

**THE STATE BAR OF CALIFORNIA**

**GUIDELINES ON INDIGENT DEFENSE  
SERVICES DELIVERY SYSTEMS  
(2006)**



*The State Bar  
of California* | Office of Legal Services,  
Access & Fairness Programs

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A ten-member Working Group was appointed by the State Bar Board of Governors in May 2004 and was tasked with the following:

- Collect, review and evaluate current information from a variety of indigent, criminal defense programs and compare to the 1990 Guidelines;
- Obtain public comments on the 1990 version;
- Draft revisions to the Guidelines and distribute draft for public comment; and
- Revise Guidelines and submit final version for approval by the Board of Governors no later than December 2005.

The Working Group members below made substantial contributions to the revised Guidelines and their efforts are greatly appreciated:

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**Sanny Lau, Contract Attorney and Reporter for the Working Group**

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## INTRODUCTION

In California the vast preponderance of persons charged with criminal offenses or subjected to the processes and consequences of the dependency, delinquency or mental health courts are indigent and represented by appointed counsel. In the 1980's, counties were hard pressed to fund defense services as well as the other heavy costs of the criminal justice system. As a result, alternative defense delivery systems were created. Three main service models emerged: (1) contracting with private attorneys, (2) administering assigned counsel programs, and (3) establishing second public defender offices.

A statewide study of defense services by the State Bar's former Standing Committee on the Delivery of Legal Services to Criminal Defendants ("Committee") revealed that among California's 58 counties, there was no consistency in the manner, cost efficiency, and quality of legal services being provided to the indigent accused throughout the state. It also found that the quality and standards of ethics of these services varied widely.

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

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



Among its duties, the Commission was charged with promulgating “voluntary guidelines for systems for the delivery of indigent criminal defense services.” The first set of guidelines drafted by the Commission was approved by the Board of Governors of The State Bar of California in December 1990. These guidelines were modeled after the standards recommended by the American Bar Association (ABA), the National Legal Aid and Defender Association (NLADA), the National Advisory Commission on Criminal Justice Standards and Goals (NAC Standards), and the National Study Commission on Defense Services (NSC Guidelines).

Given the profound changes in the law and the substantially redefined role and concomitant additional responsibilities of practitioners in the fields of juvenile, mental health and criminal jurisprudence since the original guidelines were drafted, it was necessary to update the guidelines to reflect current practices and to help share information with the various programs and jurisdictions regarding proper representation for the indigent accused. To this end, the Board of Governors appointed a Working Group to revise the guidelines in May 2004.

These new guidelines place the greatest emphasis on the standards rather than the distinctions among the various indigent defense legal services delivery systems. The guidelines articulate universal standards, which apply to all indigent defense delivery systems. The method of standards compliance, however, may vary from system to system.

In some jurisdictions, by operation of law, the Public Defender must be appointed in the first instance (in the absence of any legally recognized exception). Likewise, by operation of law in some jurisdictions, the first alternative to the Public Defender is the Second Public Defender, but in others the first alternative is county contracted attorneys. In yet other

jurisdictions, the court is authorized to appoint private counsel in the first instance or as the first alternative to the Public Defender.

There exists the potential for certain distinct advantages in each model of indigent defense delivery systems. Suffice it to state that there is likely to be a crucial potential role for all types of indigent defense delivery systems and these guidelines are intended to apply to each and all of them.

The components of the criminal justice system have embraced, some to a greater or lesser extent, the principles of a new style of jurisprudence in collaborative, therapeutic, problem solving or other specialty courts. Drug treatment courts, mental health treatment courts, DUI courts and others introduce a much less adversarial and more collaborative outcome based approach. Other courts retain more aspects of the traditional adversarial model, such as Proposition 36 and domestic violence courts. Nevertheless, the indigent defense guidelines should be updated to take these new models and roles into account. Moreover, in the field of juvenile delinquency practice the enactment of Senate Bill 459<sup>1</sup> and the promulgation of Rule 1479<sup>2</sup> by the Judicial Council have revolutionized the practice and the guidelines should reflect that change.

The following guidelines discuss standards of representation and quality of services, with suggested applications for each delivery system. When referring to the guidelines, defenders should consider ways in which they might be applied within their particular delivery system.

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1. As codified in California Welfare and Institutions Code § 731 et. seq.  
2. California Rules of Court, rule 1479.

