COMMON PLEAS, RULE 65 (1991). *See also* the specific provisions of these standards and those for the ABA Defense Function Standards, which incorporate new language regarding representation by defense counsel in capital trials and appeals.

statutes establishing statewide defender programs reflect the requirement to prepare periodic reports.[19]

Standard 5-1.3. Professional independence

(a) 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.

(b) 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 not include prosecutors or judges. The primary function of boards of trustees is to support and protect the independence of the defense services program. 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.

---

19. ALASKA STAT. § 18.85.160(b) (1990) ("Public Defender shall submit an annual report to the legislature and Supreme Court . . ."); DEL. CODE ANN. tit. 29, § 4606 (1983) ("Public Defender shall make an annual report to the Governor and the General Assembly . . ."); N.M. STAT. ANN. § 31-15-7(9) (Supp. 1990) ("Chief public defender; general duties and powers—submit an annual report . . ."); CONN. GEN. STAT. § 51-291(2) (1985) (The chief public defender is to "submit to the commission . . . a report which shall include all pertinent data . . .").

History of Standard

This section has been divided into two subsections. Subsection (a) generally describes aspects of professional independence for the appointed attorney. Subsection (b) describes the composition and functions of a board of trustees as the means to secure professional independence for the program.

The word "normally," which appeared in the second edition, is stricken from the last sentence of subsection (a) where reference is made to the selection of lawyers in specific cases. The deletion emphasizes the notion that judges and other court personnel should not select lawyers for specific cases.

In subsection (b), three new sentences have been added in the third edition. The additions embody concepts found in the commentary to the second edition and are intended to strengthen the concept of independence by further specifying the size, manner of selection, composition and functions of boards of trustees.

In this section, as throughout the remainder of the chapter, reference is made to the use of contract-for-service programs wherever mention is made of the other types of delivery models. The intention is to keep major program components parallel.

Related Standards

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 3.1 (1989).

ABA Standards for Providers of Civil Legal Services to the Poor 7.1-7.3 (1986).

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.8, 13.9 (1973).

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Defense Services IV-1 and IV-2 (1984).

National Legal Aid and Defender Association, National Study Commission on Defense Services 2.10, 2.11, 2.13 (1976).

National Legal Aid and Defender Association, Standards for Defender Services III.1, III.2, III.4 (1976).

National Legal Aid and Defender Association, Standards for the Administration of Assigned Counsel Systems 2.2, 3.2–3.2.2 (1989).

Commentary

Integrity of the Professional Relationship

There are two principal alternative structures that jurisdictions can adopt to achieve a mixed system of representation consisting of defenders and private assigned counsel. First, the defender office can administer the assigned-counsel panel and, if utilized in that jurisdiction, contracts for services. Under this approach, the defender office undertakes full responsibility for all facets of the program relating to the participation of the private bar, including, for example, selection of panel lawyers, training, and processing of fee vouchers. A full-time staff of lawyers employed by the defender office also provides representation.[1] The second alternative is to have two separate entities, a defender organization and an assigned-counsel program (which may include a contract component), operating independently but with substantial coordination of activities.[2]

---

1. E.g., MD. ANN. CODE art. 27A, § 6(b) (1990)("the district public defender, subject to the supervision of the Public Defender, shall appoint attorneys from the appropriate panels . . ."); N.J. REV. STAT. § 2A:158A-7(d) (1985 & Supp. 1990) ("The Public Defender shall . . . [e]ngage counsel from said trial pools on a case basis . . . and compensate them for their services"); MASS. ANN. LAWS ch. 211D, § 5 (Law. Co-op. 1986) (". . . [The] committee shall establish, supervise & maintain a system for the appointment of counsel . . ."), § 6 (b) (1986 & Supp. 1991) (". . . [The] committee shall enter into contract agreements with any state, county or local bar association . . . [and] may also contract with such other organized groups . . ."); N.M. STAT. ANN. § 31-15-7(A)(11) (Michie 1978) ("The chief [defender shall] . . . formulate a fee schedule for attorneys who are not employees of the department who serve as counsel for indigent persons under the Public Defender Act"), § 31-15-8(C) ("The appellate division shall assist private counsel not employed under the Public Defender Act in any appellate, review or postconviction remedy proceeding by providing representation for persons entitled to representation under the Indigent Defense Act"), § 31-15-10(D) ("The district public defender shall notify the chief if, for any reason, he is unable to represent a person entitled to his representation, and the chief shall make provision for representation."); VT. STAT. ANN. tit. 13, § 5253(b) (Supp. 1990) (". . . [T]he defender general may contract for the services of investigators or additional attorneys-at-law to provide services . . ."); WIS. STAT. § 977.05(5)(e) (West 1991) ("The state public defender shall . . . [n]egotiate contracts with local public defender organizations as directed by the board.")

2. The use of administratively separate offices, which can occur under the second alternative, is seen by some jurisdictions as an effective means to avoid problems created by the need of a defender office to refuse cases due to conflicts of interest. One of the largest such operations operates in Los Angeles County. *See* THE SPANGENBERG GROUP, A STUDY OF THE PRACTICAL ALTERNATIVES THAT WOULD REDUCE THE NUMBER OF PUBLIC DEFENDERS' CONFLICT OF INTEREST CASES IN LOS ANGELES COUNTY (Final Report, July

Whichever structure is adopted, it is essential that both full-time defenders and assigned counsel be fully independent, free to act on behalf of their clients as dictated by their best professional judgment. A system that does not guarantee the integrity of the professional relation is fundamentally deficient in that it fails to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can afford to retain.[3] Where counsel is not fully independent to act in the client's behalf, the deficiency is often perceived by the defendant, which encourages cynicism toward the justness of the legal system.

The United States Supreme Court has concluded that a defendant represented by court-appointed counsel does not enjoy any Sixth Amendment right to a "meaningful attorney-client relationship."[4] The Court found that the key to compliance with constitutional requirements is not that counsel be a person in whom the accused has the most confidence but that counsel be capable of effective assistance. That case involved the substitution of a new public defender when the first became sick on the eve of trial. The trial judge denied a continuance over the strong objection of the defendant himself, who wished to keep his original attorney. While court calendars may require such exigencies, the integrity of the existing attorney-client relationship is clearly compromised by such judicial interference. Judges should exercise their discretion in a manner which is sensitive to the existence and maintenance

---

1986).

The creation of a "second public defender" office has also been used to avoid conflicts of interest. Alaska and New Hampshire have done this on a statewide basis. ALASKA STAT. § 44.21.410(a)(5) (1991) (The office of public advocacy shall . . . provide legal representation . . . in cases involving indigent persons who are entitled to representation . . . and who cannot be represented by the public defender agency because of a conflict of interests."); N.H. REV. STAT. ANN. § 604-B:8 (1990) ("The state of New Hampshire . . . may, in addition to the contract for the public defender program . . . contract for an alternate public defender program to represent indigent defendants in circumstances where, because of conflict of interest or otherwise, the public defender program is unable to provide representation to a defendant.").

3. In Polk County v. Dodson, 454 U.S. 312, 318–321 (1981), the Court stated that "[e]xcept for the source of payment, the relationship [of public defender and client] became identical to that existing between any other lawyer and client." Later, the Court concluded, "Held to the same standards of competence and integrity as a private lawyer, a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client." (Citations omitted.)

4. Morris v. Slappy, 461 U.S. 1 (1983).

of the attorney-client relationship if equity between retained and appointed counsel is to have meaning.

Another situation which may compromise the integrity of a relationship between attorney and client is the use of so-called "horizontal" or "stage" representation. In that scheme, different attorneys from the public defender office or contracting agency represent the defendant at each stage of the proceeding. The practice of "horizontal" representation is explicitly rejected in standard 5-6.2, and is implicitly rejected here as well.

The importance of independence for lawyers who represent the poor has been stressed in other standards relating to defense services. The National Legal Aid and Defender Association states that "[h]owever attorneys are selected to represent qualified clients, they shall be as independent as any other private counsel who undertakes the defense of an accused person."[5] A similar view is expressed in the standards of the National Advisory Commission: "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."[6]

As a means of achieving independence for counsel, standard 5-1.3 recommends that "[t]he selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by administrators of the defender and assigned-counsel programs." Retained lawyers are neither chosen nor approved by the courts, and there are no compelling reasons for defenders and private assigned counsel to be treated differently. Moreover, if a lawyer desires continuous appointments from the court or elected officials, there may be a strong temptation to compromise clients' interest in ways that will maximize the number of future case assignments. The assignment of cases by the defender or assigned-counsel program also should help to alleviate the fear of clients that the defense lawyer is working for the judge or court official in charge of appointments.

Studies have shown the effectiveness of early entry by the defender office in cases, and a number of jurisdictions permit representation by the defender program prior to formal court appointment where the

---

5. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STANDARDS FOR DEFENSE SERVICES III.1 (1976).

6. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 13.8 (1973).

defendant requests counsel and asserts a lack of financial means to retain a lawyer. Nonetheless, there may be unusual situations where the assignment of lawyers by the defender or assigned-counsel program may not be feasible. For example, where a defendant is arrested and presented in court at an irregular hour, the judge may be the only person available to select a lawyer for the defendant's presentment. Such instances should be the rare exception to the general rule of selection of counsel by the program itself.

Governing Board

Another means of assuring the professional independence of defenders and private assigned counsel is to provide for the establishment of boards of trustees to oversee the delivery of defense services. The presence of a board serves to insulate the legal representation plan from unwarranted judicial interference. During the past decade, boards of trustees or other similar bodies have been adopted in a number of states, even where there are no statewide public defender services.[7] This development is consistent with ABA and other national standards. For example, the National Legal Aid and Defender Association states that "[t]he most appropriate method of assuring independence modified with a proper mixture of supervision is to create a board of directors. . . ."[8]

In some jurisdictions, public defenders who are either elected or locally appointed have achieved a considerable measure of independence. Hence, the standard simply acknowledges that for defenders a board of trustees is "[a]n effective means of securing professional indepen-

7. Different styles of boards of trustees or commissions have been adopted. *See, e.g.*, COLO. REV. STAT. § 21-1-101(2) (1986) ("The Colorado supreme court shall provide for the appointment, terms, and procedure for a five-member public defender commission . . ."); D.C. CODE ANN. § 1-2703(a) (1981) ("The powers of the Service shall be vested in a Board of Trustees composed of 11 members."); GA. CODE ANN. § 17-12-71(a) (Harrison 1990) (". . . there shall be established a nominating committee . . ."), (c) (". . . [T]his committee shall make itself available, upon the request of the person appointed as public defender, to advise and assist in any matters pertaining to the operation of the office of public defender."); MASS. ANN. LAWS ch. 211D, § 1 (Law. Co-op. 1986 & Supp. 1991) ("There shall be a committee for public counsel services . . . to plan, oversee, and coordinate the delivery of . . . legal services . . . The committee shall consist of fifteen persons to be appointed for a term of three years by the justices for the supreme judicial court."); WIS. STAT. ANN. § 15.78 (West 1991) ("There is created a public defender board consisting of 9 members appointed for staggered 3-year terms.").

8. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STANDARDS FOR DEFENSE SERVICES III.1 (1976).

dence." The standard, however, states categorically that assigned-counsel programs "should be governed by such a board." This is because, despite their diminution over time, most programs in this country for the assignment of private lawyers remain ad hoc in nature, very much under the control and supervision of the judiciary.[9] The use of boards of trustees for assigned-counsel programs is still the single most promising means of promoting their independence.

An important function of a board of trustees, regardless of whether adapted to a defender or to an assigned-counsel system, is to establish general policy for the program composed of lawyers performing professional work. Because of the potential for political interference from a board of trustees, it is critical that the board's oversight not deal with day-to-day operations, including matters such as specific hiring and promotional decisions. It is preferable for the majority of the trustees on such boards to be members of the bar. Trustees who are lawyers will tend to assure a response to the needs and problems of the program grounded in an understanding of the lawyer's professional function and responsibility. Indeed, because of the specialization involved in the field of criminal defense, it is undoubtedly desirable for many of the attorney board members to have a background in the practice of criminal law. However, boards of trustees should not be limited solely to lawyers. In order for the defender and/or assigned-counsel programs to have the confidence of the community as a whole, it is important that the board reflect the racial, ethnic, and sexual composition of the client community.

Members of governing boards should not include prosecutors and judges. This restriction is necessary in order to remove any implication that defenders are subject to the control of those who appear as their adversaries or before whom they must appear in the representation of defendants, except for the general disciplinary supervision which judges maintain over all members of the bar.[10]

---

9. The trend is away from this method of operation. In 1973, fully 80 percent of all rural areas used the ad hoc system of judicial appointment, while in 1982 the percent of all counties using such systems dropped to 59.5 percent. Data from 1986 indicate that the ad hoc system of appointment of counsel by judges was used in a bare majority of jurisdictions (52 percent). BUREAU OF JUSTICE STATISTICS BULLETIN, CRIMINAL DEFENSE FOR THE POOR, 1986 at 3, Table 3 (1988).

10. The exclusion of judges and prosecutors from defender boards is sometimes codified. *See, e.g.*, D.C. CODE ANN. § 1-2703(b)(4) (1981) ("Judges of the United States courts in the District of Columbia and of District of Columbia courts may not be appointed to serve as members of the Board of Trustees."); WIS. STAT. ANN. § 15.78 (West 1991) ("No

Interference in the Conduct of Particular Cases

An essential criterion of an adequate system of providing representation is the ability of defenders and assigned counsel to perform their functions much as they would if they were privately retained. This, however, is not an appropriate role of a board of trustees. The primary function of a board should be to make general policy, not to attempt to dictate the conduct of particular cases. Consistent with this principle, several public defender statutes explicitly prohibit interference in the handling of specific cases by defenders.[11]

Standard 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 effective defense participation in every phase of the process. In addition, supporting services necessary for providing quality legal representation should be available to the clients of retained counsel who are financially unable to afford necessary supporting services.

History of Standard

Standard 5-1.4 in the second edition dealt with both supporting services and training. The importance of the topics resulted in their separation into two separate standards. New standard 5-1.5 contains the language of former standard 5-1.4 regarding training. Two phrases added to the first sentence bring the standard into congruence with the sentiment and language of standard 5-1.1.

---

member may be, or be employed on the staff of, a judicial or law enforcement officer, district attorney, corporation counsel or the state public defender.").

11. *E.g.*, D.C. CODE § 1-2703(a) (1981) ("The Board of Trustees shall establish general policy for the Service but shall not direct the conduct of particular cases"); MINN. STAT. ANN. § 611.215 (West 1992) ("In no event shall the board or its members interfere with the discretion, judgment or zealous advocacy of counsel in their handling of individual cases as a part of the judicial branch of government."); WIS. STAT. § 977.04 (West 1991) ("The board shall not make any decision regarding the handling of any case nor interfere with the state public defender or any member of his or her staff in carrying out professional duties.").

The last sentence is new to this standard but transfers, virtually verbatim, language from standard 5-6.1 in the second edition. The language is more consistent with the topic discussed here.

Related Standards

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 8.1 (1989).

ABA Standards for Criminal Justice 3-2.4, 4-4.1 (3d ed. 1993).

ABA Standards for Providers of Civil Legal Services to the Poor 6.3 (1986).

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.14 (1973).

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Defense Services III-8 (1984).

National Legal Aid and Defender Association, National Study Commission on Defense Services 3.4 (1976).

National Legal Aid and Defender Association, Standards for Defender Services IV.3 (1976).

National Legal Aid and Defender Association, Standards for the Administration of Assigned Counsel Systems 4.6 (1989).

Commentary

A *sine qua non* of quality legal representation is the support personnel and equipment necessary for professional service. In private law firms, overhead expenses, of which support services are a significant part, average about 45 percent of all office expenses.[1] Secretarial tasks can only be performed properly with adequate word-processing equipment (usually computers); telephones with the ability to send and receive fax messages; adequate copying and mailing facilities; adequate data-processing and filing systems; and whatever specialized equipment may be required to perform necessary investigations.[2]

Quality legal representation cannot be rendered either by defenders or by assigned counsel unless the lawyers have available other supporting services in addition to secretaries and investigators. Among these

1. ALTON AND WEIL, THE 1990 SURVEY OF LAW FIRM ECONOMICS, at 17.
2. See also standard 5-4.3.

are access to necessary expert witnesses, as well as personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and at sentencing. The quality of representation at trial, for example, may be excellent and yet unhelpful to the defendant if the defense requires the assistance of a psychiatrist or handwriting expert and no such services are available.

If the defense attorney must personally conduct factual investigations, the financial cost to the justice system is likely to be greater because the defender's time is generally more valuable than the investigator's. Moreover, when an attorney personally interviews witnesses, the attorney may be placed in the untenable position of either taking the stand to challenge the witnesses' credibility if their testimony conflicts with statements previously given or withdrawing from the case.[3] Other standards (see related standards section herein) also stress the critical importance of supporting services.

In the case of defender programs, the budget appropriation should be sufficient to enable the employment or retention of as many nonlegal personnel as are necessary for purposes of providing an adequate defense. In the federal courts, recent amendments to the Criminal Justice Act make the authorization of such services mandatory, without financial limits, when counsel for the person who is unable to afford them is able to make a showing of necessity in an *ex parte* proceeding.[4] Significantly, this statute authorizes payments for services other than counsel even for the clients of retained lawyers who are unable to afford investigators and expert witnesses,[5] and it also authorizes the expenditure of some funds on an emergency basis without prior court authorization.[6]

The United States Supreme Court has held that fundamental fairness requires that a defendant on trial in a capital case must be provided with the funds necessary to hire an expert psychiatrist, where sanity is the only material issue at trial.[7] The defendant, who was represented by assigned counsel, had been refused the funds for the examination

3. *See, e.g.*, Rosen v. National Labor Relations Board, 735 F.2d 564 (D.C. Cir. 1984); Jones v. City of Chicago, 610 F.Supp. 350 (N.D. Ill. 1984); Mentor Lagoons, Inc. v. Rubin, 31 Ohio 3d 256, 510 N.E.2d 379 (1987). *See also* ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(A) (1981); ABA MODEL RULES OF PROFESSIONAL CONDUCT 3.7 (1983).

4. 18 U.S.C. § 3006A (e)(1) (1992).

5. *Id.*

6. 18 U.S.C. § 3006A (e)(2) (1992).

7. Ake v. Oklahoma, 470 U.S. 68 (1985).

under then-prevailing Oklahoma law. The Court concluded that the state has the obligation to provide any legally indigent accused the "basic tools of an adequate defense or appeal."[8] While the Court's ruling can be read narrowly as applying only in death penalty cases where sanity is an issue at both trial and sentencing, the Court's test for access to "basic tools of an adequate defense" has potentially broad application in all contexts regarding the provision of support services.

The courts of a number of states have recognized a defendant's constitutional right to a broad range of supporting services, including such diverse issues as forensic dental records, fingerprints, firearms, jury selection and demography.[9] Inability to afford counsel necessarily means that a defendant is unable to afford essential supporting services, such as investigative assistance and expert witnesses. The converse does not follow, however. Just because a defendant is able to afford retained counsel does not mean that sufficient finances are available for essential services. This standard, like the Criminal Justice Act provisions noted above, authorizes supporting services to be made available to the clients of retained counsel who are unable to afford the required assistance. This means that the defense services program should include sufficient funding in its budget for such contingencies, and defense services funded through the courts should do likewise.

Standard 5-1.5. Training and professional development

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.

History of Standard

This standard is new with the third edition, but the content draws heavily from the second edition. The first sentence of the standard is a

8. In determining whether access to a psychiatrist was a "basic tool," the Court applied the balancing test of Matthews v. Eldridge, 424 U.S. 319 (1976).

9. *See generally* KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY, OBTAINING FUNDS FOR THE DEFENSE OF INDIGENTS ACCUSED OF CRIMES (June 1990).

modified version of the last sentence of standard 5-1.4 from the second edition. The last sentence is adapted directly from standard 3-2.6 in the second edition, which deals with training programs for prosecutors.

Related Standards

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 9.1 (1989).

ABA Standards for Criminal Justice 3-2.6 (3d ed. 1993).

ABA Standards for Providers of Civil Legal Services to the Poor 3.5 (1986).

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.16 (1973).

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

National Legal Aid and Defender Association, National Study Commission on Defense Services 5.7, 5.8 (1976).

National Legal Aid and Defender Association, Standards for the Administration of Assigned Counsel Systems 4.3 (1989).

National Legal Aid and Defender Association, Standards for Defender Services V.1-V.7 (1976).