The guidelines encompass not merely norms for lawyers but for all participants in the multi-disciplinary defense delivery systems essential to ensure high quality advocacy and appropriate outcomes.

## GUIDELINES

### I. INDEPENDENCE

The indigent defense provider's ultimate and overriding obligation is to properly represent each individual client. Hence all other loyalties and concerns are subordinate to the best interests of each client. The decisions of the defense provider must not be effected by political influence and must be unaffected by judicial intervention, except to the same extent that a privately retained counsel may properly be influenced by rulings of the court.

#### A. Assigned Counsel and Contract Systems

An attorney representing an indigent criminal defendant owes allegiance, first and foremost to his or her client. If the attorney cannot represent the client's interests, due to a conflict or otherwise, he or she must refuse the appointment, or immediately withdraw from the case. In an assigned counsel system, this should not present a problem, but in a contract system great care must be taken to avoid passing the conflict from one member of a firm to another.<sup>3</sup>

Of equal importance, and more likely to occur, is the situation where there may be no actual lack of independence, but there is the appearance of a loss of independence. When

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3. "contract system" here refers to a system in which an entity contracts to represent indigent criminal defendants for profit. It is necessary to draw this distinction, because most private or non-institutional indigent defense systems will have some form of contract with the county to set forth obligations covered by the contracting entity. Where a single firm, or even a collection of firms has the contract, the temptation to secure a profit at the cost of the client's rights is great.

a judge appoints the attorney, or it is done on an ad hoc basis, the appearance of undue influence is great, and points to the necessity for basing appointments of counsel on a rotational system.<sup>4</sup>

Since county government funds assigned counsel programs in California, care must be taken by the administrators of such organizations to assiduously avoid any conflict with the unequivocal duty of loyalty owed to each individual client. Decisions about what resources are reasonable and necessary to properly prepare a client's case, for example, must be made without regard to political pressure exerted by county government that may threaten the administrator's livelihood or the continued existence of the organization itself. Failure of an administrator to act to protect this core obligation to the client could result in the suspension of the right to practice law or disbarment, for which no indemnification could be effective.

Faithful adherence to the independence guideline may also compel an administrator to challenge court practices that interfere with the duty of client loyalty. Where an assigned counsel system is the primary method of public defense in a county, the administrator should be diligent to assure that the court in fact appoints counsel for indigent people who request the appointment of counsel. Efforts to thwart the right of the indigent accused to the appointment of counsel at public expense may require assigned counsel attorneys to file writs, challenges

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4. Systematic assignment of counsel through a planned program, in lieu of *ad hoc* assignments by the courts, has been uniformly recommended by national professional organizations and governmental study groups. (See American Bar Association Standards for Criminal Justice Providing Defense Services (ABA Standards), standard 5-2.1); The National Legal Aid and Defender Association (NLADA) standard I.2(b); The National Advisory Commission on Criminal Justice Standards and Goals (NAC Standards) Court 13.5; The National Study Commission on Defense Services. (NSC Guidelines), p. 142.)

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

for cause, and peremptory challenges against offending judicial officers. The obligation to protect independence may also make it necessary to alert the public to such behavior by a judicial officer.

The obligation to protect the independence of a defender organization extends to attacks by federal, state, county and local government, law enforcement organizations, and community based organizations or individuals, among others.

If an assigned counsel organization or contract system is the only or primary method of public defense in a county, the administrator should be free to honor requests by indigent persons for representation prior to commencement of court proceedings and formal appointment.

An administrator should have the responsibility to run the program with/or without the aid of a governing board. In order to preserve the administrator's oversight for the program, he or she should serve for a specified period of time, and be removed only for good cause.

Procedures should be established by the administration to monitor attorney conduct in order to enforce reasonable standards of representation. Care must be taken however to avoid violating an attorney's professional independence or chilling zealous representation. Nor should there be interference with the attorney-client relationship, if the client is satisfied with appointed counsel and if counsel is representing the client competently.<sup>5</sup> Care also should be taken not to deny the attorney due process in the procedures for suspension or removal.

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5. See Smith v. Superior Court (1968) 68 Cal.2d 547, 562, 68 Cal.Rptr. 1, 10.