Commentary

Adequate and frequent training programs are a key component in the provision of quality representation by defense attorneys. Criminal law is a complex and difficult legal area, and the skills necessary for provision of a full range of services must be carefully developed. Moreover, the consequences of mistakes in defense representation may be substantial, including wrongful conviction and death or the loss of liberty. Despite recent suggestions by the U.S. Supreme Court that defenders may be insulated from liability in most circumstances,[1] the cost of retrials based on trial errors by defense counsel or on counsel's ineffectiveness may alone be sufficient justification for effective training as a cost-saving device. The strong trend in the states away from the imposition of a mandatory *pro bono* obligation in criminal cases is

1. Ferri v. Ackerman, 444 U.S. 193 (1979); Polk County v. Dodson, 454 U.S. 312 (1981); *but see*, Tower v. Glover, 467 U.S. 914 (1984).

grounded in the notion that the demands of contemporary criminal practice make it impossible to impose an obligation of service on attorneys who work in this complex and demanding field.[2]

To meet the need for training, programs should be established for both beginning and advanced practitioners, and should emphasize substantive legal subjects as well as effective trial, appellate and collateral attack techniques. In defender offices, it is particularly important that there be entry-level training programs, so that new attorneys receive at the outset of their practice an intensive learning experience that will equip them to provide effective representation. The necessity of training assigned counsel is just as important, but their attendance at training programs may have to be spaced over longer periods because of other time commitments. One possible function of a defender program in the mixed system of representation suggested in standard 5-1.2 would be to offer training seminars to attorneys participating in the assigned-counsel program. Another efficient use of the office's programs might be in the provision of courses on criminal law and procedure topics which would fulfill local continuing legal education requirements.

Attendance at regional and national training programs also should be encouraged. Many defender programs have made it a part of their regular training schedule to send all new attorneys to the annual summer course of the National Criminal Defense College within two years of their entry into the office. Other useful programs are offered through the National Institute of Trial Advocacy and the National Legal Aid and Defender Association, both regionally and nationally. Some states have particularly strong programs in training in particular topics such as capital case advocacy.

Standard 5-1.6. Funding

Government has the responsibility to fund the full cost of quality legal representation for all eligible persons, as defined in standard 5-7.1. It is the responsibility of the organized bar to be vigilant in supporting the provision of such funding. The level of government that funds defender organizations, assigned-counsel programs or contracts for services depends upon which level will best insure the provision of independent, quality legal representation. Under no circumstances should the funding power interfere with or retaliate

2. *See* discussion in commentary to standards 5-1.6 and 5-2.2.

against professional judgments made in the proper performance of defense services.

History of Standard

This standard, new with the second edition, has been amended significantly. Changes in the first sentence make more clear and emphatic the obligation of government, not the bar or the individual attorney, to fully fund defense services.

A new second sentence makes clear a role for the organized bar in assisting funding efforts. The language parallels that of the opening standard of the chapter, 5-1.1, which sets forth an educative function for the bar.

The amended third sentence clarifies the factors which should determine the level of government at which services are funded.

Related Standards

ABA Standards for Providers of Civil Legal Services to the Poor 3.6, 6.2 (1986).

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.6 (1973).

National Legal Aid and Defender Association, National Study Commission on Defense Services 2.17, 2.18 (1976).

National Legal Aid and Defender Association, Standards for Defender Services I.3 (1976).

Commentary

Our system of justice is a reflection of our societal development, and the furnishing of adequate defense services a measure of our justice system. Only society as a whole has the necessary resources to finance defender and assigned-counsel programs. Accordingly, this standard declares that the sole responsibility of paying for defense services rests on government. Presently, representation systems are financed primarily by state governments, local governments, or a combination of both.[1]

1. Federal defender programs are an example of appropriate government funding. They are funded by the Administrative Office of the U.S. Courts from the recommendation of the Defense Services Committee of the U.S. Judicial Conference. 18 U.S.C. § 3006A (g)(2)(a) (1992).

But regardless of the source of funding, the level of financing in many states is inadequate—sometimes woefully inadequate. The likely result is the denial of effective legal representation for those unable to afford counsel.

This standard deals with the funding of the defender system as a whole, not the related issues of the compensation to be paid to assigned counsel, addressed in standard 5-2.4, or the salaries paid to public defenders or contracting attorneys, addressed in standards 5-4.1 and 5-3.3(b)(ix). Taken as a whole, funding for defender services in the United States increased during the past decade. Funding from all sources increased by 60 percent from 1982 to 1986, when the total reached nearly $1 billion.[2] The great majority of this increase, however, was due solely to the huge increase in caseloads during the decade—per capita case costs increased in the same period by only 14 percent, to an average of $223 per case, nationwide.[3] Some expansion of funding at the state level was due not only to the rise in caseloads but also to the increased breadth of responsibility of programs into a broad range of quasi-criminal proceedings in which counsel has been newly mandated.[4] Finally, the reinstitution of the death penalty and its increasing imposition in cases handled by defender programs also contributed to the cost of defense services. At bottom, relative to the rest of the criminal justice system, defender services continue to suffer. Prosecution, for example, is funded at a ratio of three to one over defense services at both the federal and state or local levels.[5]

Individual states, on the other hand, fared better in many cases because the funding of defense services was centralized at the state level.[6] As of 1986, only ten states funded their defender services at the county level; twenty states were funded wholly at the state level while

---

2. BUREAU OF JUSTICE STATISTICS BULLETIN, CRIMINAL DEFENSE FOR THE POOR, 1986 at 4 (1988).

3. Robert L. Spangenberg, *We Are Still Not Defending the Poor Properly*, 4 CRIM. JUST. 11 (Fall 1989).

4. *See* discussion at standard 5-5.2.

5. ABA BAR INFORMATION PROGRAM, POSTCONVICTION DEATH PENALTY REPRESENTATION PROJECT, A COMPARISON OF PROSECUTION AND DEFENSE RESOURCES FOR CAPITAL LITIGATION 5 (Sept. 1991).

6. Between 1982 and 1989, states which shifted to state funding included Delaware, Georgia, Indiana, Iowa, Minnesota, Montana, Oregon, South Dakota and Tennessee. Spangenberg, *We Are Still Not Defending the Poor Properly*, 6 CRIM. JUST. 11 (1989).

the remainder used some combination of state and local funding.[7] Other standards recommend that representation programs be financed at the state level because the state is best able to bear the bill and because funding is not made a function of the sometimes-volatile local hostility to the provision of public funds for the representation of persons accused of serious crimes against local citizens.[8] While this may often be true, standard 5-1.5 does not take a position on whether funding should be state or local, because of the belief that this decision should be based "upon which level will best insure the provision of independent, quality legal representation."

Some states now fund defense services substantially from fees imposed in all criminal cases or from taxes earmarked for dedication to defender services.[9] Such systems put the defender system at risk because the amount raised each year may fluctuate widely, the actual revenues cannot be easily projected, the fees frequently fall disparately on a particular segment of the population, and costs of administration of these systems are inordinately high. Systems based on user fees or taxes should be avoided; funds for defense services are best allocated from general revenues.

Whatever the level and source of financing, the power of the purse obviously should not be used to interfere with or prevent the proper discharge of defense services. Thus, the funding authority, like boards of trustees for defender and assigned-counsel programs (see standard 5-1.3), should not seek to intervene in the conduct of particular cases. Nor should funding bodies retaliate against unpopular, albeit professionally proper, actions of defender programs by reducing the level of available financing.

---

7. BUREAU OF JUSTICE STATISTICS BULLETIN, CRIMINAL DEFENSE FOR THE POOR, 1986 at 4, Table 4 (1988).

8. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 2.17 (1976).

9. Such systems are used currently in Alabama, Arkansas, Louisiana, and Oklahoma. In Ohio, 50 percent of the funds for operation of the system come from such sources.

PART II.

ASSIGNED COUNSEL

Standard 5-2.1. Systematic assignment

The plan for legal representation should include substantial participation by assigned counsel. That participation should include a systematic and publicized method of distributing assignments. Except where there is a need for an immediate assignment for temporary representation, assignments should not be made to lawyers merely because they happen to be present in court at the time the assignment is made. A lawyer should never be assigned for reasons personal to the person making assignments. Administration of the assigned-counsel program should be by a competent staff able to advise and assist the private attorneys who provide defense services.

History of Standard

The first sentence was amended to reflect the language in section 5-1.2(b). The standard maintains its commitment to use of a staff model for the administration of all assigned counsel programs. In rural areas or in areas with few criminal cases, it may be useful to use a contract for services which is part of a larger plan, or to have a single assigned-counsel program include several judicial districts, as is suggested in standard 5-1.2(a). Alternatively, this standard's requirement that there be a staff can be discharged by having the defender office administer the assigned-counsel plan.[1] In a statewide defender program, it may be possible to have the necessary staff for assigned-counsel panels hired and supervised by the central office. In addition to supplying advice and assistance to private attorneys, a staff is necessary to discharge essential administrative tasks in connection with operation of the assigned-counsel program.

1. *See* commentary to standard 5-1.3.

Related Standards

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1 (1989).

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.15 (1976).

National Legal Aid and Defender Association, Standards for the Administration of Assigned Counsel Systems 3.1.B, 3.3, 4.1 (1989).

National Legal Aid and Defender Association, National Study Commission on Defense Services 2.2, 2.3, 2.16 (1976).

National Legal Aid and Defender Association, Standards for Defender Services I.2.b (1976).

Commentary

During the decade from 1975 to 1985, the national use of the assigned counsel model as the exclusive means for delivery of defense services declined by 20 percent.[2] Because these programs largely serve rural areas, it is now estimated that they serve only about one-quarter of the U.S. population.[3]

Unfortunately, the last available data show that fully 75 percent of assigned counsel jurisdictions continue to operate on an ad hoc basis.[4] In the ad hoc system, selection of the attorney is either completely within the discretion of the judge or is from a frequently ignored "list" of attorneys kept by the judge or other court personnel. The assignment of criminal cases on this informal basis also has been condemned by the National Legal Aid and Defender Association[5] and the National Advi-

2. In 1982, one national study reported that, from 1973 to 1982, the percentage of jurisdictions using assigned counsel declined from 72 percent to 60 percent. BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, CRIMINAL DEFENSE SYSTEMS 3 (Aug. 1984). In 1986, the percentage had declined further to 52 percent. BUREAU OF JUSTICE STATISTICS BULLETIN, CRIMINAL DEFENSE FOR THE POOR, 1986, Table 3 (Sept. 1988).

3. CRIMINAL DEFENSE SYSTEMS, *supra*, n. 2, at Table 2.

4. BUREAU OF JUSTICE STATISTICS, NATIONAL DEFENSE SYSTEMS STUDY 17, Table 15 (Sept. 1988).

5. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 2.3 (1976); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STANDARDS FOR DEFENSE SERVICES I.2(b) (1976). NLADA has more recently adopted a comprehensive set of standards to address the administration of assigned counsel systems. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS (1989). References are made to those standards in the "Related Standards" sections of this Part.

sory Commission on Criminal Justice Standards and Goals.[6] Among the reasons frequently mentioned for the unsuitability of the random approach are the following:

> undue reliance on inexperienced counsel and overall lack of quality control; the potentiality of patronage or its counterpart, discrimination, in the selection process and the corollary possibility of political control or undue influence intruding upon the independence of counsel; unavailability of lawyers resulting in waivers of counsel; inadequate or, at best, uneven provision of compensation for services and general lack of fiscal controls; the lack of training and continuing education in criminal law and procedure; and the inability of the approach to develop a skilled and vigorous defense bar able and willing to seek reforms in the criminal justice system.[7]

At its worst, the ad hoc system for assigning counsel is typified by the practice of appointing lawyers only because they happen to be present in the courtroom at the time a defendant is brought before the judge. This method of assignment obviously is unlikely to achieve an equitable distribution of assignments among the qualified members of the bar, and in some jurisdictions the practice has given rise to a cadre of mediocre lawyers who wait in the courtroom in hopes of receiving an appointment.

However the assigned-counsel program is structured, it is urged that the plan for distributing assignments be in writing and publicized. Publicity is apt to dispel doubts concerning the method by which the defense of the accused is being achieved and fosters scrutiny of the plan by the bar and public. This recommendation is consistent with the federal Criminal Justice Act of 1964, which requires that each United States District Court prepare a plan for assigning counsel pursuant to the act.[8]

---

6. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 13.5 (1973).

7. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, commentary at 142 (1976).

8. 18 U.S.C. § 3006A(a) (1992). *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, DEFENDER SERVICES DIVISION, MODEL CRIMINAL JUSTICE ACT PLAN (March 1, 1991).

In order to have an effective assigned-counsel system, a competent staff should be available to advise and assist members of the private bar who provide representation. Some staff members should be experienced in criminal defense matters, and the assistance should include, if desired, advice on the handling of specific cases, information concerning recent criminal law and procedure developments, written materials on criminal defense, and appropriate training programs. In addition, there are numerous administrative tasks that must be discharged, including the assignment of cases to private attorneys (standard 5-1.3), the collection of names of qualified members of the bar (standard 5-2.2), and the approval of compensation vouchers submitted by appointed lawyers (standard 5-2.4).

Standard 5-2.2. Eligibility to serve

Assignments should be distributed as widely as possible among the qualified members of the bar. Lawyers licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts should be encouraged to submit their names for inclusion on the roster of attorneys from which assignments are made. Each jurisdiction should adopt specific qualification standards for attorney eligibility, and the private bar should be encouraged to become qualified pursuant to such standards. Counsel should not seek to avoid appointment by a tribunal to represent a person except for good cause.

History of Standard

The standard was amended in three ways for the third edition. First, the second sentence now states that lawyers should be "encouraged to submit" their names for inclusion on the roster, rather than including all names, as the second edition urged. This clarifies the inherent meaning of the sentence; participation on the roster should be voluntary rather than compulsory. Second, a new sentence was added which suggests the adoption of qualification standards for participating attorneys, a practice which is used in the best panel programs. Third, a new last sentence is added, mirroring the language of ABA Model Rule 6.2.

Related Standards

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 5.1 (1989).

ABA Model Rules of Professional Conduct 6.2 (1983).

ABA Standards for Criminal Justice 4-1.6 (3d ed. 1993).

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.15 (1976).

National Legal Aid and Defender Association, Standards for the Administration of Assigned Counsel Systems 2.9, 4.1.1 (1989).

National Legal Aid and Defender Association, National Study Commission on Defense Services 2.15 (1976).

National Legal Aid and Defender Association, Standards for Defender Services I.2.b (1976).

Commentary

In 1988, the American Bar Association's Special Committee on Criminal Justice in a Free Society surveyed the entire criminal justice system. Among the important conclusions which it reached was the following:

> All lawyers, whether criminal practitioners or not, share in the responsibility of ensuring that the most visible legal institution in the Nation, the criminal justice system, is of the highest attainable quality. Increasingly, however, indigent defense in many cities is almost the exclusive responsibility of public defenders and a very small private bar. The remainder of the trial bar is not fulfilling its obligation to participate through the representation of indigent defendants, and as a result, the shunning of criminal defense practice deprives the criminal justice system of a powerful voice for criminal justice reform, because the influential lawyers are unfamiliar with the working of the criminal justice system.[1]

Standard 5-2.2 is aimed at making certain that private bar involvement is accomplished. Its emphasis lies in the participation of "quali-

1. SPECIAL COMMITTEE ON CRIMINAL JUSTICE IN A FREE SOCIETY, AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE IN CRISIS 7–8 (1988).

fied" members of the bar. The standard thus rejects the notion that every member of the bar admitted to practice in a jurisdiction should be required to provide representation.[2] Instead, it suggests that the members of the bar qualified for appointments are those who are "experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts . . ." (emphasis added). The practice of criminal law is complex, and only qualified attorneys can properly be expected to serve as assigned counsel. While it is imperative that assigned counsel possess advocacy skills so that prompt and wise reactions to the exigencies of a trial may be expected, this alone is not deemed sufficient. There must also be familiarity with the practice and procedure of the criminal courts and knowledge in the art of criminal defense.[3]

It is critical, however, that the assigned-counsel system be administered in a manner that attracts participation from the largest possible cross-section of members of the bar and affords opportunities for inexperienced lawyers to become qualified for assigned cases. Accordingly, those responsible for administering assigned-counsel programs should continuously canvass the bar to make certain that all who display a willingness to serve are permitted to do so. One means of acquiring

2. In Knoxville, Tennessee, the judges of the general sessions court, which handles misdemeanors, responded to a caseload crisis by drafting 1,200 practicing and non-practicing lawyers into service as assigned counsel without compensation, resulting in strong criticism on both legal and ethical grounds. *Criminal Crash Course*, 78 A.B.A.J. 14 (April 1992).

3. In United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039 (1984), the Supreme Court held that the Sixth Amendment guarantee of effective assistance of counsel is not violated simply because a real estate lawyer, totally unfamiliar with criminal law and trials, is assigned to provide representation in a complicated fraud prosecution. The Sixth Amendment is breached, according to the Court, only if there is a breakdown of the adversarial process and specific errors of trial counsel are shown. The Court further explained in a footnote: "We consider in this case only the commands of the Constitution. We do not pass on the wisdom or propriety of appointing inexperienced counsel in a case such as this. It is entirely possible that many courts should exercise their supervisory powers to take greater precautions to ensure that counsel in serious criminal cases are qualified . . . We address not what is prudent or appropriate, but only what is constitutionally compelled. . . ." 466 U.S. at 665, 104 S. Ct. at 2050, n.38.

A few states have responded to the high threshold for review of claims of ineffectiveness by the adoption of comprehensive performance standards. *See, e.g.*, Committee for Public Counsel Services, *Performance Guidelines Governing Representation of Indigents in Criminal Cases*, 15 MASS. LAWYERS WEEKLY 1048 (March 17, 1987) (Massachusetts). *See generally* Gist, *Assigned Counsel: Is the Representation Effective?*, 4 CRIM. JUST. 16 (1989); Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181–212 (1984).

information on members of the bar is to ask that all interested lawyers complete a questionnaire in which is listed prior involvement in criminal defense or prosecution and previous civil trial experience.

There is no more demanding task for a criminal lawyer than that of representing a person accused or convicted of a capital offense. The selection of such attorneys within an assigned counsel system therefore takes on critical importance. The U.S. Congress recognized this concept when it limited representation for state prisoners under sentence of death in federal habeas corpus proceedings to lawyers with significant experience in criminal law and procedure.[4] Eligibility standards also are part of the *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* adopted by the ABA in 1989.[5]

Where interested attorneys lack sufficient experience and skill in criminal defense, there are a variety of procedures that can help them qualify for assigned cases. For example, in one assigned-counsel program inexperienced applicants are first required to observe a wide variety of criminal court proceedings. The lawyer is then directed to work with a regular member of the assigned counsel panel, during which time the apprentice attorney is asked to conduct various kinds of court proceedings (e.g., preliminary hearings, misdemeanor trials) under the supervision of the experienced lawyer. Attendance at training programs sponsored by the assigned-counsel program also is required. At the conclusion of the apprenticeship period, the attorney becomes a regular panel member and is assigned to the least serious misdemeanor cases.[6]

An attorney who is not competent to handle a criminal case has an absolute duty to decline court appointment.[7] Declination of an appointment is also appropriate when representation would create an unrea-

---

4. The Anti-Drug Abuse Act, 21 U.S.C. § 848 (q)(4)(B) and (q)(9)(1991).

5. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 5.1 (1989).

6. These procedures have been utilized by the San Mateo, California, assigned-counsel program to qualify panel attorneys for assigned cases. NLADA, National Study Commission Report, commentary at 240. Other programs have adopted exemplary qualification standards which must be met by participating panel attorneys. *See, e.g.*, OHIO PUBLIC DEFENDER COMMISSION, ASSIGNED COUNSEL STANDARDS & STATE MAXIMUM FEE SCHEDULE, § 120-1-10 (Revised 1990); MICHIGAN APPELLATE ASSIGNED COUNSEL SYSTEM REGULATIONS, MINIMUM STANDARDS FOR INDIGENT CRIMINAL APPELLATE DEFENSE SERVICES, Section 4 (Amended Jan. 28, 1988); WASHINGTON DEFENDER ASSOCIATION, STANDARDS FOR PUBLIC DEFENSE SERVICES, Standard 14 (Oct. 1989).