B. Institutional Public Defenders<sup>6</sup>

Institutional public defender offices are departments of county government in California and as such must be managed in many ways in compliance with the provisions of county charters, county ordinances, county policies and procedures and the California Government Code. Nevertheless, the most fundamental and overriding obligation of an institutional public defender, whether elected or appointed, is to properly represent each individual client. Should there develop an unavoidable conflict between the duties, responsibility or allegiance of an institutional public defender as a county manager or department of county government, and the role of said Public Defender in representing an indigent client, the duty to properly represent the client supersedes all other loyalties.<sup>7</sup>

The institutional public defender must resist any efforts by others to cause such a defender to compromise this core duty even at the risk of financial penalty to an individual defender or to the continued existence of the entire defender office. Failure by such a defender to carry out this responsibility could result in the suspension of the right to practice law or disbarment, for which no indemnification would be effective.

Allegiance to the independence guideline may require the institutional public defender to challenge a refusal to properly appoint the public defender in general, as well as an improper refusal to do so under the alleged authority of Penal Code Section 987.05 , or by exceeding the court's authority by purporting to declare the defender unavailable, or by use of the stratagem that accused persons should proceed pro per, despite the lack of any request by

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6. Throughout the guidelines, the term "institutional public defender" will include the Public Defender and the Second Public Defender.

7. See Young v. County of Marin (1987) 195 Cal. App.3d 863, 871, 241 Cal.Rptr. 169, 173.

them to do so, allegedly to enforce their Farretta rights, or an improper attempt to remove the defender under the purported authority of People v. Lucev or People v. Johnson.<sup>8</sup>

Such dubious artifices may require the institutional defender to file writs, challenges for cause, peremptory challenges, complaints to the Presiding Judge or to the Commission on Judicial Performance, as well as by inviting news media to report abuses and to expose such attacks on the defender's independence during the course of judicial elections or in the judicial appointment process.

The institutional defender must be equally as animated and determined if the attacks on independence originate from federal, state, county or local government, law enforcement, law schools, media, community based organizations or individuals.

The institutional defender need not wait until court appointment to commence representation of a client. Such a defender is fully authorized to initiate representation upon request of an indigent or in response to someone acting on behalf of an indigent, such as a family member.<sup>9</sup>

## II. STANDARDS OF REPRESENTATION

Indigent defense providers must act zealously to provide services meeting the mandate of being a "reasonably competent attorney acting as a diligent, conscientious advocate."<sup>10</sup>

This includes, *inter alia*, discharging the following responsibilities in a timely manner:

(1) thoroughly interviewing the clients; (2) obtaining discovery; (3) conducting an in-depth

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8. See Faretta v. California (1975) 422 U.S. 806, 835-836 95 S.Ct. 2525, 2541; People v. Lucev (1986) 188 Cal.App.3d 551, 556-557, 233 Cal.Rptr. 222, 225; People v. Johnson (1980) 26 Cal.3d 557, 162 Cal.Rptr. 431.

9. See California Government Code § 27706.

10. People v. Pope (1979) 23 Cal.3d 412, 424, 152 Cal.Rptr. 732, 738.

factual inquiry (including an investigation if called for); (4) performing all necessary legal research; (5) preserving evidence; (6) securing the appointment of and utilizing necessary expert witnesses; (7) informing the client of critical developments in the preparation of the case; (8) bringing proper legal motions and doing whatever else is necessary to protect each client's legal rights; (9) otherwise preparing for trial or disposition; (10) being aware of and exploring alternatives to sentencing as well as possible and probable sentences; (11) being aware of and investigating direct and collateral consequences of various dispositional alternatives (including but not limited to immigration consequences) and accurately advising the client of such alternatives; and (12) advising clients of appellate rights and maintaining clients' confidences in compliance with Rule 3-100 of the California Rules of Professional Conduct.

A. Assigned Counsel and Contract Systems

Assigned counsel programs and indigent defense contracts should furnish a competent attorney acting as a diligent, conscientious advocate, who undertakes the following responsibilities: (1) careful factual and legal investigation and utilization of needed experts; (2) prompt action to protect a client's legal rights; (3) informing the client of case developments; (4) a demonstrated willingness to try appropriate cases; (5) (for cases to be tried) preparing for jury selection, examination of witnesses, and preparation of arguments; (6) knowing and exploring disposition and sentencing alternatives available in the relevant jurisdiction; (7) advising clients concerning their rights of appeal; (8) refusing to accept more cases than the attorney can competently handle; (9) declining matters which the attorney knows or should know he or she is not competent to handle; and (10) maintaining client confidences and secrets.