7. *See generally* Monahan and Aprile, *Pro Bono Service in Criminal Cases Is Neither Mandatory Nor Ethical*, 5 CRIM. JUST. 35 (Fall 1990).

sonable financial burden, or when the client is "so repugnant to the lawyers as to be likely to impair the attorney-client relationship."[8] These grounds constitute good cause for declination of an appointment, and have been recognized with increasing frequency by state courts.

Just as counsel should decline appointment in certain criminal matters, courts should not require counsel to accept assignment of cases when the attorney offers valid reasons.[9] A majority of the state courts which have reached the issue now conclude that trial judges may not invoke either the attorney's oath or the traditional obligation of *pro bono* service as a means of compelling attorney service without risking constitutional violations.[10]

Standard 5-2.3. Rotation of assignments and revision of roster

(a) As nearly as possible, assignments should be made in an orderly way to avoid patronage and its appearance, and to assure fair distribution of assignments among all whose names appear on the roster of eligible lawyers. Ordinarily, assignments should be made in the sequence that the names appear on the roster of eligible lawyers. Where the nature of the charges or other circumstances require, a lawyer may be selected because of his or her special qualifications to serve in the case, without regard to the established sequence.

---

8. ABA MODEL RULES OF PROFESSIONAL CONDUCT 6.2 (1983).

9. In Mallard v. U.S. District Court for the Southern District of Iowa, 490 U.S. 296 (1989), the Supreme Court narrowly held that 28 U.S.C. § 1915(d), which states that a court may "request" counsel to represent a person unable to retain an attorney, does not authorize "coercive appointments of counsel." *Id.*, at 1823. The notion that attorneys are "officers of the court," however, is tenacious, and finds its way into Supreme Court jurisprudence. *See, e.g.*, Federal Trade Commission v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990) (dissenting opinion of Justice Blackmun, at 453; *In re* Snyder, 472 U.S. 634 (1985), *reversing on other grounds*, Matter of Snyder, 734 F.2d 334 (8th Cir. 1984).

10. A summary of the state decisions is provided in State ex rel. Stephan v. Smith, 747 P.2d 816 (Kan. 1988). Other decisions have recognized that the acceptance of pro bono cases is not a condition of licensure as an attorney. *See, e.g.*, DeLisio v. State, 740 P.2d 437 (Alaska 1987). *See also* Note, *Current Status of the Traditional Duty of the Attorney to Serve Without Compensation Upon Court Appointment*, 93 W. VA. L. REV. 1001 (1991); Martineau, *The Attorney as Officer of the Court: Time To Take the Gown Off the Bar*, 35 S.C.L. REV. 541 (1984). *But see* Madden, et al. v. Township of Delran, et al., 126 N.J. 591, 601 A.2d 211 (1992).

(b) The roster of lawyers should periodically be revised to remove those who have not provided quality legal representation or who have refused to accept appointments on enough occasions to evidence lack of interest. Specific criteria for removal should be adopted in conjunction with qualification standards.

History of Standard

A new subsection (b) was added to the standard. Provisions regarding revision of the roster and removal of attorneys are a necessary adjunct to those regarding a process for the selection of attorneys to serve on the roster, covered in standard 5-2.2.

Related Standards

ABA Standards for Providers of Civil Legal Services to the Poor 3.4 (1986).

National Legal Aid and Defender Association, National Study Commission on Defense Services 2.16, 5.5 (1976).

National Legal Aid and Defender Association, Standards for the Administration of Assigned Counsel Systems 4.1, 4.5 (1989).

Commentary

The practice of systematically rotating the assignment of cases achieves equality of distribution among qualified attorneys and also makes it unlikely that any single attorney will become overloaded with appointments. It is doubtful, however, that a single list of attorneys should be used for the purpose of making all assignments in rotation. Cases differ in complexity and seriousness, and there are likely to be wide differences in the backgrounds and experiences of panel attorneys. Accordingly, it may be necessary to have several lists of attorneys, including lawyers qualified for capital cases, other felonies, and misdemeanors. As criminal defense experience is acquired, lawyers can be promoted from the misdemeanor panel to the felony panel and then ultimately to the list of attorneys qualified for capital cases.[1]

Regardless of whether one or more lists of panel attorneys are used, it occasionally will be necessary to make assignments that are not within

1. *See* commentary to standard 5-2.2, *supra*.

the normal rotation of attorney names. Sometimes this may occur because a particular case requires an attorney possessing special qualifications. Rotational appointments also may be impossible where the designated attorney has a conflict of interest or where there is a need to consolidate a case with other pending cases of the same client.

Neither statutes nor court decisions recognize the right of an eligible defendant to select the private lawyer of his or her choice.[2] Nor does the defendant generally have the right to choose assigned counsel rather than a defender (or vice versa) or to select a new lawyer when relations with an attorney deteriorate.[3] In contrast, the defendant with sufficient funds can retain the lawyer of his or her choice and discharge an attorney when confidence in the lawyer diminishes.

The overall goal of the assigned-counsel program should be to assure the presence of sufficient numbers of private practitioners capable of providing competent legal services. In addition to encouraging private lawyers to provide representation, some effort also should be devoted by the administrators of the program to monitoring the performance of assigned counsel. Admittedly, this is not an easy task and there obviously are difficulties in having third parties scrutinize the judgments of private counsel. On the other hand, the difficulty of the task should not be an excuse for doing nothing. At the very least, the staff of the program should investigate and keep track of any complaints made against assigned counsel by judges and clients. Where there is compelling evidence that an attorney consistently has ignored basic responsibilities outlined in the ABA Defense Function Standards, or that the attorney has refused appointment repeatedly, the attorney's name should be removed from the roster after notice and hearing, with the possibility of reinstatement after removal if adequate demonstration of remedial measures is shown.[4]

---

2. *See generally* Annotation, *Indigent Accused's Right to Choose Particular Counsel Appointed to Assist Him*, 66 A.L.R.3d 996 (1975).

3. The United States Supreme Court has stated in dicta that there is no Sixth Amendment basis for the recognition of "a meaningful attorney-client relationship," where a defendant complained that he had an established relationship with a public defender whose emergency surgery required that a substitute defender replace him on the eve of trial. The Court stated that the only test should be whether the new defender is "competent and prepared." Morris v. Slappy, 461 U.S. 1 (1983). The issue was, however, not addressed as part of the holding of the Court, and has not been reached to date.

4. *See* NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS 4.5-4.5.3 (1989).

Standard 5-2.4. Compensation and expenses

Assigned counsel should receive prompt compensation at a reasonable hourly rate and should be reimbursed for their reasonable out-of-pocket expenses. Assigned counsel should be compensated for all hours necessary to provide quality legal representation. Compensation for assigned counsel should be approved by administrators of assigned-counsel programs.

History of Standard

The third edition makes the language on "reasonable compensation" more explicit. Rather than the second edition's call for compensation for "time and service performed," the newly revised standard calls for "prompt" payment "at a reasonable hourly rate," as well as reasonable out-of-pocket expenses. A new second sentence makes clear that assigned counsel are to be paid for "all hours necessary to provide quality legal representation."

Related Standards

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.1 (1989).

ABA Standards for Criminal Justice 21-2.4, 22-4.3 (2d ed. 1980).

National Legal Aid and Defender Association, Standards for the Administration of Assigned Counsel Systems 4.7–4.7.4 (1989).

National Legal Aid and Defender Association, National Study Commission on Defense Services 3.1 (1976).

Commentary

These standards adopt the view that "[g]overnment has the responsibility to fund the full cost of quality legal representation . . . "[1] The government should assure that every assigned attorney, in every assigned case, receives "prompt compensation at a reasonable hourly rate," as well as reimbursement for reasonable out-of-pocket expenses. This standard thus rejects the view that lawyers are required to provide pro bono legal services in criminal cases.[2]

Just what constitutes a "reasonable hourly rate" has been the subject of much litigation and significant legislative modification over the past

1. *See* standard 5-1.6 and accompanying commentary.

2. *See* commentary to standard 5-2.2 on the trend away from enforcement of the pro bono obligation in assigned criminal cases.

decade. One end of the spectrum was expressed more than 20 years ago by the President's Crime Commission, which said that counsel should be paid "a fee comparable to that which an average lawyer would receive from a paying client for performing similar services."[3] The other end, unfortunately, continues to be embodied in statutory maximum fee limitations which are vastly disproportionate to the efforts expended by counsel in even the most routine criminal matter.[4] The problem is particularly acute in capital cases, where states sometimes treat statutory compensation provisions the same for capital and non-capital representation, despite the extraordinary responsibilities inherent in death penalty litigation.[5]

Since a primary objective of the payment system should be to encourage vigorous defense representation, flat payment rates should be discouraged.[6] The possible effect of such rates is to discourage lawyers from doing more than what is minimally necessary to qualify for the flat payment. Recent decisions striking down statutory fee maximums

---

3. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 61 (1967). *See, e.g.*, Hulse v. Wifvat, 306 N.W.2d 707, 711 (Iowa 1981) (defining reasonable compensation as "the ordinary and customary charges for like services in the community.") A recent decision from Arkansas articulated detailed factors to be considered by the trial court in awarding fees: "the experience and ability of the attorney, the time and labor required to perform the legal service properly, the novelty and difficulty of the issues involved, the fee customarily charged in the locality for similar legal services, the time limitations imposed upon the client's defense or by the circumstances, and the likelihood, if apparent to the court, that the acceptance of the particular employment will preclude other employment of the lawyer." Arnold v. Kemp, 813 S.W.2d 770, 776 (Ark. 1991).

4. One such example is Virginia, where the maximum statutory limit is $100 in district courts, $132 for misdemeanors and $575 for felonies in circuit courts. VA. CODE ANN. § 19.2-163 (Michie 1991). Another is the non-waivable maximum of $500 in felony cases which continues to apply in South Carolina. *See* S.C. CODE ANN. § 17-3-50 (Law. Co-op. 1990).

5. Wilson and Spangenberg, *State Post-Conviction Representation of Defendants Sentenced to Death*, 72 JUDICATURE 331, 335–336 and Table 3 (1989).

6. Though no state statute apparently provides for flat payment rates for assigned counsel, many do establish minimum and/or maximum compensation schedules, *e.g.*, KY. REV. STAT. § 31.070 (1980 & Cum. Supp. 1982); MISS. CODE ANN. § 99-15-17 (Cum. Supp. 1983); TEX. CRIM. PROC. CODE art. 26.05 (Vernon Cum. Supp. 1984). In practice, the amounts awarded pursuant to these types of statues sometimes result in flat fees because the courts fail to exercise the discretion that the law authorizes. See also Annot., 3 A.L.R.4th 576 (1981) (validity of state statute or court rule fixing maximum fees for court-appointed counsel).

constitute a strong trend away from the payment of flat fees.[7] It is also important that the compensation plan provide for extra payments to counsel when representation is provided in unusually protracted or complicated cases.[8]

The federal Criminal Justice Act of 1964 was amended in 1988 to provide more generous compensation for assigned counsel in federal cases. According to this statute, a maximum of $3,500 may be paid for a felony and a maximum of $1,000 for a misdemeanor, subject to waiver for extended and complex cases; the hourly rates are $60 per hour for in-court time and $40 per hour for time spent out of court, with exceptions permitting payment of up to $75 per hour in some districts.[9] Federal compensation, however, is by no means high, particularly in light of inflationary trends in the economy and when compared with fees paid in retained criminal cases.

There are a variety of reasons for requiring that reasonable compensation be paid to assigned counsel. First, it is simply unfair to ask those lawyers who happen to have skill in trial practice and familiarity with criminal law and procedure to donate time to defense representation. It is worth remembering that the judge, prosecutor, and other officials in the criminal courtroom are not expected to do work for compensation that is patently inadequate. Lawyers do, of course, have a public service responsibility,[10] but the dimension of the national need and constitutional importance of counsel is so great that it cannot be discharged by

---

7. *See, e.g.*, Arnold v. Kemp, 306 Ark. 294, 813 S.W.2d 770 (1991); State v. Makemson, 491 So.2d 1109 (Fla. 1986); Remata v. State, 559 So.2d 1132 (Fla. 1990); People v. Johnson, 417 N.E.2d 1062 (Ill. App. 1981); State ex rel. Stephan v. Smith, 747 P.2d 816 (Kan. 1987); Wilson v. State, 574 So.2d 1338 (Miss. 1990); State v. Ryan, 444 N.W.2d 656 (Neb. 1989); State v. Robinson, 465 A.2d 1214 (N.H. 1983); State v. Lynch, 769 P.2d 816 (Okla. 1990). The Florida Supreme Court has gone farther in capital cases. In *State v. White*, 537 So.2d 1376 (Fla. 1989), the court stated, "we are hard pressed to find any capital case in which the circumstances would not warrant an award of attorney's fees in excess of the current statutory fee cap."

8. In 1989, for example, the ABA Task Force on Death Penalty Habeas Corpus called for statutory amendments to 28 U.S.C. § 2254, dealing with federal habeas corpus by state prisoners, to provide for reasonable compensation "notwithstanding the rates and maximum limits generally applicable to criminal cases," as well as ex parte determinations of the need for all reasonable expenses of counsel. Recommendations and Report of the AMERICAN BAR ASSOCIATION TASK FORCE ON DEATH PENALTY HABEAS CORPUS, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES 20 (1989).

9. 18 U.S.C. § 3006A(d)(1),(2) (1992).

10. *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT 6.1 (1983).

unpaid or inadequately compensated attorneys. Indeed, where payments for counsel are deficient, it is exceedingly difficult to attract able lawyers into criminal practice and to enhance the quality of the defense bar. But most important, the quality of the representation often suffers when adequate compensation for counsel is not available.

The standard recognizes that payment of fees must be prompt as well as adequate. Some jurisdictions incur debts to assigned counsel but either fail to or willfully withhold payment as a means of fiscal control. This practice is unfair to counsel with whom the jurisdiction has a contractual relationship. Moreover, the standard now clearly distinguishes between the fees paid to counsel and the expenses incurred by counsel for such necessary items as investigative, expert or other services. Each is necessary for the provision of quality representation, and each should be paid.

This standard recommends that counsel should be compensated for "all hours necessary to provide quality legal representation," and that approval of compensation for assigned counsel be by administrators of assigned-counsel programs. Where the discretion to approve payment claims is vested in the judiciary, the necessary independence of counsel is compromised. Defense lawyers ought not be placed in the position where the amount of their compensation may be influenced by the degree to which the court is pleased with their representation. Moreover, in jurisdictions where there are multiple judges passing on voucher claims, the reimbursements paid to counsel may be exceedingly inequitable, depending on which judge happens to approve the voucher. It is also a questionable use of judicial time for judges to approve the compensation claims of assigned counsel. When judges review vouchers, reasons should be articulated for cuts and defense counsel should have an opportunity to defend expenses and fees, with an opportunity for administrative review.

The administrators of assigned-counsel programs should be free to develop flexible standards for compensation that take into consideration the number of hours reasonably expended in light of the complexity, duration and difficulty of the case. To assist in the development of fee schedules, it may be appropriate to develop criteria that can be used in assessing voucher claims.

PART III.

CONTRACT DEFENSE SERVICES

Standard 5-3.1. Use of contracts for services

Contracts for services of defense counsel may be a component of the legal representation plan. Such contracts should ensure quality legal representation. The contracting authority should not award a contract primarily on the basis of cost.

History of Standard

This standard is new.

Related Standards

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense, Preamble and Guideline IV.3 (1984).

National Legal Aid and Defender Association, National Study Commission on Defender Services 2.6 (1976).

Commentary

Defining Contracts for Defense Services

Contracts for defense services are not a new phenomenon. Two of the largest defender offices in the country, Philadelphia and New York City, have, since their inception, been private nonprofit corporations that contract with city government for the provision of defense services.[1] By the same token, every attorney who accepts appointment as part of an assigned counsel panel has, in some sense, a contractual rela-

1. *See In re* Articles of Inc. of Defenders Ass'n of Philadelphia, 453 Pa. 353, 307 A.2d 906, *cert. denied*, 414 U.S. 1079 (1973) (holding that nonprofit defender association is sufficiently independent from city government to avoid conflict of interest); Wallace v. Kern, 481 F.2d 621 (2d Cir. 1973) (holding that New York City's nonprofit legal services corporation, the Legal Aid Society, does not act under color of state law for purposes of civil rights liability).

tionship with the government. However, contracts for defense services, as used here, refer to the provision of defense services over a period of time to a determined population of individuals or in a determined jurisdiction at a contractual rate offered and controlled by a government or representative thereof. In that sense, then, the older nonprofit corporations, while serving, for all intents and purposes as public defender offices, technically would be contract offices, while the private assigned counsel would not.

When contract programs began to proliferate widely in the early 1980s, observers found it easier to describe contracts for defense services than to precisely define them. In one of the earliest studies, the authors focused on the major elements of contracts: the negotiation and award process, the parties, the services provided, and the payment mechanisms.[2] A 1982 national survey was the first to take note of the growth of contracts as a primary means of defense service delivery. The survey noted that such contracts provided services through "individual private attorneys, local bar associations, nonprofit organizations, or law firms joined for the purposes of securing a contract."[3] The same survey provided a profile of contract defense service programs: counties were usually responsible for making the contract award; contracts were most often awarded to individual practitioners or private law firms; the average number of cases involved was between 100 and 250 cases per attorney; and contracts typically involved "block grants" of a fixed number of cases at a fixed price. Almost one-fourth of the reporting counties had an existing public defender program, with the contract designed solely for provision of services in cases involving conflicts of interest or declarations of unavailability by the public defender program. One-half of the counties reportedly used competitive bidding for representation through contracts, while the remaining half normally negotiated a contract with a single lawyer or law firm.[4] These characteristics continue to be typical of contemporary contract programs.[5]

---

2. Spangenberg, Davis and Smith, *Contract Systems Under Attack: Balancing Cost and Quality*, 39 NLADA BRIEFCASE 5, 7 (Fall 1982).

3. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY 19 (Sept. 1986).

4. *Id.* at 19–20.

5. Two local studies focus on the problems of conflicts of interest and the development of contracts for services. THE SPANGENBERG GROUP, A STUDY OF THE PRACTICAL ALTERNATIVES THAT WOULD REDUCE THE NUMBER OF PUBLIC DEFENDERS' CONFLICT OF INTEREST CASES IN LOS ANGELES COUNTY (Final Report, July 1986); THE SPANGENBERG GROUP, STUDY

Growth in Contract Systems

Contract systems for the delivery of defense services were a new phenomenon in the 1980s. A national study of defense services in 1973 did not include contract services as a means for the delivery of defense services.[6] By 1986, however, the use of contract defense systems had grown to include 11 percent of all counties in the United States.[7] That growth was the fastest of any system for the provision of defense services during the relevant period. The growth continues. Arizona, Idaho, Kentucky, New Mexico, North Dakota, Oregon, and Washington now provide a majority of their defense services through the use of contracts for services. In 1984, Alaska, a statewide public defender jurisdiction, created the separate Office of Public Advocacy to contractually handle conflict and other cases. Contract offices were also created in Los Angeles, St. Louis, and the Harlem Neighborhood Public Defender Program of New York City to handle conflicts of interest and declarations of unavailability by the existing public defender offices.

Criticism of the use of contracts, particularly through bidding and the use of block grant awards, grew with the proliferation of contract systems. The oldest experiment with the use of contracting through bids, in San Diego, California, was so heavily criticized nationally that the county eventually abandoned the system for a public defender model.[8]

In the case of contracts for defense services, there were two reasons for rapid growth in their use. First, the law of conflicts of interest grew more strict as a result of decisions by the United States Supreme Court that suggested that representation of multiple defendants created serious problems of conflicts of interest.[9] Public defender programs grew concerned about the appearance of impropriety and developed policies for the declaration of conflicts of interest in all multiple-defendant cases,

---

OF THE PROPOSED KING COUNTY OPERATED AND MANAGED PUBLIC DEFENSE PROGRAM (Final Report, Oct. 1989).

6. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE OTHER FACE OF JUSTICE (1973).

7. BUREAU OF JUSTICE STATISTICS, CRIMINAL DEFENSE FOR THE POOR, 1986 at 1–3 (Sept. 1988).

8. *See* Mayer, *Low Bid, Low Service*, AM. LAWYER, April 1985, at 33; Schachter, *Contract System May Put Lawyers at Odds with Clients*, L.A. TIMES, Dec. 8, 1985, at Part II, 1; Galante, *Contract Public Defenders Slammed*, NAT. L.J., April 7, 1986, at 3, col.2.