Attorneys should maintain adequate office space in the community of appointment and be open during normal business hours to answer phone calls and for appointments with clients who are not in custody. Interviews of clients should be conducted as soon as possible but should take place prior to the first court appearance after appointment.

If an assigned counsel or contract system is the only or primary method of public defense in a county, care should be taken to insure that there is no gap in defense services that might have a negative impact on clients. Thus services such as prejudgment writ litigation in appellate courts should be provided where necessary to protect the interests of the client.

Such assigned counsel or contract systems should be prepared to respond to requests for representation at lineups and for Miranda<sup>11</sup> calls. It may also be appropriate to arrange for services or to coordinate with those who represent current clients at parole violation hearings, since information disclosed at such hearings can have a significant impact on a client's pending case.

Comment:

An attorney's professional responsibilities are set forth in Strickland v. Washington (1984) 466 U.S. 668, 104 S.Ct. 2052; Pope 23 Cal.3d, *supra* at 424; and In re Alvernaz (1992) 2 Cal.4th 924, 937, 8 Cal.Rptr.2d 713. The provisions concerning adequate office space, telephone answering, and prompt interviews are equally important in responding to practical concerns underlying the more general guidelines, and they address frequent complaints by clients about a lack of responsiveness and communication with their appointed attorneys.

## B. Institutional Public Defenders

All members of the institutional defender team (e.g., investigators, paralegals, law clerks, social workers, support staff and attorneys) are included in this standard.

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11. See Miranda v. Arizona, 384 U.S. 486 (1966).

The focus is on assuring that thorough, careful, meticulous, effective and comprehensive services are provided. There should exist no gap in the services spectrum. For example, it is contemplated that the institutional defender provides or arranges for prejudgment writ litigation in appellate tribunals, that similar services are likewise provided in response to writ or appellate action by prosecutor's offices and that when necessary any appropriate administrative law advocacy occurs.

Institutional public defenders must establish a mechanism whereby representation is provided in response for requests for services at lineups and for Miranda<sup>12</sup> calls. It may be necessary and appropriate to provide services, arrange for services or coordinate with others who provide representation, at adult parole violation hearings (pursuant to the recent litigation settlement providing for counsel in such situations)<sup>13</sup> on behalf of clients who are represented by the institutional defender on open pending cases that may be impacted by information disclosed at such parole violation proceedings.

### III. QUALIFICATIONS OF INDIGENT DEFENSE PROVIDERS

Cases must be assessed as to seriousness and complexity and only assigned to indigent defense providers who possess the requisite relevant experience, training and ability necessary for such matters. At a minimum there must be compliance with existing Judicial Council standards regarding qualifications for assignment to capital cases (the trial counsel or appellate counsel standards, whichever applies).

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12. See Miranda v. Arizona, *infra*.

13. See Valdivia v. Schwarzenegger (2002) (U.S.D.C., E.D. Cal.) S-94-0671 LKK/GGH (stipulated order for permanent injunctive relief).

A. Assigned Counsel and Contract Systems

Attorney qualifications for case assignments should be based upon criteria reflecting the necessary relevant experience and training for the various categories of cases handled by the program. Categories of cases should be identified by the level of skill and relevant experience required of attorneys to handle each type. Panels of attorneys should be established for each category of case based on the verifiable experience and skill of each lawyer.

Where indigent defense services are provided pursuant to the provisions of a contract between a county and a bar association or other non-profit agency, the administrator may find the assistance of a peer review committee helpful in reviewing the applications of attorneys to participate on the established panels. Verifiable information to support an application for placement on a panel or for reclassification to a panel that demands more experience and skill should be required of the attorney applicant. If utilized, the peer review committee should be composed of lawyers familiar with the procedures of the local jurisdiction who have relevant experience comparable to that of senior public defenders. At least one member of such a committee should have capital case experience.

In order to ensure the level of skill of panel attorneys, criteria established for each panel should make clear that meeting the minimum requirements does not create an entitlement to participation on a particular panel. The administrator must retain the discretion to deny participation at the level requested, or at all, where an applicant meets the listed minimum requirements but whose skill level and/or past performance does not represent the competence required for quality representation.

In counties where indigent defense services are provided pursuant to a contract with a private law firm or other for-profit entity, care should be taken to assure that only attorneys who have the requisite skill and experience to handle a particular category of cases are assigned to such cases. Including such a requirement in the contract for indigent defense services is highly recommended.

The requirements for panel participation may vary from county to county, and may depend to some extent on the available pool of attorneys. In no event however, should the size and characteristics of the pool of available attorneys be permitted to justify qualifications so minimal that quality representation is endangered. Minimum experience requirements may be assigned to different case categories (e.g., misdemeanors, “wobbler” felonies, felonies with alleged “strike” allegations pursuant to California’s “Three Strikes” law, serious felonies, homicides and capital cases). Qualifications for capital cases are set forth in California Rules of Court, rule 4.117.<sup>14</sup>

#### B. Institutional Public Defenders

It is incumbent upon institutional indigent defense providers to ensure that the performance of all of their various categories of employees be continuously monitored to ascertain competence to properly handle each distinct type of task involved and inherent in the kinds of responsibilities assigned to them.

It is essential that such institutional defenders maintain awareness of the evolution of required competencies of each employee and for each type of case. Furthermore, each institutional defender should operate a system to track the progress and development of each employee so that an appropriate assignment is made to match the knowledge, skills,

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14. See also American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003), guideline 5.1.

experience, and current motivation of each institutional defender employee with the complexity and seriousness of the charges each client faces.

To the maximum extent feasible, and in compliance with any civil service or other public employment rules, the operation of this guideline should be documented in writing and reflected in the general functional assignments, appraisals of promotability as well as assignments to individual cases.

It should be noted that institutional public defenders should continuously engage in a process to achieve a proper match between the current qualifications of the employee and the dimensions of the case(s) to be assigned. Employee qualifications may be dynamic, improving or possibly degrading over time.

#### IV. QUALITY CONTROL

There should exist a mechanism whereby the quality of the representation provided by indigent defense providers is monitored and accurately assessed, employing uniform standards. Likewise, should remedial training or some form of punitive action be needed, a fair and uniform approach should exist. In addition, productivity should be measured, as one legitimate expectation of indigent criminal defense providers is that costs will be reasonably contained.

##### A. Assigned Counsel and Contract Systems

Each jurisdiction shall establish operating rules which promote the overall quality of indigent representation. This section of the guidelines is intended to cover quality issues after an attorney has first established the minimum requirements for eligibility.

An orientation of program policies and procedures should be provided for each attorney before cases are assigned. Entry-level training should be mandatory for all attorneys, unless an attorney's prior experience merits an exception.

In addition to the State Bar's Minimum Continuing Legal Education (MCLE) requirements, assigned or contract counsel systems should require that the attorneys' ongoing legal education include formal training likely to assist the individual attorney's professional development. The required MCLE 25 units per three-year cycle may apply toward the local training requirement if relevant to criminal law representation. However, the local jurisdiction may require more than 25 units and should also require some nexus to criminal law rather than only the MCLE's generic unit requirements. Also, the formal training requirements should be tailored for individual advancement. For example, a very experienced trial attorney who tries death penalty cases will require training which is very different from a new attorney who is just starting to represent clients charged with the lowest level felony cases. Notice of such formal training requirements should be included in any separate contract signed by the attorney.

In lieu of any local formal education requirements which go beyond the State Bar's 25 unit MCLE rules, informal training should also be credited. Some limited examples include: (1) out of state seminars which are highly relevant to criminal defense, such as deoxyribonucleic acid (DNA) legal issues, that do not qualify for MCLE credits; (2) apprenticeship-like second chair pretrial and trial experience; (3) Keenan counsel education while in joint representation with a lead attorney of a client facing a death sentence;<sup>15</sup> and, (4) in-service training, including systematic, comprehensive instruction in substantive and procedural law and courtroom skills.

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15. See Keenan v. Superior Court (1982) 31 Cal.3d 424, 429-432, 180 Cal.Rptr. 489, 492-494.

Each jurisdiction and individual attorney should set approximate case load limits to assure that the individual attorney is not so over worked that the quality of representation is diminished. These limits will vary depending upon the type of practice involved. For example, a death penalty specialist, who tries most of his/her cases, may carry a very small case load of only a few cases. However, an attorney who primarily handles driving under the influence cases, which typically settle, may handle a much larger number of cases without difficulty.

Each jurisdiction should maintain a written complaint procedure for complaints made against an attorney who is providing indigent legal representation. After receiving a complaint, the designated authority (i.e., administrator or a peer review committee) should give written notice of the accusation to the attorney. The written complaint procedures may include informal resolutions, or streamlined investigations to weed out apparent unfounded complaints. The attorney is to be provided basic due process rights in any investigation or hearing, including an appellate right.