9. Holloway v. Arkansas, 435 U.S. 475 (1978) and Wheat v. United States, 486 U.S. 153, 154 (1988). In *Wheat*, several defendants sought to remain with the same lawyer after attempts to waive conflicts of interest. The Court held that the trial judge may override the choice of lawyers and order separate counsel when "a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Id.* at 163.

as well as in other cases that presented potential conflicts of interest.[10] The rise in declarations of conflicts, in turn, led the counties, or in one case, the entire state of Alaska, to create second public defender offices or contracts for services with lawyers as a means to institutionally control costs.[11]

A second reason for the growth in contracts was an attempt to control burgeoning costs due to increased caseloads in public defender offices. Some of the earliest use of contracts for services was accompanied by the use of bidding systems that encouraged bidders to compete to submit the lowest possible bid in order to obtain the stable, predictable and sometimes sizeable income provided by winning a contract. Unfortunately, most of these early contracts were not accompanied by any criteria for awarding the contract, for monitoring performance, for dealing with any unanticipated rise or fall in caseload, or for contract renewal or termination. Instability in systems was promoted by the simple fact that the contract provider could change from year to year, and even if the contractor remained the same, market pressures frequently compelled submission of lower and lower bids in order to keep the contract. The desire for economy in services all too often overrode constitutional obligations.

Results were uniformly dismal. Contracts were criticized in national studies[12] and several contractual programs failed to survive judicial scrutiny on constitutional grounds.[13] In 1985, the ABA House of Delegates adopted a resolution opposing the award of contracts for defense services on the basis of cost alone, and urging governments to consider

---

10. *See* Broderick and Cohen, *When Public Defenders Have Conflicts of Interest*, 2 CRIM. JUST. 18 (1987).

11. *See* Turner, *Tucson PD Office Clones Itself*, NAT. L.J., April 11, 1988, at 3.

12. Lefstein, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING 49–55 (ABA Standing Committee on Legal Aid and Indigent Defendants, May 1982); WILSON, CONTRACT BID PROGRAMS: A THREAT TO QUALITY INDIGENT DEFENSE SERVICES (NLADA 1982).

13. *See, e.g.*, State v. Smith, 140 Ariz. 355, 681 P.2d 1374 (1984) (Mohave County contract system so overworks contract attorneys as to deny defendants' rights to due process and counsel under Arizona and U.S. Constitutions); People v. Barboza, 173 Cal. Rptr. 458, 627 P.2d 188 (1981) (contract with county creates disincentive to declaration of conflicts of interest, which violates rules of criminal procedure); Gendron v. State Bar of California, 35 Cal. 3d 409, 673 P.2d 260 (1983) (disciplinary action against contract defender upheld); *but see* People v. Knight, 239 Cal. Rptr. 413, 194 Cal. App. 3d 337 (2d Dist., 1987) (no ineffective assistance merely because services provided through contract).

additional factors such as "attorney workload maximums, staffing ratios, criminal law expertise, and training, supervision and compensation guidelines." The need for national standards to guarantee the delivery of quality defense services through control of the contracting process was apparent.

The Emergence of Local and National Standards

The National Legal Aid and Defender Association developed a set of national standards for the delivery of contracts for services entitled *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services.* That document, the product of nearly four years of effort and drawing heavily on the *ABA Standards for Criminal Justice,* was approved by the NLADA Board of Directors in 1984, after which it was circulated to the ABA for review and comment. At its annual meeting in 1985, the ABA House of Delegates approved a resolution urging jurisdictions using contracts for services to do so in accordance with both the ABA *Standards* and the NLADA *Guidelines.*

State and local defender programs and other awarding agencies have also begun to adopt contract standards. States that have taken such action include Massachusetts, North Dakota, Oregon, and Washington.[14] Though controls on the use of contracts grow, many continue to fear that the issue of cost will override concern with quality legal services.[15]

Contracts for defense services, under these standards, should be no more than a "component" of the legal representation plan. It is assumed that contracts should not be the primary provider, as they often are in practice. The role of primary provider, under the standards, is reserved for the public defender office, which is considered to be the most effective means of protection of the delivery of quality legal representation.[16] The contract model may be an effective way to assure the important involvement of the private bar in the delivery of defense services, but

14. *See, e.g.,* Spears, *Contract Counsel: A Different Way to Defend the Poor,* 6 CRIM. JUST. 24 (Spring 1991); WASHINGTON DEFENDER ASSOCIATION, STANDARDS FOR PUBLIC DEFENDER SERVICES (Oct. 1989).

15. *See, e.g.,* Nelson, *Quality Control for Indigent Defense Contracts,* 76 CAL. L. REV. 1147 (1988). Concerns with privatization of services have also arisen in the area of prisons, and criticism of private prisons has also been vocal. *See, e.g.,* Robbins, *The Legal Dimensions of Private Incarceration,* 38 AM. U. L. REV. 531 (1989).

16. *See* standard 5-1.2 and commentary.

that involvement may also be accomplished by the use of a coordinated assigned counsel panel.

The key with all components of an effective defense services program is not merely cost but also the provision of quality legal representation. While it should be obvious that no contract for defense services should be awarded on the basis of cost alone, the apparent economies in the use of contracts make the admonition necessary on the face of the standard. If the contractor follows even the rudimentary components of the contracting process, as set forth in these standards, appropriate attention will be given to the balance of cost and quality.

Reference to the use of contracts has also been incorporated throughout this chapter, where contracts may make up an important component of service delivery.[17]

Standard 5-3.2. Contracting parties and procedures

(a) The contracting authority and each contractor should be identified in the contract. Procedures for the award of contracts should be published by the contracting authority substantially in advance of the scheduled date of award.

(b) 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.

(c) The contracting parties should avoid provisions that create conflicts of interest between the contractor and clients.

History of Standard

This standard is new.

Related Standards

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Defense Services I-1, I-2, II-1, II-2, II-3, III-1, III-13, IV-1, IV-2, and IV-3 (1984).

17. *See* standards 5-1.3, 5-1.6, 5-5.4, 5-7.3, and 5-8.1.

Commentary

Subsection (a) is based on the NLADA *Guidelines for Negotiating and Awarding Governmental Contracts for Defense Services* (hereinafter *Guidelines*).[1] Under the *Guidelines*, the "contracting authority" is "the public office, officer, or agency which has the authority to prepare bids, negotiate, or otherwise conclude a contract and to obligate funds for those unable to afford defense services."[2] The "contractor" is "an attorney, law firm, professional association, lawyer's association, law school, bar association or non-profit organization" which can or does contract for defense services.[3] The language regarding precontract publication of procedures is new with this standard. Such publication gives to potential contractors both notice and an opportunity to adequately prepare for submission of a contract proposal.

Subsection (b) reiterates the theme of independence for the contracting attorneys, a central concern in the provision of legal services to a sometimes unpopular and politically disempowered constituency. The use of a board of trustees or directors also provides support and insulation for the contracting attorneys or entities.[4]

Subsection (c) addresses a particular concern with the provision of services through contracts. Contracts may create disincentives for the declaration of a conflict of interest, where the contractor must reimburse the county for the cost of outside counsel. Such contracts have been held to violate statutes or court rules barring conflicts of interest.[5]

Standard 5-3.3. Elements of the contract for services

(a) Contracts should include provisions which ensure quality legal representation and fully describe the rights and duties of the parties, including the compensation of the contractor.

(b) Contracts for services should include, but not be limited to, the following subjects:

(i) the categories of cases in which the contractor is to provide services;

(ii) the term of the contract and the responsibility of the

1. *See* commentary to standard 5-3.1.
2. GUIDELINES, Guideline I-1.
3. GUIDELINES, Guideline I-2.
4. *See* commentary to standard 5-1.3.
5. People v. Barboza, 29 Cal. 3d 374 (1981); People v. Mroczko, 35 Cal. 3d 92 (1983).

contractor for completion of cases undertaken within the contract term;

(iii) the basis and method for determining eligibility of persons served by the contract, consistent with standard 5-7.1;

(iv) identification of attorneys who will perform legal representation under the contract and prohibition of substitution of counsel without prior approval;

(v) allowable workloads for individual attorneys, and measures to address excessive workloads, consistent with standard 5-5.3;

(vi) minimum levels of experience and specific qualification standards for contracting attorneys, including special provisions for complex matters such as capital cases;

(vii) a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses;

(viii) limitations on the practice of law outside of the contract by the contractor;

(ix) reasonable compensation levels and a designated method of payment;

(x) sufficient support services and reasonable expenses for investigative services, expert witnesses and other litigation expenses;

(xi) supervision, evaluation, training and professional development;

(xii) provision of or access to an appropriate library;

(xiii) protection of client confidences, attorney-client information and work product related to contract cases;

(xiv) a system of case management and reporting;

(xv) the grounds for termination of the contract by the parties.

History of Standard

The standard is new.

Related Standards

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1, 5.1 (1989).

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Contracts for Defense Services III-2 through III-23 (1984).

Commentary

The elements of a contract for defense services are surprisingly complex if quality services are to be provided. Compliance with the items listed here is the most significant guarantee of quality in the delivery of contractual services.

Subsection (a) suggests that each contract should be developed through a careful and considered process. The elements of a good contract for services, the minimum of which are listed in subsection (b), obviate the use of standard form contracts.

The elements of a contract included in subsection (b) generally parallel the structure of the chapter with regard to the structure and funding of effective defense services. They draw heavily on specific components elucidated in the *Guidelines.* As elsewhere in the chapter, but not explicitly in the *Guidelines,* the standard gives special attention to the problems created by capital cases.

In addition to the explicit elements listed here, the contracting parties should have an agreement with regard to the provision of malpractice insurance for the attorneys and their staffs.

PART IV.

DEFENDER SYSTEMS

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. The chief defender and staff should be compensated at the rate commensurate with their experience and skill sufficient to attract career personnel and comparable to that provided for their counterparts in prosecutorial offices. The chief defender should be appointed for a fixed term of years and be subject to renewal. Neither the chief defender nor staff should be removed except upon a showing of good cause. Selection of the chief defender and staff by judges should be prohibited.

History of Standard

The standard has been amended to reflect current law regarding affirmative action and the hiring of minorities and women. The first two sentences were amended to make clear that hiring based on merit and the targeting of specific populations for hiring are not inconsistent concepts.

The second sentence was amended to remove reference to the recruitment of minority attorneys based on the minority groups which are "substantially represented in the defender program's client population."

Related Standards

ABA Standards for Criminal Justice 3-2.3 (3d ed. 1993).

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.7-13.11 (1973).

National Legal Aid and Defender Association, National Study Commission on Defense Services 2.12, 3.2, 5.9 (1976).

National Legal Aid and Defender Association, Standards for Defender Services III.3, IV.4 (1976).

Commentary

Selection and Independence of Chief Defender and Staff

Selection of the chief defender and staff should not be based on political considerations or on any other factors unrelated to the ability of persons to discharge their employment obligations. Hiring and promotion should be based on merit and the defender program should encourage opportunities for career service. These themes also are contained in other national standards for defenders. The National Legal Aid and Defender Association, for example, recommends that the defender director "be selected on the basis of a non-partisan, merit procedure which ensures the selection of a person with the best available administrative and legal talent, regardless of political party affiliation, contributions, or other irrelevant criteria."[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. It may also be possible, though perhaps more difficult, to achieve independence if the chief defender is elected or chosen by a political body, such as a county commission or city council. 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."[2] 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.

Neither merit selection nor objectives of independence suggest that it is inappropriate to make special efforts to recruit minority candidates and women for staff positions in public defender offices. State law or policy often makes it mandatory to make such efforts. Diversity in the attorney staff of public defender offices contributes to the institutional goal of quality representation.[3]

---

1. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 2.12 (1976).

2. *See* standard 5-1.3.

3. Similar policies are embodied in the third edition ABA PROSECUTION FUNCTION STANDARDS, standard 3-2.3 (3d ed. 1993), dealing with prosecution office hiring practices.

Employment Status

Security of employment for the chief defender and staff is essential in attracting career personnel and in encouraging professional independence. Standard 5-4.1 endorses the principle that staffs of defender programs should not be removed unless a good cause showing is made. Any lesser protection for employees may interfere with the recruitment of qualified personnel and would make it possible for chief defenders to politicize offices by bringing in personal friends or politically-connected attorneys who may not be particularly well qualified.[4] But while the opportunity to make a career in criminal defense work should be available, in most defender programs there is a great deal of turnover among the younger lawyers, due to the pressure involved in criminal litigation. Where removal of an attorney is sought by the chief defender, notice and hearing procedures should be provided, the decision should be subject to review, and due process protection should be accorded. Although standard 5-3.1 also sanctions removal of the chief defender based on good cause, presumably such proceedings would be uncommon, due to the appointment of the chief defender for a fixed term. The use of a fixed term helps to assure that the performance of the chief defender will be constantly reexamined by the board of trustees or other appointing authority.

There is disagreement among national standards on whether chief defenders and their staffs should be given tenure. The National Advisory Commission flatly recommends against "civil service status" for staff attorneys, believing that tenure may preclude a new chief defender from assembling the best possible staff.[5] The National Legal Aid and Defender Association urges that the chief defender be appointed for a fixed term of from four to six years, subject to renewal.[6] It also recommends that removal of staff attorneys be made "only for cause, except during a fixed probationary period which an office may employ for newly hired attorneys."[7]

In the past decade, two more states, Tennessee and Nebraska, have joined Florida in providing for the popular election of public defenders

---

4. *See* Branti v. Frankel, 445 U.S. 507 (1980) (dismissal of assistant public defenders solely because of their political beliefs violates the First and Fourteenth Amendments).

5. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 13.10 (1973).

6. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 2.12 (1976).

7. *Id.* 5.9.

in the state.[8] This standard calls for the appointment of defenders as the best method to assure independence of the defender office and to avoid the risk of issues other than merit becoming involved in the selection of the chief defender. Other provisions of these standards suggest that appointment is the best, though not the only appropriate means for selection of the public defender.[9]

Compensation

The ability to attract and retain qualified lawyers in criminal defense programs is exceedingly difficult when the compensation is inadequate. In order to encourage sufficient salaries for the chief defender and staff, standard 5-3.1 suggests that salaries be "comparable to that provided for their counterparts in prosecutorial offices."[10] This presupposes, of course, that the salaries paid to the chief prosecutor and staff are adequate. Where they are not, it may be advisable to compare the chief defender's salary to that which is paid to the presiding trial judge in the jurisdiction as well as the earnings of attorneys in private practice engaged in defense representation. Both the National Advisory Commission and the National Legal Aid and Defender Association recommend that the salary of the chief defender be comparable to that paid the local presiding judge.[11]

Standard 5-4.2. Restrictions on private practice

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

---

8. *See, e.g.*, FLA. STAT. ANN. § 27.50 (West 1991); TENN. CODE ANN. § 8-14-202(b)(1)(A) (1991). The legislation in Nebraska limits elections to the cities of Omaha and Lincoln. NEB. REV. STAT. § 23-3401 (1990). Public defenders have also been elected in San Francisco for many years.

9. *See* commentary to standard 5-1.3.

10. The federal Criminal Justice Act provides that compensation of the Federal Defender "shall be fixed . . . at a rate not to exceed" that of the U.S. Attorney in the same federal district. 18 U.S.C. § 3006A(g)(2)(a) (1992).

11. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 13.7 (1973); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 3.2 (1976).

History of Standard

The standard was unchanged.

Related Standards

ABA Standards for Criminal Justice 3-2.3(b) (3d ed. 1993).

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.7 (1973).

National Legal Aid and Defender Association, National Study Commission on Defense Services 2.9 (1976).

National Legal Aid and Defender Association, Standards for Defender Services III.3 (1976).

Commentary

The work of defenders is exceedingly demanding, normally requiring that they devote as much effort to their cases as time permits. Where part-time law practice is permitted, defenders are tempted to increase their total income by devoting their energies to private practice at the expense of their nonpaying clients. Even more important, the expertise required of defense counsel is less likely to be developed if an attorney maintains a private practice involving civil cases. A prohibition of private practice by full-time personnel also assists in countering any tendency for those responsible for financing to maintain low salary structures on the assumption that defenders can supplement their salaries through private practice. Where part-time defenders continue to be used, clear and uniform standards should exist for the scope and performance of duties, limits on private practice and the avoidance of conflicts of interest. At the very least, part-time defenders should not handle retained criminal cases in the same courtrooms as their criminal cases. It may also be appropriate to prohibit the part-time defender from handling private criminal matters in the same county where that person serves as a defender, or even to restrict the part-time defender to the handling of retained civil cases outside of the defender program.

In rural jurisdictions, where the volume of criminal cases is generally small, it may be desirable to regionalize defense services in order to create offices with caseloads large enough to justify full-time personnel. This approach has proved feasible in jurisdictions with statewide public

defender programs.[1] Another option is the use of contracts for services as part of a comprehensive program. Furthermore, as part of the mixed system of representation recommended in standard 5-1.2, some of the time of defenders in rural areas can be profitably spent assisting private counsel in their handling of assigned cases.

The trend in recent years, particularly in jurisdictions with statewide defender systems, has been toward requiring full-time attorneys who are precluded from the private practice of law. Standard 5-4.2, moreover, parallels the recommendations contained in all of the other standards for defender services.[2]

Nothing in this section is meant to suggest that any public defender should be prohibited from the performance of pro bono legal work, so long as it is outside of the office and office hours and does not involve court appearances.

Standard 5-4.3 Facilities; library

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

History of Standard

The standard was not amended.

Related Standards

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.13, 13.14 (1973).

National Legal Aid and Defender Association, National Study Commission on Defense Services 2.7, 3.4 (1976).

National Legal Aid and Defender Association, Standards for Defender Services IV.2, IV.5 (1976).

1. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 181–182 (1976).

2. *See* the related standards section herein.

Commentary

Office Location

The principal office of the defender program must necessarily be located near the courts in order to avoid inconvenience to the staff and unnecessary travel. Where defender offices are located in court buildings, the identification of the program should make clear that it is not associated with the judiciary or law enforcement components of the criminal justice system. Indeed, it has been argued that the presence of defender offices in courthouses may contribute to defendants doubting whether the program is independent of the judiciary. Location of the office outside of the courthouse should not, of course, prevent the defender program from access to a private location in the courthouse for client and witness conferences.

Regardless of its downtown location, the defender program may also find it useful to establish branch offices in the neighborhoods in which many of its clients reside. The standards of the National Advisory Commission and the National Legal Aid and Defender Association contain recommendations to this effect.[1]

Office Appearance

It is essential to the efficient operation of the defender program that facilities be provided in which clients can be interviewed in privacy. Without offices and facilities befitting the nature of a lawyer's professional calling, the accused may very well lack confidence in the defender and, ultimately, in the system of justice itself. Appropriate facilities are also necessary to attract and retain career personnel.

Equipment and Library

The equipment of the defender program should take advantage of the significant advances in office technology which have become available to the private practitioner and other government offices. Thus, there should be dictation and transcription equipment, photocopying equipment capable of handling complex documents, computers and word processing equipment, computer-assisted legal research, facsimile facilities and audio- and videotaping equipment, to mention a few exam-

1. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 13.13 (1973); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 2.7 (1976).

ples. The presence of other law libraries in the vicinity of the defender office may make the purchase of less widely used volumes unnecessary, but should not serve as an excuse for failing to establish any library at all.

PART V.

TYPES OF PROCEEDINGS AND QUALITY OF REPRESENTATION

Standard 5-5.1. Criminal Cases

Counsel should be provided in all proceedings for offenses punishable by death or incarceration, regardless of their denomination as felonies, misdemeanors, or otherwise. An offense is also deemed to be punishable by incarceration if the fact of conviction may be established in a subsequent proceeding, thereby subjecting the defendant to incarceration.

History of Standard

An amendment to the first sentence now specifically includes any proceeding in which capital punishment is a possibility. The word "incarceration" was substituted for the less precise term "imprisonment" in the standard. "Incarceration" includes both prison and jail sentences.

Related Standards

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 1.1, 3.1 (1989).

ABA Standards for Criminal Justice 4-1.2 (3d ed. 1993).

ABA Standards for Criminal Justice 11-5.3, 14-1.3 (2d ed. 1980).

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.1 (1973).

National Legal Aid and Defender Association, National Study Commission on Defense Services 1.1 (1976).

National Legal Aid and Defender Association, Standards for Defender Services II.3 (1976).

Commentary

In *Gideon v. Wainwright*,[1] the Supreme Court recognized that the Sixth and Fourteenth Amendments require that counsel be made available

1. 372 U.S. 335 (1963).

when the defendant is charged with a serious crime. The Court also has extended the right to public representation to various types of pretrial proceedings, such as preliminary hearings,[2] lineup identifications,[3] and custodial interrogations.[4] In misdemeanor and petty offense cases, the Court ruled in *Argersinger v. Hamlin*[5] that counsel must be provided if imprisonment is imposed, unless the defendant knowingly and intelligently waives the right to an attorney.

There has been considerable debate since the Court's ruling in *Argersinger* concerning how the decision can best be implemented. This is because *Argersinger*, by its terms, extended the right to counsel in misdemeanor and petty offense cases only for defendants who are actually imprisoned. But it cannot be known whether imprisonment results until sentence is pronounced. On the other hand, it is obviously essential to decide whether to provide counsel well before trial or a plea of guilty, let alone pronouncement of sentence.[6]

To comply with *Argersinger*, this standard recommends that counsel be provided "in all criminal proceedings for offenses punishable by incarceration." The effect of this standard is to provide counsel for all defendants who are actually jailed, and also to make counsel available for all defendants who, while not incarcerated, are prosecuted for offenses subject to jailing.[7] Inevitably, therefore, counsel will be provided in some cases where *Argersinger* does not specifically require a lawyer.

This broad standard for implementing *Argersinger* is justified. First, the presence of counsel in cases punishable by incarceration that do not result in the imposition of an actual sentence to jail will help to assure fair proceedings. The Supreme Court stressed in *Argersinger* the need for counsel in order to assure fair trials, and this objective obviously is served regardless of whether incarceration results. Moreover, no other suggested formulation for implementing the *Argersinger* decision is satisfactory. A "classification of offense" standard, whereby courts

2. Coleman v. Alabama, 399 U.S. 1 (1970).
3. United States v. Wade, 388 U.S. 218 (1967).
4. Miranda v. Arizona, 384 U.S. 436 (1966).
5. 407 U.S. 25 (1972).
6. *See* standard 5-8.1
7. *See* Ridgeway v. Baker, 720 F.2d 1409 (5th Cir. 1983) (indigent father facing imprisonment for contempt for noncompliance with Texas child support order has due process right to court-appointed counsel, regardless of characterization of proceeding as "civil"). *See also* Fernos-Lopez v. Figarella, 929 F.2d 20 (1st Cir. 1991); Colson v. Maine, 646 F. Supp. 102 (Dist. of Maine 1986).

determine never to impose imprisonment for certain misdemeanors and petty offenses and thus withhold providing counsel in these cases, is tantamount to judicial repeal of the legislature's penalty provision of incarceration. A "predetermination procedure," discussed in the *Argersinger* decision,[8] by which the court confers with the prosecutor in advance of the proceeding to determine the likelihood of imprisonment being imposed, is also rejected. In addition to being time-consuming, there is substantial risk that the court will receive information about the defendant or the offense charged which will make it exceedingly difficult for the judge to sit as fair and impartial arbiter, regardless of whether it is determined that counsel should be provided.

Many states have enacted statutes consistent with standard 5-5.1 requiring, at a minimum, that counsel be afforded whenever there is possibility of imprisonment. The standards promulgated by several other national groups are more far-reaching. Thus, the National Legal Aid and Defender Association provides that counsel should be made available "[i]n any governmental fact-finding proceeding . . . which might result in the loss of liberty or in a legal disability of a criminal or punitive nature,"[9] and the National Advisory Commission standards extend to all criminal cases, regardless of whether deprivation of liberty is a possibility.[10]

Standard 5-5.1 does not expressly apply to cases punishable only by a fine, although it can be argued that counsel is necessary in such proceedings in order to assure fair trials, just as in cases involving the possibility of imprisonment.[11] The standard, however, does state that

8. Argersinger v. Hamlin, 407 U.S. at 42 (Burger, C.J., concurring). *But see id.* at 54 (Powell, J., concurring), where it is noted that such pretrial determinations may present equal protection problems: "There may well be an unfair and unequal treatment of individual defendants, depending on whether the individual judge had determined in advance to leave open the option of imprisonment. Thus, an accused indigent would be entitled in some courts to counsel while in other courts in the same jurisdiction an indigent accused of the same offense would have no counsel."

9. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 1.1 (1976).

10. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 13.1 (1973).

11. However, in Scott v. Illinois, 99 S. Ct. 1158 (1979), the Supreme Court held that the Constitution does not require the furnishing of counsel to a defendant who receives only a fine. In *Scott* the defendant could have been imprisoned, but the trial court decided on a fine rather than incarceration. Pursuant to standard 5-5.1, of course, the court would have been required to offer counsel to the accused since the offense was "punishable by incarceration."

counsel should be provided "if in fact of conviction may be established in a subsequent proceeding, thereby subjecting the defendant to imprisonment." The standard thus covers what may be termed "imprisonment once removed" situations.[12] For example, counsel is required under this standard when a conviction can be used in a subsequent proceeding so as to apply a recidivist statute and thereby lead to imprisonment.[13] Consistent with this standard, the Supreme Court has held in *Baldasar v. Illinois*[14] that an uncounseled misdemeanor conviction, which did not result in incarceration, may not be used under an enhanced penalty statute to convert a subsequent misdemeanor offense into a felony.[15]

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, postconviction relief, and probation and parole revocation, regardless of the designation of the tribunal in which they occur or classification of the proceedings as civil in nature.

History of Standard

There were no changes in this standard for the third edition.

Related Standards

ABA Standards for Criminal Justice 4-8.5 (3d ed. 1993).

ABA Standards for Criminal Justice 18-7.5, 22-4.3, 33-5.2 (2d ed. 1980).

---

12. Compare People v. Lynn, 102 Ill. 2d 267 (1984) (defendant placed on probation after pleading guilty, without counsel, to a misdemeanor charge did not have right to counsel "retroactively violated" when probation was revoked and he was sentenced to prison).

13. *See also* S. KRANTZ et al., RIGHT TO COUNSEL IN CRIMINAL CASES 44 (1976); Note, Argersinger v. Hamlin *and the Collateral Use of Prior Misdemeanor Convictions of Indigents Unrepresented by Counsel at Trial*, 35 OHIO ST. L.J. 168, 182–186 (1974).

14. 446 U.S. 22 (1980).

15. *But cf.* Lewis v. United States, 445 U.S. 55 (1980) (an uncounseled felony conviction may be used as a proper predicate for imposing federal sanctions for possession of a firearm by a felon).

National Advisory Commission on Criminal Justice Standards and Goals, Corrections 2.2 (1973).

National Legal Aid and Defender Association, National Study Commission on Defense Services 1.1 (1976).

Commentary

This standard recognizes a broad right to counsel in collateral criminal proceedings in which a defendant may be deprived of liberty or otherwise subjected to serious deprivations. Implementation of this standard undoubtedly involves the extension of counsel to some proceedings in which the right to legal representation is neither constitutionally nor statutorily required. In the collateral proceedings contemplated by this standard, however, counsel is regarded as necessary to serve as the client's advocate and to assure fair hearings and procedures.

This standard contemplates, *inter alia,* the assignment of counsel in situations where all of the elements of a formal adversary proceeding against the accused may not be present. Thus, a person summoned before a grand jury who is the target of an investigation should be afforded legal representation.[1] Similarly, counsel should be provided to defendants at lineups conducted immediately after arrest and before the initiation of charges,[2] and also to persons seeking to challenge the execution of search warrants that do not result in arrests.

In recent years, the line between criminal and civil proceedings which give rise to a constitutional right to counsel has become increasingly blurred. Thus, protected liberty interests have extended due process concepts to justify the provision of counsel for indigent litigants in such "quasi-criminal" matters as contempt for failure to make child support payments, termination of parental rights, civil commitment, and civil

1. In United States v. Washington, 431 U.S. 181 (1977), the Supreme Court held that a target witness summoned before a grand jury did not have to be advised that he was the object of the grand jury probe. The Court in *Washington* did not decide whether Miranda warnings were constitutionally required since the grand jury witness was, in fact, advised of the right to remain silent and to obtain assistance of counsel, and that his testimony could be used against him in a subsequent proceeding. *See also,* United States v. Mandujano, 425 U.S. 564 (1976), where, in a plurality opinion that commanded only four votes, the Supreme Court stated that Miranda warnings need not be given to a putative or virtual defendant called before a grand jury.

2. In United States v. Wade, 388 U.S. 218 (1967), the Supreme Court held that counsel should be provided to defendants at postindictment pretrial lineups occurring prior to initiation of formal proceedings. Kirby v. Illinois, 406 U.S. 682 (1972).

contempt.[3] The arguments for a right to counsel in these contexts seem to suggest a right to counsel in traditionally civil contexts as well, so long as critical liberty interests are involved.[4] This standard stops at proceedings "arising from or connected with" the commencement of criminal proceedings, but should not be taken to disparage the right to counsel in broader contexts as an essential aspect of a fair trial and access to justice, so long as an effective administrative infrastructure—perhaps like that suggested in this chapter—is provided.[5]

Although the Supreme Court has held that a state is not required to provide counsel in discretionary reviews of convictions,[6] a majority of states do provide authorization for counsel to some extent in postconviction proceedings.[7] The right to legal representation in such proceedings is provided for in both the Uniform Post-Conviction Procedure Act[8]

---

3. *See* BRANDT, THE RIGHT TO COUNSEL: AN OVERVIEW 30–35 (Undated Monograph, Abt Associates Inc., Criminal Defense Technical Assistance Project); Catz and Firak, *The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard*, 19 HARV. CIV. RTS.-CIV. LIB. L. REV. 397, 399–400 (1984).

4. *See, e.g.*, Johnson and Schwartz, *Beyond* Payne: *The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants, Part One: The Legal Arguments*, 11 LOYOLA L.A. L. REV. 249 (1978); Mowrer v. Superior Court (Ledesma), 201 Cal. Rptr. 893, 155 Cal. App. 3d 262 (2d Dist. 1984) (right to appointed counsel, though not public defender, in paternity action); Scherer, Gideon's *Shelter: The Need To Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. CIV. RTS.-CIV. LIB. L. REV. 557 (1988); Note, *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 WILLIAM AND MARY L. REV. 627 (1989). *But see* Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (presumption against the appointment of counsel where, in termination of parental rights suit, litigant cannot be deprived of personal liberty).

5. The American Bar Association has also adopted a set of standards for the provision of legal services in civil legal services programs. ABA STANDARDS FOR PROVIDERS OF CIVIL LEGAL SERVICES TO THE POOR (August 1986).

6. Ross v. Moffitt, 417 U.S. 600 (1974) (no right to counsel in discretionary appeal to highest state court); Pennsylvania v. Finley, 107 S. Ct. 1990 (1987) (no right to counsel in state postconviction proceedings); Murray v. Giarratano, 109 S. Ct. 2765 (1989) (no right to counsel in capital state postconviction proceedings).

7. Thirty-four states provide for the appointment of counsel in postconviction proceedings, either by statute or by specific court rule. Note, *Discretionary Appointment of Counsel at Post-Conviction Proceedings*, 8 U. GA. L. REV. 434, 453–456 (1974). In capital cases, only nineteen states make the appointment of counsel mandatory. Wilson and Spangenberg, *State Post-Conviction Representation of Defendants Sentenced to Death*, 72 JUDICATURE 331, 334, Table 1 (April-May 1989).

8. National Conference of Commissioners on Uniform State Laws, Uniform Post-Conviction Procedure Act § 5 (1980).

and in the standards of the National Advisory Commission.[9] Detailed provisions of the ABA Standards related to the assignment of counsel in postconviction cases are contained in standards 22-4.3 and 22-5.2.[10] In the area of extradition, the vast majority of states have adopted the Uniform Criminal Extradition Act, which guarantees to defendants "the right to demand and procure legal counsel."[11]

This standard goes beyond what the Supreme Court has required in probation and parole revocation proceedings. In *Gagnon v. Scarpelli*,[12] the Court held that a state is not constitutionally obligated to provide counsel at all such hearings. Legal representation, according to *Gagnon*, should be furnished on a case-by-case basis, depending on whether the probationer or parolee is likely to have difficulty in presenting his or her version of the disputed facts without the aid of counsel. With this approach there is substantial risk that counsel will be withheld from some defendants who desire legal representation. Accordingly, this standard contemplates that counsel be made available for all probation and parole revocation hearings. Such proceedings should occur without counsel only if a knowing and intelligent waiver of counsel has been entered. The requirement of counsel at probation revocation proceedings is dealt with in greater detail in ABA standard 18-7.5 (2d ed. 1980).

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

9. National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.4 (1973).

10. *See also* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-5.7(a) (2d ed. 1987) (stating that "whenever a correctional official, other state official, the prosecution, or counsel for the convict have reason to believe that a convict may be currently incompetent, such person should petition the court for an order requiring an evaluation. . . . If a convict is not represented by counsel, the court should appoint counsel at the same time it orders the evaluation."); and INSTITUTE FOR JUDICIAL ADMINISTRATION—AMERICAN BAR ASSOCIATION JUVENILE JUSTICE STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 2.3 (1980) (urging the provision of counsel in delinquency and in need of supervision matters, "all proceedings arising from or related to" such matters, and custody or adoption proceedings).

11. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM CRIMINAL EXTRADITION ACT § 10 (1936).

12. 411 U.S. 778 (1973).

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.

History of Standard

"Workload," as used in this standard, is to be distinguished from the more narrow term "caseload." Caseload is the number of cases assigned to an attorney at any given time. Workload is the sum of all work performed by the individual attorney at any given time, which includes the number of cases to which the attorney is assigned, but also includes other tasks for which that attorney is responsible. For example, a managing attorney who has extensive supervisory responsibilities but a very low caseload may have a heavier workload than a staff attorney whose caseload is average. Similarly, a case may create workload issues when it takes longer to prepare or dispose of because the penalty is higher or because it is especially complex. Subsection (a) deals with workload; subsection (b) deals with caseload.

Subsection (a) adds reference to contracts for services in the first sentence, as well as a new final sentence which accents the particular problems affecting workload as a result of the concentration of immense resources in the burgeoning numbers of capital prosecutions and appeals in cases in which the defendant is legally indigent.

Subsection (b) also makes reference to contracts for services. It adds a reference to individual attorneys when discussing those who must use discretion to determine the limits of caseload and the steps to be taken in response to that caseload. A new final sentence is also added urging

courts to be sensitive to the imposition of excessive caseloads. The addition recognizes that the problem of excessive caseloads originates in both the reluctant acceptance of cases by overburdened appointed counsel as well as in docket pressures experienced by appointing judges.

Related Standards

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 6.1 (1989).

ABA Standards for Criminal Justice 4-1.3(e) (3d ed. 1993).

ABA Standards for Providers of Civil Legal Services to the Poor 3.2 (1986).

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.12 (1973).

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Defense Services III-6 (1984).

National Legal Aid and Defender Association, National Study Commission on Defense Services 5.1, 5.3 (1976).

National Legal Aid and Defender Association, Standards for Defender Services IV.1 (1976).

National Legal Aid and Defender Association, Standards for the Administration of Assigned Counsel Systems 4.1.2 (1989).

Commentary

The goal in providing defense services should be to secure quality legal representation for persons unable to afford counsel (standard 5-1.1). This objective should be pursued regardless of whether the defense services provided relate to criminal cases (standard 5-5.1) or to collateral matters (standard 5-5.2).

One of the most significant impediments to the furnishing of quality defense services for the poor is the presence of excessive workloads. One recent national survey, for example, found workloads to be one of the most significant concerns of public defender offices. Defenders attributed the precipitous growth in their caseloads to increased drug prosecutions, police or prosecutorial overcharging, mandatory mini-

mums or increased sentences, and failure of funding agencies to provide adequate attorneys and other resources.[1]

All too often in defender organizations or in contracts for services attorneys are asked to provide representation in too many cases. Assigned counsel whose principal professional activity is representation of the accused in criminal matters may also accept an excessive number of cases, either because of the perceived economic benefits or because of pressures from the judiciary due to exploding dockets. Unfortunately, not even the most able and industrious lawyers can provide quality representation when their workloads are unmanageable. Excessive workloads, moreover, lead to attorney frustration, disillusionment by clients, and weakening of the adversary system.

The attorney who has too many clients also experiences special concerns about his or her ethical duties. The Model Rules admonish an attorney not to represent a client if "the representation will result in violation of the rules of professional conduct. . . ."[2] The commentary to that section states that representation should not be accepted "unless it can be performed competently, promptly . . . and to completion."[3] At least one state, Wisconsin, has issued an ethics opinion on limits to defender workload.[4] Similarly, the ABA Defense Function standards state that defense counsel "should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation. . . ."[5]

---

1. NATIONAL INSTITUTE OF JUSTICE, NATIONAL ASSESSMENT PROGRAM: SURVEY RESULTS FOR PUBLIC DEFENDERS 3 (Nov. 26, 1990).

2. ABA MODEL RULES OF PROFESSIONAL CONDUCT 1.16(a)(1) (1983).

3. *Id.* to Rule 1.16, paragraph 1.

4. Wisconsin Committee on Professional Ethics, Formal Opinion E-84-11, Sept. 1984. The opinion states that a staff lawyer faced with a workload "that makes it impossible . . . to prepare adequately for cases and to represent clients competently" should, "except in extreme or urgent cases, decline new legal matters and should continue representation in pending matters only to the extent that the duty of competent, nonneglectful representation can be fulfilled." In addition, the attorney "should withdraw from a sufficient number of matters to permit handling of the remaining matters." In support of its conclusion, the Committee cites to ABA Formal Opinion 347 (Dec. 1, 1981).

5. ABA STANDARDS FOR CRIMINAL JUSTICE 4-1.3(e) (3d ed. 1993). Excessive workloads may contribute to the likelihood of malpractice suits being brought against public defenders. The Supreme Court has held that an attorney appointed in the federal courts to represent a criminal defendant is not entitled to immunity in a state malpractice suit brought by the former client. Ferri v. Ackerman, 444 U.S. 193 (1979). *But see* Polk County v. Dodson, 454 U.S. 312 (1981) (public defender immune under 42 U.S.C. § 1983 for actions performed as counsel under color of state law); *see also* Tower v. Glover, 467 U.S.

Methods for measurement of caseloads and workloads have advanced considerably over time. The most rudimentary method is that of counting the number of open files allocated to each attorney in a defender or contract program. This method obviously suffers, however, from the lack of any information on how long a case may take for disposition or how complex the case may be. It provides no means by which to project future staffing needs. Another method is to count the number of cases which are or should be disposed of over a fixed period of time, usually a year. Finally, time-based systems calculate how long it takes an attorney to perform a specific task, on average, then divide that figure into the total available time over a specific period to come up with how many "units" of activity an attorney can perform over the time period in question.[6] The National Legal Aid and Defender Association has developed systems for automated or manual management information of defender programs[7] and the calculation of "weighted" caseloads[8] which explain and amplify the accurate measurement of workload and caseload.

The determination of whether caseloads are excessive necessarily is entrusted to the defender organization and to the individual attorney, whether a staff public defender, a contractor for services or an assigned counsel. Only the lawyers themselves know how much must be done to represent their clients and how much time the preparation is likely to take. To assist in assessing workloads, some defender offices have established caseload guidelines that are useful in determining whether the office workload or that of a particular attorney is excessive.[9] It is

914 (1984) (proven conspiracy between defender and other court personnel can deprive defender of immunity under civil rights statute).

6. *See* M. BRODERICK AND R. BURKE, PUBLIC DEFENDER CASELOADS AND COMMON SENSE: AN UPDATE 25–39 (NLADA, 1992).

7. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AMICUS, A MANUAL MANAGEMENT INFORMATION SYSTEM FOR PUBLIC DEFENDER OFFICES (1980).

8. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, CASE WEIGHTING SYSTEMS: A HANDBOOK FOR BUDGET PREPARATION (Sept. 1985).

9. In determining maximum effective workloads for its staff attorneys, the District of Columbia Public Defender Service considers the following factors: quality of representation, speed of turnover of cases, percentage of cases tried, extent of support services available to staff attorneys, court procedures, and other activities or complex litigation. 1 LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, AN EXEMPLARY PROJECT 13–14 (1974). In Ohio, the Public Defender Commission Rules call for each public defender office in the state to set minimum and maximum workloads for its attorneys and staff. OHIO PUBLIC DEFENDER COMMISSION, ASSIGNED COUNSEL STANDARDS & STATE MAXIMUM FEE SCHEDULE, Rule 120-1-07.

also helpful for managers of defender offices to encourage their attorneys to make known any concerns they have regarding excessive workloads.[10] In addition, in some instances it may be useful to arrange for independent assessments of workload levels to be conducted by independent consultants.[11]

The standards of the National Advisory Commission, first developed in 1973, have proven resilient over time, and provide a rough measure of caseloads. They recommend that an attorney handle no more than the following number of cases in each category each year:

150 felonies[12] per attorney per year; or
400 misdemeanors per attorney per year; or
200 juvenile cases per attorney per year; or
200 mental commitment cases per attorney per year; or
25 appeals per attorney per year.[13]

---

10. The tensions which are created between competing goals of staff and supervising attorney in a defender program are explored in Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WISC. L. REV. 473. *See also* Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 BOST. COL. L. REV. 531 (1988).

11. Several significant workload and caseload studies have been performed in recent years. *See* MAXIMUS, DESIGN A WORKLOAD MEASUREMENT AND DEVELOP WORKLOAD/CASELOAD STANDARDS (New York Legal Aid Society, 1989); NATIONAL CENTER FOR STATE COURTS AND THE SPANGENBERG GROUP, WORKLOAD AND PRODUCTIVITY STANDARDS: A REPORT TO THE OFFICE OF THE STATE PUBLIC DEFENDER [OF CALIFORNIA] (July 28, 1989); THE SPANGENBERG GROUP, CASELOAD/WORKLOAD STUDY FOR THE STATE PUBLIC DEFENDER OF WISCONSIN (Final Report, Sept. 1990); THE SPANGENBERG GROUP, WEIGHTED CASELOAD STUDY FOR THE STATE OF MINNESOTA BOARD OF PUBLIC DEFENSE (Draft, Jan. 1991).

12. The standard does not refer to capital representation. Thus, felonies referred to here do not include death penalty cases.

13. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 13.12 (1973). These standards were recently endorsed by an ABA Committee studying the criminal justice system, with slight modification. While supporting the standards in all other categories, the Committee recommended that attorneys handle no more than 300, not 400, misdemeanors per year. ABA SPECIAL COMMITTEE ON CRIMINAL JUSTICE IN A FREE SOCIETY, CRIMINAL JUSTICE IN CRISIS 43 (1989). The Washington (State) Defender Association also adopted a variation of the national standards, with 300 misdemeanors and 250 juvenile or civil commitment cases per attorney per year. WASHINGTON DEFENDER ASSOCIATION, STANDARDS FOR PUBLIC DEFENSE SERVICES, STANDARD THREE (Oct. 1989). The modified number of misdemeanor cases seems particularly apt when it is considered that the original standard was adopted before the full impact of the U.S. Supreme Court's decision in Argersinger v. Hamlin, 407 U.S. 25 (1972).

Such an approach presents the obvious difficulty that not all felonies are of equal complexity and not all lawyers are of equal ability or have access to identical supporting services. Practices and policies, as well as court capacity, vary from jurisdiction to jurisdiction. In contrast, the National Legal Aid and Defender Association avoids any reference to precise numbers of cases that can be handled.[14] However, it emphasizes that excessive workloads must be curtailed and that defender organizations must vigorously pursue alternatives when the numbers of persons requiring representation exceed the capacity of their staffs.

Workload in capital cases creates extraordinary difficulties in every jurisdiction in which the death penalty can be imposed.

Time requirements in such cases vastly exceed those of noncapital felony cases.[15] In some states where death row populations are high, the situation has reached crisis proportions. After conducting a national survey, for example, attorneys in Florida arrived at an annual caseload standard of five cases per attorney when the defendant was not under a warrant of death, and three cases per attorney when a warrant for execution had been issued.[16] In California, where the Office of the State Public Defender handled capital appeals in the California Supreme Court, one study concluded that the attorneys handling such cases should be responsible for only two to three briefs per year in such cases.[17]

Once the determination is made that quality representation is impossible due to inordinate workload, a variety of options are available. If

---

14. NLADA, NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 5.1, 5.3 (1976); NLADA, STANDARDS FOR DEFENDER SERVICES 4.1 (1976).

15. A compilation of recent state and national data, for example, found that attorneys in capital cases spent an average of 400 to 500 hours in representation at trial in state court, and that the average total time spent on a capital case, from trial through all petitions to the United States Supreme Court, averaged between 1412 and 1710 hours. Wilson and Spangenberg, *State Post-Conviction Representation of Defendants Sentenced to Death*, 72 JUDICATURE 331, 336, Table 4 (1989).

16. THE SPANGENBERG GROUP, A CASELOAD/WORKLOAD FORMULA FOR FLORIDA'S OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE: EXECUTIVE SUMMARY, Table 1 (Feb. 1987). These caseloads, it should be noted, were based on the allocation of one investigator and one legal secretary per every two attorneys. *Id.*, at Table 2. Even these standards have not ended the litigation over the appropriate limits on capital caseloads in Florida public defender offices. *In re* Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130 (Fla. App. 1990).

17. Based on a work unit theory of twenty-six units per experienced attorney per year, the formula put the value of a brief in a capital case at nine units. NATIONAL CENTER FOR STATE COURTS AND THE SPANGENBERG GROUP, WORKLOAD AND PRODUCTIVITY STANDARDS: A REPORT TO THE OFFICE OF THE STATE PUBLIC DEFENDER 82–93 (July 28, 1989).

assigned counsel are involved, the administrator of the program should reassign cases to other private counsel or request the defender organization to provide representation. No additional cases should be given to the assigned counsel until the program administrator is assured that the workload has been brought under control. In the case of a defender program with excessive workload, additional cases must be refused and, if necessary, pending cases transferred to assigned counsel. In order to ease workload pressures, the statute of one statewide defender program authorizes the agency to engage private counsel "on a case basis whenever needed to meet caseload demands."[18] The agency is also given authority to "divide the case workload . . . between the professional staff and the trial pool of attorneys."[19] The capability of reducing excessive workloads for both defenders and assigned counsel is greatly aided where the programs are fully independent of judicial and political controls.[20]

Standard 5-5.4. Impact litigation

(a) The legal representation plan should permit pursuit of litigation which affects:

(i) substantial numbers of similarly situated clients of the program, or

(ii) fundamental rights which cannot otherwise be effectively protected.

(b) Any such litigation should be undertaken only when it is in the best interests of the affected clients.

History of Standard

The standard is new.

Related Standards

ABA Standards for Providers of Civil Legal Services to the Poor 5.3, 6.5 (1986).

18. N.J. STAT. ANN. § 2A:158A-9 (1971 & Cum. Supp. 1981–1982).
19. *Id.*
20. *See* standards 5-1.3 and 5-4.1.

Commentary

The defender organization in each jurisdiction is best equipped and trained to do that for which it was created: provision of quality services in the defense of criminal cases. However, the legal representation plan in every jurisdiction should permit the defender office to initiate separate legal proceedings on behalf of clients of the program. Such cases, in which the clients become plaintiffs in either individual or class actions, may be appropriate when substantial numbers of clients are similarly situated or where the state or its agents violate fundamental rights which cannot otherwise be protected. Clients of defender offices are, definitionally, without the resources to afford counsel. As such, these clients usually are not in a position to pursue legal actions as plaintiffs in order to protect legal rights that may be important to their cases. The standard does not suggest that the defender office must take all cases in which such action is requested; it only urges defender offices (and their funding sources) to recognize that such actions should be permitted, if, in the judgment of the office and after discussion and consent from affected clients, they are necessary.

Examples of cases are numerous. They have included actions to protect attorney-client communications, where jail officials were reading client correspondence; actions to keep juvenile clients in clean, uncrowded and conveniently located facilities; or actions to challenge improper jury selection procedures that affect large numbers of the agency's clients.[1] The source of authority for such actions may be implicit in the creation of the office,[2] or may be part of the office's organizational structure.[3]

In some jurisdictions where the workload problem has been particularly acute, defender organizations have instituted lawsuits to challenge requirements that they be required to take additional cases.[4] Such

1. Each of these actions was actually pursued by the Los Angeles public defender office in the 1970s. Bohne, *The Public Defender as Policy-Maker*, 62 JUDICATURE 176, 178–180 (Oct. 1978).

2. *Id.*

3. There are specialized litigation units, for example, in defender offices in the District of Columbia, the Philadelphia Defender Association and the New York Legal Aid Society.

4. *See* standard 5-5.3. *E.g.*, Gardner v. Luckey, 500 F.2d 712 (5th Cir. 1974); Wallace v. Kern, 481 F.2d 621 (2d Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974); Noe v. County of Lake, 468 F. Supp. 50 (N.D. Ind. 1978), *aff'd without opinion*, 601 F.2d 595 (7th Cir. 1979); Family Division Trial Lawyers v. Moultrie, 725 F.2d 695 (D.C. Cir. 1984); Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988), *on pet. for rehearing and suggestions for rehearing en banc*, 896 F.2d 479 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 2572.

"systemic" attacks have lead to significant improvements in defender systems. Fears of political recriminations or lack of resources may make the defender program reluctant to pursue such actions.[5] In such instances, the office may cooperate with other interested parties in bringing the action.[6] In others, the action is brought by attorneys disaffected with little or no compensation for their services who then bring suit to recover fees and expenses.[7] The growth of these actions in recent years shows that litigative solutions are often the only effective means of forcing salutary changes in defender systems.

5. *See, e.g.*, State v. Evans, 129 Ariz. 153, 629 P.2d 989 (1981) (Attorney General and county attorneys lack standing to prohibit county public defenders from pursuing federal habeas corpus on behalf of all agency clients under sentence of death, where the actions of the public defenders were alleged to have exceeded statutory authority).

6. In Connecticut, for example, the Connecticut Civil Liberties Union brought an action on behalf of seven inmates in state habeas corpus proceedings, alleging that the Public Defender's Office had unreasonably delayed the filing of their appeals. The office cooperated in providing information on the situation of each client. Gaines v. Manson, 194 Conn. 510, 481 A.2d 1084 (1984).

7. State ex rel. Partain v. Oakley, 227 S.E.2d 314 (W. Va. 1976); Hulse v. Wifvat, 306 N.W.2d 707 (Iowa 1981); Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986); DeLisio v. Alaska Supreme Court, 740 P.2d 437 (Alaska 1987); State ex rel. Stephan v. Smith, 747 P.2d 816 (Kan. 1987); Jewell v. Maynard, 383 S.E.2d 536 (W.Va. 1989); State v. Ryan, 444 N.W.2d 656 (Neb. 1989); Wilson v. State, 574 So. 2d 1338 (Miss. 1990); Arnold v. State, 306 Ark. 294 (1991); State v. Lynch, 769 P.2d 1150 (Okla. 1991). These systemic attacks are analyzed in Note, (Un)Lucky v. Miller: *The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 Yale L. J. 481 (1991); Margulies, *Resource Deprivation and the Right to Counsel*, 80 J. CRIM. L. & CRIMINOLOGY 673 (1989); Wilson, *Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 203 (1986); Bright, et al., *Keeping* Gideon *from Being Blown Away*, 4 CRIM. JUST. 10 (Winter 1990); CRIMINAL DEFENSE TECHNICAL ASSISTANCE PROJECT, DEVELOPING STRATEGIES FOR RESOLVING WORKLOAD PROBLEMS AND CONTROLLING CASELOADS (Undated monograph, Abt Associates, Cambridge, Mass.).

PART VI.

STAGE OF PROCEEDINGS

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.

History of Standard

The first sentence in this edition was the last sentence of the same standard in the second edition.

A new third sentence was added regarding the provision of two qualified attorneys in capital cases at trial. It is taken from the language of an ABA resolution adopted at the 1985 Midyear Meeting.

The last sentence was revised. The word "promptly" was added to denote the urgency with which action should be taken, and the phrase "contractor for services" was also added to conform with changes made throughout the chapter.[1]

Related Standards

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 2.1 (1989).

ABA Standards for Criminal Justice 4-2.1 (3d ed. 1993).

ABA Standards for Criminal Justice 10-4.1, 10-4.2, 14-1.3, 22-3.1 (2d ed. 1980).

---

1. *See* Part III., Contracts for Services.

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.1, 13.3 (1973).

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Defense Services III-18 (1984).

National Legal Aid and Defender Association, National Study Commission on Defense Services 1.2-1.4 (1976).

National Legal Aid and Defender Association, Standards for Defender Services II.2 (1976).

National Legal Aid and Defender Association, Standards for the Administration of Assigned Counsel Systems 2.5 (1989).

Commentary

Decisions of the Supreme Court have held that the right to representation by counsel attaches at "critical stages" that occur prior to trial, such as custodial interrogations conducted by law enforcement authorities,[2] lineups conducted after the initiation of adversary proceedings,[3] and preliminary hearings.[4] The Court also has recognized that the right to counsel may also apply at preliminary judicial proceedings where pleas are required to be entered that are later used against defendants or where defenses must be claimed that are irretrievably lost if not asserted.[5] This standard, however, extends beyond the Supreme Court's decisions, for it applies to situations that have not been held to be "critical stages" within the meaning of the Sixth Amendment. Thus, the standard recommends that counsel be provided "as soon as feasible after custody begins," assuming that this event occurs, as it usually does, prior to the defendant's appearance before a judicial officer or the filing

2. Miranda v. Arizona, 384 U.S. 436 (1966).

3. Kirby v. Illinois, 406 U.S. 682 (1972).

4. Coleman v. Alabama, 399 U.S. 1 (1970).

5. White v. Maryland, 373 U.S. 59 (1963) (plea entered at arraignment and in the event of later trial could be introduced in evidence against defendant); Hamilton v. Alabama, 368 U.S. 52 (1961) (defense of insanity was required to be pleaded at arraignment or lost).

of formal charges.[6] Indeed, any qualified person who needs the assistance of counsel before being taken into custody, or even before the filing of formal criminal charges, should be able to receive that assistance if requested.[7]

Effective representation of the accused requires that counsel be provided at the earliest possible time. Often there are witnesses who must be interviewed promptly by the defense lest their memories of critical events fade or the witnesses become difficult to locate. Where the accused is incarcerated, defense counsel must begin immediately to marshal facts in support of the defendant's pretrial release from custody. Counsel's early presence in the case can also sometimes serve to convince the prosecutor to dismiss unfounded charges, to charge the accused with less serious offenses, or to divert the case entirely from the criminal courts.[8] Perhaps most important, unless the indigent accused is provided counsel at the earliest possible time, discrimination occurs between the poor defendant and the defendant of financial means: the latter is able to afford counsel and frequently acquires legal representation well before formal commencement of adversary proceedings. This standard seeks to provide for the indigent accused similar representation opportunities.

To aid in achieving the goal of early representation by counsel, the standard recommends that the appropriate authorities assume responsibility for notifying the defender or assigned-counsel programs when a person in custody is without counsel or requests to see an attorney.

---

6. However, the Supreme Court has held in United States v. Gouveia, 467 U.S. 180, (1984), that the Sixth Amendment does not require the appointment of counsel prior to the initiation of adversary judicial proceedings against indigent inmates who are confined in administrative detention for approximately nineteen months while being investigated for criminal activities committed in prison. Standard 5-6.1 does not specifically address the type of fact situation involved in *Gouveia*, although its underlying rationale is inconsistent with the Supreme Court's result in the *Gouveia* case. *See also* ABA STANDARDS FOR CRIMINAL JUSTICE 23-3.3 (2d ed. 1980), which deals with alleged criminal misconduct of prisoners.

7. The ABA's Grand Jury Policy and Model Act suggests that it is appropriate to appoint counsel in some circumstances during grand jury proceedings. *See* ABA GRAND JURY POLICY AND MODEL ACT (1977–1982).

8. A national study by the Justice Department found, for example, that early representation by appointed counsel improved the accuracy of bail setting and early release of defendants without danger to the public, promoted prompt and efficient case processing and resolution, improved the attorney-client relationship, and made defender programs more cost-effective. U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, EARLY REPRESENTATION BY DEFENSE COUNSEL FIELD TEST: FINAL EVALUATION REPORT (The URSA Institute, August 1984).

By implication, this standard necessarily imposes a responsibility on defender and assigned-counsel programs to provide representation to defendants at early stages of proceeding. Indeed, to implement fully the goal of this standard, defender and assigned-counsel programs should publicize their availability in courts and detention facilities, be prepared to provide emergency twenty-four-hour representation, and conduct routine daily checks of detention facilities to ascertain whether unrepresented defendants are present. Similarly, the ABA Model Rules impose on prosecutors the obligation not to give any advice to defendants who are unrepresented except the advice to obtain counsel, without cost if necessary.[9]

The requirements of capital litigation have made the appointment of two attorneys at trial a necessity. The process by which the two counsel enter a capital case is, of course, no different than any other covered by this standard. In 1985, at its Midyear Meeting, the ABA adopted a resolution stating that in the trial of capital cases two attorneys should be appointed as trial counsel. One person is to act as primary defense counsel and the other as co-counsel. Both are to have "substantial trial experience which includes the trial of serious felony cases," as is suggested by standard 5-2.2.[10] The appointment of co-counsel lessens the burden on primary counsel and provides that attorney with both research assistance and emotional support. The second attorney provides a fresh perspective. Most important, the two attorneys are necessary for the additional duties created by the need for an integrated defense at bifurcated proceedings dealing first with guilt or innocence and later with a sentence of either death or some lesser penalty. In capital trials, courts should be most concerned with fairness, not economy.

Standard 5-6.1 is consistent with the recommendations of other national organizations. The National Advisory Commission urges that representation begin "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."[11] Likewise, the National Legal Aid and Defender Association states that representation should be available when a person

9. ABA MODEL RULES OF PROFESSIONAL CONDUCT 4.3 (1983).

10. Similar criteria for the appointment of counsel are found in recent federal legislation dealing with the appointment of qualified counsel for the representation of persons under sentence of death for federal capital crimes. Comprehensive Drug Abuse Prevention and Control Act of 1990, 21 U.S.C.A. § 848(q)(4) through (9) (1992).

11. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 13.1 (1973).

is arrested, detained, or "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. . . ."[12]

Standard 5-6.2. Duration of representation

Counsel should be provided at every stage of the proceedings, including sentencing, appeal, certiorari and postconviction 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.

History of Standard

The insertion of the word "certiorari" in the first sentence is consistent with an ABA resolution calling for appointment of counsel by the Supreme Court for preparation of certiorari petitions, adopted in 1979.

A new second sentence was added to make explicit reference to provision of counsel in all aspects of capital representation, including clemency. This language is consistent with both the ABA *Guidelines* in capital cases, incorporated into this chapter at standard 5-1.2 above, and the recent recommendations of the ABA on provision of appointed counsel in federal habeas corpus proceedings, which differ only in recommending that the attorney appointed after trial be a person other than trial counsel.[1]

Related Standards

ABA Guidelines for the Appointment and Performance of Counsel in Capital Cases 11.9.1-11.9.5 (1989).

ABA Standards for Criminal Justice 4-8.1-4-8.6 (3d ed. 1993).

ABA Standards for Criminal Justice 11-5.3, 14-1.3, 18-6.3, 18-7.5, 20-2.2, 21-2.2, 21-3.2, 22-4.3, 22-5.2 (2d ed. 1980).

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.1 (1973).

---

12. NLADA, NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 1.2 (1976).

1. ABA TASK FORCE ON DEATH PENALTY HABEAS CORPUS, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES (Oct. 1989).

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Defense Services III-23 (1984).

National Legal Aid and Defender Association, National Study Commission on Defense Services 5.11 (1976).

National Legal Aid and Defender Association, Standards for Defender Services 2.3 (1976).

National Legal Aid and Defender Association, Standards for the Administration of Assigned Counsel Systems 2.6 (1989).

Commentary

Stage of Proceedings

Once representation begins as provided in standard 5-6.1, it is important that it continue throughout all subsequent stages of the criminal proceeding. The right to counsel at sentencing is firmly established. The role and responsibilities of counsel at sentencing is discussed in ABA Standard 18-6.3 (2d ed. 1980). The right to counsel for defendants on their first appeal to an appellate court is constitutionally required pursuant to the Supreme Court's 1963 decision in *Douglas v. California.*[2] Although not constitutionally required, counsel normally should be present for the preparation of certiorari petitions and the handling of postconviction petitions.[3]

Continuity in the Trial Court

This standard suggests that the attorney initially appointed to provide representation continue to do so throughout the trial proceedings.[4] This affords the best opportunity for the development of a close and confidential attorney-client relationship. The standard thus rejects the practice in some public defender programs in which "stage" or "horizontal"

2. 372 U.S. 353 (1963). *See also* chapter 21 of the ABA STANDARDS FOR CRIMINAL JUSTICE, second edition, which deals generally with procedures for processing appeals and the duties of appellate counsel.

3. *See* ABA STANDARDS FOR CRIMINAL JUSTICE 5-5.2 (3d ed. 1992), 22-4.3, and 22-5.2 (2d ed. 1980). The U.S. Supreme Court has rejected the right to counsel in both noncapital and capital collateral attacks. Pennsylvania v. Finley, 107 S. Ct. 1990 (1987) and Murray v. Giarratano, 109 S. Ct. 2765 (1989).

4. However, the Supreme Court has held that in some circumstances the Sixth Amendment right to counsel is not violated if a defendant is required to proceed with substitute counsel. *See* Morris v. Slappy, 461 U.S. 1 (1983), discussed at commentary to standard 5-6.3.

representation is used, that is, different public defenders represent the accused at different stages of the proceedings, such as preliminary hearings, pretrial motion hearings, trials, and sentencing. The utilization of stage representation in defender offices has developed due to the belief that it is cost-efficient and because it enables defenders to specialize and often reduces travel time and scheduling conflicts.[5] The disadvantages of such representation, particularly in human terms, are substantial. Defendants are forced to rely on a series of lawyers and, instead of believing they have received fair treatment, may simply feel that they have been "processed by the system." This form of representation may be inefficient as well, because each new attorney must begin by familiarizing himself or herself with the case and the client must be reinterviewed. Moreover, when a single attorney is not responsible for the case, the risk of substandard representation is probably increased. Appellate courts confronted with claims of ineffective assistance of counsel by public defenders have commented critically on stage representation practices.[6] The National Legal Aid and Defender Association—the only other national group to address this issue specifically—also has recommended that clients receive only one attorney throughout the trial proceedings.[7]

Continuity on Appeals

This standard is silent on the issue of whether trial counsel should be required to provide appellate representation. In support of appointing new counsel on appeal, it is argued that a fresh lawyer may perceive issues from the transcript which trial counsel may miss, due to closeness and familiarity with the case. It also is suggested that new counsel on appeal is necessary in order to assure that arguments regarding ineffective assistance of counsel are presented to the appellate court. In

5. *See* L. McIntyre, The Public Defender: The Practice of Law in the Shadows of Repute 101–102, 134–135 (1987).

6. *E.g.*, Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) ("in such an institutionalized system there are inherent the risks of a loss of the close confidential relationship between litigant and counsel and the subordination of an individual client's interest to the larger interest of the organization"). *See also* United States ex rel. Thomas v. Zelker, 332 F. Supp. 595 (S.D.N.Y. 1971) (in determining whether defendant had been afforded effective assistance of counsel, court considered the fact that defendant was represented by at least four public defenders at various stages before trial and was not aware who was acting as his attorney at any given time).

7. National Legal Aid and Defender Association, National Study Commission on Defense Services 5.11 (1976).

addition, the brief-writing skills required of appellate counsel may not always be possessed by trial attorneys. On the other hand, it is said that familiarity with the case greatly facilitates preparation of the brief and oral argument. Significantly, the plans adopted by most federal courts pursuant to the Criminal Justice Act of 1964 generally provide for continuity of representation through appeal.

Where local rule requires that trial counsel normally provide representation on appeal, in some instances the practice may impose an unreasonable burden. An attorney's other professional commitments, for example, may not afford sufficient time to prepare a time-consuming appeal. Alternatively, counsel may believe that there is a nonfrivolous issue concerning whether counsel rendered effective assistance in the trial court. Or the geographic separation of the trial and appellate courts may impose a serious travel hardship. Whenever any of these circumstances are present, counsel should be encouraged to inform the appointing authorities and arrangements should be made to assign counsel better able to carry the case forward.

In defender programs, it may be appropriate to establish an appeals division, which can lead to substantial specialization in brief writing and oral argument. Other programs develop a system of rotation between the trial and appellate divisions, which provides a wide range of flexibility and opportunities for new experience. A defender who has numerous trial commitments may find it difficult to devote sufficient time to brief preparation. When the trial lawyer from the defender program does not prepare the brief, he or she should at least be available to consult with the appellate attorney concerning possible issues on appeal. If the defender attorney on appeal believes that an issue of ineffective assistance of counsel should be presented, the defender program should be excused and private counsel appointed to the case. Unless this is done, the appellate lawyer from the defender office will be faced with a conflict of interest in complaining about the conduct of a colleague who represented the client in the trial court. The problem is avoided in jurisdictions that have established wholly independent statewide appellate defender programs.[8]

8. *E.g.*, CAL. GOVT. CODE § 15421 (West 1980); ILL. ANNOT. STAT. ch. 38, § 208-1 et seq. (Smith-Hurd Cum. Supp. 1980–1981).

Standard 5-6.3. Removal

Representation of an accused establishes an inviolable attorney-client relationship. Removal of counsel from representation of an accused, therefore, should not occur over the objection of the attorney and the client.

History of Standard

No changes were made to this standard.

Related Standards

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 7.1 (1989).

National Legal Aid and Defender Association, National Study Commission on Defense Services 5.12 (1976).

Commentary

Counsel for indigent defendants should have total freedom to represent their clients as they deem professionally appropriate. Whether selected to provide representation by the judiciary or whether chosen, as recommended herein, "by the administrators of the defender, assigned-counsel and contract-for-services programs,"[1] attorneys should not have to fear that zealous representation of clients may result in their removal. Clients, moreover, should have the right to continue satisfactory relationships with defense lawyers in whom they have confidence and trust.[2] Significantly, where retained counsel are involved, courts have held that a lawyer cannot, consistent with the Sixth Amendment,

1. Standard 5-1.3.

2. However, the Supreme Court has held that a defendant's Sixth Amendment right to counsel is not violated where, six days before trial, defendant's original counsel from the public defender's office is replaced by another public defender, original counsel was hospitalized and replacement counsel assured the trial court that he had time to prepare and did not need a continuance. Morris v. Slappy, 461 U.S. 1 (1983). Also, the Court in this case rejected the argument that the Sixth Amendment right to counsel includes the right to a "meaningful attorney-client relationship." 461 U.S. at 14. ABA STANDARDS FOR CRIMINAL JUSTICE 5-6.2 and 5-6.3 (2d ed. 1980), and accompanying commentary, are cited with approval in Morris v. Slappy, 461 U.S. at 24 n.6. (Brennan, J., concurring).

be removed over the objection of the defendant.[3] Some state courts have recognized a state constitutional right to "trust and confidence" in appointed counsel.[4]

Ideally, this standard also should apply in cases involving an attorney's representation of multiple parties where a client, after being informed of a potential conflict of interest, wishes to continue the attorney's employment.[5] The National Legal Aid and Defender Association states that "the defense system should not terminate or interfere with [the attorney-client] . . . relationship without great justification, and the attorney should resist efforts by the court to terminate or interfere with that relationship."[6]

3. *E.g.*, United States v. Seale, 461 F.2d 345 (7th Cir. 1972); Releford v. United States, 288 F.2d 298 (9th Cir. 1961); Lee v. United States, 235 F.2d 219 (D.C. Cir. 1956); People v. Crovedi, 417 P.2d 868 (Cal. 1966). One exception occurs when counsel is to be paid with the proceeds of criminal activity which are the subject of forfeiture under federal law. Caplin & Drysdale, Inc. v. U.S., 491 U.S. 617 (1989) and Monsanto v. U.S., 491 U.S. 600 (1989).

4. *E.g.*, Harris v. People, 567 P.2d 750 (Cal. 1977); Amadeo v. State, 384 S.E.2d 181 (Ga. 1989).

5. The U.S. Supreme Court, however, has held that a trial court acted within its discretion in refusing to accept defendant's request to substitute counsel who had been representing two separately charged accomplices, although the defendant had executed the appropriate waivers. Wheat v. United States, 486 U.S. 153 (1988). The majority rejected the contention that waivers by all affected defendants cure any problem created by multiple representation.

6. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 5.12 (1976).

PART VII.

ELIGIBILITY FOR ASSISTANCE

Standard 5-7.1. Eligibility; ability to pay partial costs

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.

History of Standard

This edition eliminates as redundant the phrase "to themselves or their families" after the word "hardship" in the first sentence, as it appeared in the second edition's standard 5-6.1.

The title and some language in the section is new, but the concepts are not. The title and new language in the second sentence come from what was standard 5-6.2 in the second edition, which dealt, *inter alia*, with a defendant's ability to pay partial costs of defense.

The last sentence of the second edition version of this standard (5-6.1) was inappropriate here. It was moved to current standard 5-1.4 (3d ed. 1992).

Related Standards

ABA Standards for Providers of Civil Legal Services to the Poor 2.1 (1986).

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.2 (1973).

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Defense Services III-3 (1984).

National Legal Aid and Defender Association, National Study Commission on Defense Services 1.5 (1976).

National Legal Aid and Defender Association, Standards for Defender Services II.1 (1976).

National Legal Aid and Defender Association, Standards for the Administration of Assigned Counsel Systems 2.3 (1989).

Commentary

Financially Unable/Substantial Hardship

The fundamental test for determining eligibility for counsel should be whether persons are "financially unable to obtain adequate representation without substantial hardship." All of the other nationally recognized standards on defense services cited in the related standards section also adopt a "financial inability/substantial hardship" test. The federal Criminal Justice Act of 1964[1] and the statutes in a great majority of the states invoke the test of "inability to afford counsel" or the equivalent, and many mention substantial hardship.[2] In many states, the standards for providing counsel are detailed and make specific references to such factors as income, expenses, liquid assets, and number and ages of dependents.[3] It is common now for states to use variations on the Legal Services Corporation's poverty formula.[4]

No state uses only "indigency" as the basis for providing counsel. This test is rejected because it confuses the question of the right to be provided counsel with issues about eligibility for public welfare assistance and suggests a rigid standard for every defendant without regard to the cost of obtaining legal services for a particular case. One use of eligibility for welfare or public assistance, however, is the development of "presumptive eligibility" in criminal cases. The major national study of eligibility criteria recommended adoption of the system used in a number of states whereby any applicant for appointment of counsel who is a current recipient of state or federally administered public assistance is automatically considered eligible for appointed counsel without further inquiry.[5]

---

1. 18 U.S.C. § 3006A(b)(1992).

2. U.S. Department of Justice, National Institute of Justice, Containing the Costs of Indigent Defense Programs: Eligibility Screening and Cost Recovery Programs 13, 78 (Sept. 1986).

3. *Id.* at 78.

4. In 1986, for example, the Legal Services Corporation formula was used in Colorado and North Dakota. *Id.* at 16–18.

5. *Id.* at 15. "[I]t appears that a large number of criminal defendants fall into this category." *Id.* Recommendation 2, at 69.

Eligibility Guidelines

A majority of states now have formal eligibility criteria.[6] Perhaps because statutes concerning eligibility are written in general terms, however, there are considerable disparities in eligibility determinations among the states and sometimes within the same state. In order to assure fair eligibility determination and equal treatment for defendants similarly situated, it is essential that there be detailed written guidelines that implement this standard's "financial inability/substantial hardship" test or other tests of a similar nature.

Standard 5-7.1 contains an important recommendation which should be included in all regulations relating to eligibility: the ability of defendants to post bond should not be used as a basis to deny providing counsel. The ability to post bond is rejected as a basis for denying counsel because it requires the accused to choose between receiving legal representation and the chance to be at liberty pending trial. Since a person's freedom prior to trial often is essential to the preparation of an adequate defense, placing the defendant in this dilemma is arguably a denial of the effective assistance of counsel.[7]

A host of other specific factors should also be considered in preparing eligibility guidelines. For example, the National Legal Aid and Defender Association suggests that a defendant's "liquid assets" be taken into account; these are defined as "cash in hand, stocks and bonds, bank accounts and any other property which can be readily converted to cash."[8] While a defendant's home and car are suggested as factors to be considered by the National Advisory Commission[9] and the National Legal Aid and Defender Association,[10] exclusion of these factors is recommended by the latter's National Study Commission Recommendations since neither is capable of immediate conversion to cash and

---

6. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY 34 (Sept. 1986). This is particularly true in those states with statewide public defender programs. *Id.*

7. A District of Columbia statute recognizes the importance of a defendant's pretrial freedom by providing for temporary custodial release upon a showing that such release is necessary to the preparation of a viable defense. D.C. CODE § 23-1321(h)(2) (Cum. Supp. 1983). *See also* United States v. Reese, 463 F.2d 830 (D.C. Cir. 1972).

8. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 1.5 (1976).

9. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 13.2 (1973).

10. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STANDARDS FOR DEFENDER SERVICES II.1(a) (1976).

both are necessities. Indeed, in a case where counsel was denied because of ownership of an automobile, the Supreme Court of Hawaii reversed on the grounds that the defendant's vehicle was a reasonable necessity of life.[11] Additional factors to consider in establishing eligibility guidelines include the debts and liabilities of the accused, the cost of retaining competent counsel in the area, and the defendant's own assessment of whether representation can be obtained without creating substantial personal family hardship. Eligibility criteria also should be regularly updated to account for inflation and increases in the cost of living.

Standard 5-7.2. Reimbursement, notice and imposition of contribution

(a) Reimbursement of counsel or the organization or the governmental unit providing counsel should not be required, except on the ground of fraud in obtaining the determination of eligibility.

(b) Persons required to contribute to the costs of counsel should be informed, prior to an offer of counsel, of the obligation to make contribution.

(c) Contribution should not be imposed unless satisfactory procedural safeguards are provided.

History of Standard

The title of the standard was changed, and the text has been significantly modified. The first sentence of standard 5-6.2 in the second edition, dealing with partial ability to pay, has been transferred intact to standard 5-7.1 in the third edition. New standard 5-7.2 has been divided into three subsections.

Subsection (a) continues the second edition policy against the use of "reimbursement," defined in commentary as applying "where the defendant is ordered at the termination of proceedings to make payments for the representation that has been provided."

"Contribution," discussed in commentary as a payment "at the time counsel is provided or during the course of proceedings," is implicitly approved in black-letter and discussed with approval in commentary.

11. State v. Mickle, 56 Haw. 23, 525 P.2d 1108 (1974).

This policy on the use of contribution also reflects the commentary discussion in the second edition.

Subsections (b) and (c) were added to protect procedural rights of the accused in the event that contribution is imposed. Subsection (b) contains a notice provision, while subsection (c) suggests the adoption of appropriate due process protection.

New standard 5-8.1 strikes a phrase found in the second edition (standard 5-7.1) about advice by the court to defendants as to the provision of counsel "without cost." Subsection (b) of the third edition standard 5-7.2 seeks to reconcile the apparent conflict in these standards between the obligation of advice of the right to appointed counsel at state expense and the potential obligation of the defendant to contribute to the costs of counsel. The third edition uses the word "person" in reference to those against whom contribution is assessed, bringing the language herewith into conformity with that of standard 5-8.1, which uses the term "person" when referring to an offer of counsel prior to formal charging.

Related Standards

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.2 (1973).

National Legal Aid and Defender Association, National Study Commission on Defense Services 1.7 (1976).

Commentary

This standard refers to "reimbursement" (sometimes called "recoupment") and to "contribution." The concepts are different, although the goal is the same in each: to obtain repayment for the costs of counsel to the state from some defendants who can afford to make such payments either because their lack of assets is temporary or because they fall just below the margin of legal indigency. It is the point in the proceedings at which the imposition of the obligation occurs that distinguishes the two terms. "Reimbursement" applies to situations where the defendant is ordered at the termination of the court proceedings to make payments for the representation that has been provided. Most

states have enacted laws that authorize reimbursement to be ordered,[1] and the Supreme Court has sustained the constitutionality of one such statute.[2] In addition, the federal Criminal Justice Act of 1964 and several state statutes authorize a "contribution" from defendants,[3] whereby the defendant makes payment, usually of a nominal fixed sum, for the representation provided either at the time counsel is first appointed or during the course of the trial proceedings.

Notwithstanding the constitutionality of reimbursement statutes, this standard recommends that defendants be ordered to provide reim-

1. A 1982 national survey found that 75 percent of all counties reported that they had some system for the recovery of costs, although distinction was made between recoupment and contribution. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY 34 (Sept. 1986). A later survey found that thirty-six states had specific statutes which authorize recoupment. U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, CONTAINING THE COST OF INDIGENT DEFENSE PROGRAMS: ELIGIBILITY SCREENING AND COST RECOVERY PROCEDURES 33, 77, Appendix A (Sept. 1986).

2. In Fuller v. Oregon, 417 U.S. 40 (1974), the Supreme Court sustained the constitutionality of the Oregon statute, which applied only to convicted defendants and which required the trial court to consider whether imposing recoupment could result in substantial hardship to the defendant. *But see* James v. Strange, 407 U.S. 128 (1972) (Kansas recoupment provision that did not provide indigent defendants with the same exemptions as other judgment debtors held unconstitutional as a violation of equal protection); Rinaldi v. Yeager, 384 U.S. 306 (1966) (New Jersey recoupment statute requiring only convicted defendants who are imprisoned to repay the cost of a transcript on appeal violated equal protection); Giaccio v. Pennsylvania, 382 U.S. 399 (1966) (recoupment statute that allowed a jury to require the defendant to pay court costs if found guilty of "misconduct" held void for vagueness). *See also* Olson v. James, 603 F.2d 150 (10th Cir. 1979) (statute allowing state to garnish wages and recoup cost of counsel even from indigent defendants who are acquitted held unconstitutional in violation of Fourteenth Amendment); Opinion of the Justices, 121 N.H. 531, 431 A.2d 144 (1981) (defendants receiving legal assistance must be afforded the same protection against garnishment of wages as civil judgment debtors).

In Fitch v. Belshaw, 581 F. Supp. 273 (D. Or. 1984), a later Oregon recoupment statute, which permitted courts to require indigent defendants, regardless of financial status and without notice or hearing, to reimburse the state for court-appointed attorneys, was held to violate the Sixth and Fourteenth Amendments. Unlike the statute upheld in *Fuller v. Oregon, supra*, this statute was applicable to both convicted and acquitted defendants, contained no standards for whether a defendant was able to pay, and did not permit a defaulting defendant to show that the refusal to pay was unintentional.

3. 18 U.S.C. § 3006A(f) (1982). Annot. 51 A.L.R. Fed. 561 (1981) (propriety of order under 18 U.S.C. § 3006A(f) (1976) directing contribution payment by or on behalf of defendant). The national study of cost recovery programs found that eleven states had statutes which permit contribution. CONTAINING THE COST OF INDIGENT DEFENSE PROGRAMS, *supra*, note 1, at 49–55 and Appendix A, at 77.

bursement for their defense costs only in instances where they have made fraudulent representations for purposes of being found eligible for counsel. Defendants who fraudulently misrepresent their financial condition to the person who determines eligibility should not be permitted to benefit from their deceit, and the defendant's lawyer has an ethical duty to reveal the misrepresentation to the court.[4] On the other hand, there are compelling policy reasons for not routinely requiring defendants to reimburse the state or local treasury for the cost of their representation. The offer of free legal assistance is rendered hollow if defendants are required to make payments for counsel for several years following conviction. Reimbursement requirements also may serve to discourage defendants from exercising their right to counsel, and long-term duties to make payments for representation may interfere with the rehabilitation of defendants.[5]

Policy considerations are different if defendants with limited financial resources are required to make contributions for their defense at the time counsel is provided or during the course of the proceedings. Such contribution orders do not impose on defendants long-term financial debts and normally are not entered unless there is a realistic prospect that the defendants can make reasonably prompt payments. Accordingly, contribution orders, in contrast to orders for reimbursement, are less likely to chill the exercise by defendants of their right to counsel. Because of the difference between contribution and reimbursement, standard 5-7.2 specifically precludes only reimbursement. Should contributions be required of defendants, however, in order to avoid interference with the attorney-client relationship, either the court or its

4. *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT 3.3 (a)(2) (1983) ("A lawyer shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a . . . fraudulent act by the client. . . .").

5. These problems are especially evident where repayment of costs is made a consideration of probation. Imposing such a condition has been challenged on the ground that it unduly chills the defendant's constitutional right to counsel: " 'many indigent defendants will come to realize that the judge's offer to supply counsel is not the gratuitous offer of assistance that it might appear to be; that, in the event the case results in a grant of probation, one of the conditions might well be the reimbursement of the county for the expense involved. This knowledge is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation. . . .' " Fuller v. Oregon, 417 U.S. at 51, quoting *In re* Allen, 71 Cal. 2d 388, 391, 455 P.2d 143, 144, 78 Cal. Rptr. 207, 208 (1969). *See also* Annot., 39 A.L.R.4th 597 (1991).

designee, rather than the defender or assigned-counsel program, should be responsible for the collection of funds.[6]

The standard calls for advice to the person to whom an offer of counsel is made that there will be an obligation to make a contribution. This makes clear the judge's obligation not to merely offer counsel without advice as to the consequences of accepting the offer; counsel cannot be offered "without cost" to the defendant when contribution will be part of the obligation of acceptance. Defendants, moreover, appear more willing to accept the obligation when informed of it in advance, and a contribution is easier to collect than when an obligation is imposed after sentencing.

When recoupment is practiced, even though not recommended here, appropriate procedural safeguards should be created. The most significant of these safeguards, as gleaned from the cases and statutes, are:

- the right to notice of the potential obligation;
- the right to an evidentiary hearing on the imposition of costs of counsel, with an attorney present and with the opportunity to present witnesses and to have a written record of the judicial findings;
- the right to a determination of present ability to pay actual costs of counsel and related fees, such as investigative or clerical costs;
- the right to all civil judgment debtor protection;
- the right to petition for remission of fees, in the event of future inability to pay;
- notice that failure to pay will not result in imprisonment, unless willful;
- notice of a limit, statutory or otherwise, on time for the recovery of fees;
- adequate information as to the actual costs of counsel, with the right not to be assessed a fee in excess of those actual costs;
- where any of these rights are relinquished, the execution of a voluntary, knowing and intelligent written waiver, as is required in any instance concerning the constitutional right to counsel.[7]

---

6. The national study on cost recovery programs also recommends contribution over recoupment for many of the same reasons articulated here. CONTAINING THE COST OF INDIGENT DEFENSE PROGRAMS, *supra*, note 1, at 70, Recommendation Five.

7. *See* Wilson, *Bad Policy, Bad Law: Compelling Indigent Defendants to Pay*, 3 CRIM. JUST. 16, 19 (Fall 1988); CONTAINING THE COSTS OF INDIGENT DEFENSE PROGRAMS, *supra* note 1, at 71–72, Recommendation Ten.

The distinction between contribution and reimbursement is recognized by the standards of the National Advisory Commission and the National Legal Aid and Defender Association. The standards of both reject any requirement of reimbursement but state that a defendant my be required, at the time representation is provided, to make a limited financial contribution if it can be done without causing substantial hardship. The National Legal Aid and Defender Association emphasizes that "[t]he contribution should be made in a single lump sum payment immediately upon, or shortly after, the eligibility determination."[8]

Despite the foregoing favorable recommendations, one very practical consideration militates against the use of either reimbursement or contribution: the amounts that can be collected under such programs are negligible.[9] There is, after all, little to be gained from seeking collection from a legally indigent and incarcerated individual.

Standard 5-7.3. Determination of eligibility

Determination of eligibility should be made by defenders, contractors for services, assigned counsel, a neutral screening agency, or by the court. When the eligibility determination is not made by the court, confidentiality should be maintained, and the determinations should be subject to review by a court at the request of a person found to be ineligible. A questionnaire should be used to determine the nature and extent of the financial resources available for obtaining representation. If at any subsequent stage of the proceedings new information concerning eligibility becomes available, eligibility should be redetermined.

History of Standard

The changes in this standard represent a shift from the policy of the second edition's standard 5-6.3. The standard adds neutral screening agencies and courts to defender agencies as appropriate assessors of eligibility for services. The second edition limited eligibility determi-

8. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 1.7(a) (1976).

9. In the last national survey of defense services, the overwhelming majority of counties recovered costs from less than 10 percent of all persons who went through the system. NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY, *supra*, note 1, at 34–35.

nations to defender organizations only. However, the standard now makes explicit that whatever the agency or person who makes an eligibility determination, principles of confidentiality of the communication apply.

Related Standards

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services III.3 (1984).

National Legal Aid and Defender Association, National Study Commission on Defense Services 1.6 (1976).

Commentary

The vast majority of serious criminal cases begin with arrest and a period of detention following which the defendant is brought to court. Standard 5-6.1 recommends that "[c]ounsel . . . be provided to the accused as soon as feasible . . . after custody begins. . . ." Standard 5-7.3 provides maximum flexibility in the determination of eligibility by allowing the inquiry to be made by a full range of personnel or agencies. There are, however, relative advantages and disadvantages in who conducts screening.

It is often appropriate for screening to be conducted by the appointed lawyer directly. The lawyer for the accused, who has a continuing and personal interest in the client's welfare, is likely to conduct eligibility interviews in a dignified manner. Information given during the interview, if candid, may involve revelations as to the proceeds of criminal conduct. The attorney is most able to make judgments about the relationship of information given during the eligibility interview and evidence of guilt or innocence of the offense charged. The suggestion that lawyers make the eligibility determination is consistent with the private attorney model, where retained counsel normally begin by ascertaining whether the client can afford the cost of the requested legal services. In addition, when the eligibility inquiry and determination are made by the defender, assigned counsel or contractor, the attorney-client privilege protects the information disclosed to the lawyer.

If an attorney is not available, it may be appropriate to have paraprofessional personnel of the defender or assigned-counsel program conduct interviews of defendants or, alternatively, to have employees

of pretrial release agencies inquire concerning eligibility. However, in a majority of jurisdictions, the inquiry is conducted by the trial court itself, usually at first appearance.[1] The judge is most often given the final authority to review eligibility decisions, and no particular system of screening has shown itself to have advantages over another.[2]

Whenever an accused is questioned about eligibility for counsel, it is suggested that the information be recorded on a questionnaire based on the guidelines recommended in standard 5-7.1. The use of a questionnaire facilitates rapid determinations of eligibility and, in the event that eligibility is denied, provides a record that can be reviewed by the trial court. An accused who seeks such review should be required to waive the attorney-client privilege respecting the financial information disclosed to the lawyer. If it is decided that the eligibility guidelines have been misapplied so as to screen out an eligible individual, the court should be permitted to order that the defender organization or assigned-counsel program provide representation.

No provision is made in this standard for a court to review a favorable determination of eligibility. As a practical matter, defenders and assigned counsel normally are interested in limiting their caseloads, rather than accepting the cases of persons financially ineligible for representation. Of course, if a private attorney or other person believed that a client was financially ineligible, a complaint could be lodged with the administrators of the defender or assigned-counsel programs, which would have the responsibility for making certain that eligibility guidelines are properly applied. If during the progress of a case new financial information comes to the attention of defenders or assigned counsel, the eligibility of the accused should be redetermined.

This standard is consistent with provisions in most state statutes that vest decisions on eligibility in the courts. Similarly, the federal Criminal Justice Act of 1964 authorizes judges to determine whether the accused is eligible for assigned counsel.[3] These provisions are part of an overall

---

1. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY 34 (Sept. 1986).

2. U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, CONTAINING THE COSTS OF INDIGENT DEFENSE PROGRAMS: ELIGIBILITY SCREENING AND COST RECOVERY PROCEDURES 12 (Sept. 1986). In its recommendations, however, this study implicitly rejects screening in open court by urging that eligibility determinations be "conducted at a centralized location by a single responsible organization. . . ." *Id.* at 70, Recommendation Three.

3. 18 U.S.C. § 3006A(b) (1992).

series of rules that place responsibility for the assignment of counsel on the courts and also empower judges to approve the amounts of compensation to be paid to assigned counsel.[4] In this chapter, in contrast, it is recommended that the court not play a role in the "selection of lawyers for specific cases" (standard 5-1.3(a)) and that "[c]ompensation for assigned counsel . . . be approved by administrators of assigned-counsel programs" (standard 5-2.4). A suggestion that eligibility determinations be limited to defenders or assigned counsel is made by the National Legal Aid and Defender Association.[5]

4. 18 U.S.C. § 3006A(b), (d) (1992).

5. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 1.6 (1976).

PART VIII.

OFFER AND WAIVER

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.

History of Standard

This is a substantial redraft of the second edition's standard 5-7.1. Revision is intended to clarify the standard's concern with nonjudicial mechanisms for provision of information to the custodial accused as to the availability of counsel. This is to be contrasted with the following section, which focuses on the provision and waiver of counsel in judicial proceedings. The title of the standard is changed to accord with the policy change, and the standard is now divided into three subsections.

Subsection (a) changes in the first sentence include the addition of the words "preferably by defense counsel" and the substitution of the more precise phrase "legal representation" for "assistance." The second sentence in the second edition was deleted as unnecessary. The third sentence now deletes the word "adequate," as has been done throughout the chapter where it appears in this context.

Subsection (b) transfers a sentence from the end of the second edition version to a new placement, while subsection (c) substitutes a new

sentence which shifts the onus to the defense service provider to assure information and access to counsel.

Related Standards

ABA Standards for Criminal Justice 4-2.1, 4-2.2, 4-2.3 (3d ed. 1993).

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.3 (1973).

National Legal Aid and Defender Association, National Study Commission Recommendations 1.2, 1.3, 1.4 (1976).

National Legal Aid and Defender Association, Standards for Defender Services II.2.b (1976).

Commentary

Standard 5-6.1 recommends that representation be provided the accused at the earliest possible time, either when "custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest." Standard 5-8.1 deals with important aspects of achieving early representation by counsel, that is, the party responsible for notifying the accused concerning the right to representation by counsel, where and when such notice should be given, and in what manner it should be provided.

Ordinarily, an offer of counsel should be made to the accused by a lawyer, and this should occur prior to defendant's appearance in court. The defense lawyer is in the best position to explain the advantages of having counsel and the pitfalls apt to be encountered in the absence of legal representation. Moreover, the accused is most likely to regard the defense lawyer as a person interested in protecting the accused's interests. If the offer of counsel is made by a police officer or prosecutor, it is less likely to be stated fairly and to be intelligently understood, due to the adversary relationship between the parties. The private offer of counsel through an attorney also minimizes the risk that information prejudicial to the accused will be revealed in the process.

In urban areas, where many persons are brought daily to a stationhouse, jail, or other central place for booking, it may be best to provide a defender or assigned counsel to make the initial offer of counsel. Alternatively, a defender program may wish to use paralegals for the function. In rural areas, the volume and frequency of arrests and factors of distance may make it impractical to adopt such a system, although

it is undoubtedly possible to have the offer of counsel made by a lawyer over the telephone.

In the event the accused is not contacted and offered the assistance of counsel, he or she should at least be afforded the opportunity to request a lawyer. In order to make this possible, a telephone should be available, as should the telephone numbers of the defender program. The telephone, of course, is only one of various means by which to provide access to counsel for the custodial accused.

The offer of counsel to which this standard is addressed should not be confused with the "warning" required pursuant to *Miranda v. Arizona*[1] to render admissible in evidence statements made by the accused while in custody. Necessarily, the circumstances and terms of such a warning cannot fulfill all the requirements for an offer of counsel, and the fact that a warning valid within the meaning of *Miranda* has been made should not in itself be considered as fulfilling the requirement of a formal offer.

The manner in which counsel is offered to the accused has considerable impact on the decision whether to accept or reject the assistance of counsel. Decisions of the Supreme Court require that the accused be given the opportunity to make an intelligent and uncoerced choice whether to be represented by counsel.[2] The accused cannot make such a choice if the offer is made in language that cannot be understood or is couched in unfamiliar terms. Since, for example, the word "counsel" is an unfamiliar abstraction to many persons, the explanation should emphasize the way in which a lawyer can assist in meeting the problems faced by the accused. Similarly, the accused should be informed that provision of counsel may be accompanied by an obligation of contribution, depending on financial eligibility, so that an informed choice can be exercised.[3]

The other national standard that comes closest to dealing with the subject matter of standard 5-8.1 is that of the National Advisory Commission. The standard, however, does not follow ABA Standard 5-8.1 in urging that advice regarding the right to counsel be given as soon as "[a] person [is] taken into custody or otherwise deprived of liberty. . . ." The Commission states that counsel may be requested by

1. 384 U.S. 436 (1966).

2. *E.g.*, Argersinger v. Hamlin, 407 U.S. 25 (1972); Carnley v. Cochran, 369 U.S. 506 (1962); Von Moltke v. Gillies, 332 U.S. 708 (1948); Johnson v. Zerbst, 304 U.S. 458 (1938).

3. *See* text and commentary to standard 5-7.2.

an accused at a criminal proceeding, and that when such a request is made, "the public defender or appointed counsel should contact the accused."[4] This standard, too, puts the burden on the defender program to assure that information regarding counsel be given to all defendants in custody. This may be by signs prepared by the office, or by pamphlets or business cards describing the services of the office, but the best way to assure accurate information is to provide regular and prompt access to an attorney or other appropriate representative of the program.

Standard 5-8.2. In-court waiver

(a) The accused's failure to request counsel or an announced intention to plead guilty should not of itself be construed to constitute a waiver of counsel in court. An accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed before a judge and a thorough inquiry into the accused's comprehension of the offer and capacity to make the choice intelligently and understandingly has been made. No waiver of counsel should occur unless the accused understands the right and knowingly and intelligently relinquishes it. No waiver should be found to have been made where it appears that the accused is unable to make an intelligent and understanding choice because of mental condition, age, education, experience, the nature or complexity of the case, or other factors. A waiver of counsel should not be accepted unless it is in writing and of record.

(b) If an accused in a proceeding involving the possibility of incarceration has not seen a lawyer and indicates an intention to waive the assistance of counsel, a lawyer should be provided before any in-court waiver is accepted. No waiver should be accepted unless the accused has at least once conferred with a lawyer. If a waiver is accepted, the offer should be renewed at each subsequent stage of the proceedings at which the accused appears without counsel.

4. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 13.3 (1973).

History of Standard

The revised standard now incorporates in a single location standards 5-7.2 and 5-7.3 from the second edition, because both standards deal with in-court provision and waiver of counsel. The two subsections of the new standard make this change by using language very similar to that of the prior standards.

Subsection (a) adds a new third sentence which defines waiver. The new last sentence is a reworded version of the first sentence of former standard 5-7.3.

Subsection (b) is a reworded version of the remainder of former standard 5-7.3. As now written, the standard better accomplishes what was desired—the provision of advice by counsel to all defendants who face the possibility of incarceration as to the consequences of waiver of counsel, prior to the in-court waiver of counsel.

Related Standards

ABA Standards for Criminal Justice 4-3.9 (3d ed. 1993).

ABA Standards for Criminal Justice 6-3.6, 11-5.3(b)(i), 14-1.3, 21-3.2 (2d ed. 1980).

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.3 (1973).

Commentary

The Supreme Court has held that an accused is constitutionally entitled to proceed without counsel.[1] Before the right to pro se representation may be claimed, however, the accused "should be made aware

1. Faretta v. California, 422 U.S. 806 (1975); *see also* McKaskle v. Wiggins, 465 U.S. 168 (1984). *But see* People v. Woodruff, 85 Ill. App. 3d 645, 406 N.E.2d 1155 (1980) (no error occurs when trial court fails to advise defendant of right to proceed pro se); State v. Garcia, 92 Wash. 2d 647, 600 P.2d 1010 (1979) (trial court has no duty to inform criminal defendant of right to proceed pro se). Other duties arise when the court appoints "hybrid" or "standby" counsel. *See also* ABA STANDARDS FOR CRIMINAL JUSTICE 4-3.9 (3d ed. 1993); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS 2.8 (1989).

of the dangers and disadvantages of self-representation,"[2] and a waiver of counsel should not be accepted unless it is entered knowingly and intelligently.[3] Thus, the court should inquire whether the accused apprehends the nature of the charges, the offenses included within them, the allowable punishments, possible defenses to the charges, and circumstances in mitigation thereof, among other factors.[4] Since the question ultimately is the subjective understanding of the accused rather than the quality or content of the explanation provided, the court should question the accused in a manner designed to reveal that understanding, instead of framing questions that call for a simple yes or no response.[5] As the Supreme Court has noted: "A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered."[6]

It follows that the absence of a request for counsel cannot be treated as a waiver. Nor should a defendant who is without counsel be called upon to plead unless a valid waiver of legal representation has been entered.[7] Although a lack of legal knowledge generally will not serve as a basis for denying assertion of the right to self-representation, waivers of counsel have been held invalid where they were not intelligently or understandingly made because of factors indicating the inherent

2. Faretta v. California, *supra* note 1, at 835. *See also* Maddox v. State, 613 S.W.2d 275 (Tex. Crim. App. 1980) (trial judge's allowing defendant to represent self after insufficient warning of the dangers of self-representation held reversible error). *But see* State v. Edwards, 592 S.W.2d 308 (Mo. 1979) (where defendant requests and receives hybrid representation, trial court does not err by failing to warn of the perils of self-representation).

3. *E.g.*, Carnley v. Cochran, 389 U.S. 506, 513–517 (1962). *See also* Edwards v. Arizona, 451 U.S. 477 (1981) (relinquishment of the right to counsel requires a knowing and intelligent waiver from defendants subjected to custodial interrogation).

4. Von Moltke v. Gillies, 332 U.S. 708, 723–724 (plurality opinion of Black, J.) (1948). Four justices in *Von Moltke* determined that the waiver was constitutionally deficient; two additional Justices agreed to reverse due to the inconclusiveness of the record. Carvey v. LeFevre, 611 F.2d 19 (2d Cir. 1979), *cert. denied*, 446 U.S. 921 (1979) (failure to tell defendant about his pending indictment rendered any waiver of counsel ineffective).

5. United States ex. rel. Miner v. Erickson, 428 F.2d 623, 636 (8th Cir. 1970) (dissenting opinion). *See also* Minor v. United States, 375 F.2d 170, 175–179 (8th Cir. 1967) (dissenting opinion).

6. Von Moltke v. Gillies, 332 U.S. at 724 (1948).

7. ABA STANDARDS FOR CRIMINAL JUSTICE 14-1.3 (2d ed. 1980) (indigent defendant not required to plead until the right to counsel is either accepted or validly waived).

incapacity of the accused to comprehend the matter.[8] The requirement that waivers be reduced to writing and made a matter of record helps to assure that the issue of counsel will not be treated lightly, and also aids in minimizing postconviction disputes over the matter of waiver.

An accused who expresses a desire to proceed without counsel may sometimes fail to understand fully the assistance a lawyer can provide. Accordingly, this standard recommends that "[n]o waiver should be accepted unless the accused has at least once conferred with a lawyer." Some courts have recognized that counsel may be assigned by the court for this limited purpose.[9] Such a practice helps to counter the argument that any waiver of counsel by a layperson must be the result of insufficient information or knowledge.

The value and need for legal assistance may become clear to the defendant only at a stage of the proceedings subsequent to the initial offer of counsel and after a waiver has been entered. Since the occasions on which persons appear without counsel should be kept to a minimum (see standard 5-1.1), the earlier waiver of counsel should not be held to preclude the appointment of counsel at a later stage of the proceedings. Accordingly, the offer of counsel should be renewed at each stage of the case, and the defendant should be afforded the opportunity to withdraw the waiver of counsel previously entered.

Provisions in the Uniform Rules of Criminal Procedure are the most detailed of any national standards on the subject of waiver of counsel. These provide that counsel may not be deemed waived unless the relinquishment of legal representation is made "expressly and voluntarily and the court is satisfied that the defendant fully understands" a number of specific matters, including the nature of the charges, the range of penalties, and the assistance a defense attorney can render at trial, at the guilty plea stage, and at sentencing.[10] The Uniform Rules also provide

8. *E.g.*, United States v. Allen, 895 F.2d 1577 (10th Cir. 1990).

9. People v. Culbert, 69 Ill. App. 2d 162, 167, 215 N.E.2d 470, 473 (1966) (dictum); State v. Erickson, 80 S.D. 639, 647, 129 N.W. 2d 712, 716 (1964) (dictum); State v. Thomlinson, 78 S.D. 235, 100 N.W.2d 121 (1960). State ex rel. J.M. v. Taylor, 276 S.E.2d 199 (W.Va. 1981) (juvenile may waive counsel only on advice of counsel); *See also Nineteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1988–1989: Trial: Right to Counsel*, 78 GEO. L.J. 1077 (1990).

10. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM RULES OF CRIMINAL PROCEDURE 711 (1974).

that a court may refuse to accept a waiver of counsel until the accused has consulted with a lawyer. These rules also provide that the court may appoint "standby counsel to assist when called upon by the defendant."[11]

11. *See also* Annot., 98 A.L.R.3d 13 (1980).