If the allegation is found to be true, the administrator or committee hearing the allegations may impose various sanctions. Such actions will vary depending upon the seriousness of the conduct. Examples could vary from taking no action, to requiring remedial education classes and monitoring, and, in extreme cases, removal of the attorney from the eligibility list.

To assure consistent quality representation, each jurisdiction shall establish written procedures, using uniform standards, to periodically monitor and accurately assess the performance of its attorneys. Such evaluations cannot be identical to those of supervisors of employees because of assigned counsels' status as independent contractors. Examples of how such an evaluation may be assembled include: (1) obtaining trial judge evaluations; (2)

obtaining pre-trial judge evaluations; (3) receiving input from prosecutors; (4) obtaining opinions from members of the defense bar; (5) reviewing significant law and motion work completed during the evaluation period; and (6) making a productivity evaluation based upon the number of cases handled, or difficult cases either resolved or litigated, during the relevant time period. As important parts of the defense function, it is critical that the work of investigators should be periodically monitored and evaluated, as should the performance of experts and other providers of ancillary services

B. Institutional Public Defenders

An institutional defender should provide a continuous, interactive system whereby mentors, supervisors and managers provide assessment, feedback, documentation, remediation and other functions to ensure that the quality of service being provided is assured.

In general, newer employees ordinarily require considerable supervision as well as training to confirm quality assurance. However, the work product of more experienced employees should also be regularly or periodically assessed, and if less than expected output under this guideline is detected, a more comprehensive audit is warranted.

It is essential that the expectations and standards by which the quality of service is to be assessed be clearly and accurately communicated to all institutional defender employees. To the maximum extent possible the performance measurements and standards should be in writing. Any oral interpretations should be only to clarify in the event of an unusual circumstance.

Retraining, remediation, referral to rehabilitative services, reassignment or other interventions for the welfare of the employee may be indicated. The ultimate responsibility of the institutional defender, however, is to the legal interests of each client. Ordinarily both



interests can be simultaneously managed well. In the case of unavoidable conflict it is the obligation/responsibility to the client that supersedes.

Institutional public defenders must comply with local, state and federal constitutional provisions and laws regarding employer and employee relations. Such defenders should provide even more clear-cut guidance and feedback to ensure that defender employees achieve the service goals and performance standards required to provide proper representation to indigent defense clients. This aspect of the quality guideline does not impose a higher standard on defender employees than other public employees. Rather it contemplates a greater effort by institutional defender managers and leaders to properly convey and assure appropriate standards are met.

#### V. TRAINING

Indigent defense providers are obligated to comply with the minimum MCLE requirements applicable to all lawyers. However, due to the consequences of criminal judgments to life and liberty, criminal defense practitioners should be required to take more educational courses than practitioners in other fields. Experienced indigent defense providers should also be expected to complete a minimum of 15 hours of relevant legal education classes or equivalent training dealing specifically with juvenile (dependency or delinquency), mental health and/or criminal law, on a calendar year basis. Indigent defense providers who are within their first year of practice of criminal law should complete a minimum of 21 hours of relevant classes or equivalent training dealing specifically with juvenile, mental health and/or criminal law during the course of that first year.

Indigent defense providers practicing in what are known as specialty courts, collaborative justice courts, or problem solving courts (e.g., drug treatment courts, Prop. 36 courts, mental health treatment courts, DUI treatment courts, domestic violence courts, reentry courts, juvenile resource advocacy courts) should acquire specialized technical training (i.e., dynamics of disease and treatment) relevant to the medical or psychosocial field involved.

A. Assigned Counsel and Contract Systems

Program funding should be sufficient to provide training resources free of charge to program attorneys. In addition to presenting MCLE classes and other jurisdiction-specific training without charge to program lawyers, training videos such as those made available by the California Public Defenders Association should be maintained for the use of program attorneys. The program should also be funded to allow it to send attorneys to select outside training and continuing legal education courses presented for example, by the California Public Defenders Association, the California Attorneys for Criminal Justice, the National Legal Aid and Defender Association, and the National Association of Criminal Defense Lawyers.

In counties in which there is a public defender and a contract/assigned conflict counsel system, resources of the public defender and the program can be shared by providing joint trainings to the extent practicable. In bar association and other non-profit programs, the administrator should seek input on the adequacy of program training and education from a committee of experienced practitioners who could be tasked with conducting regular reviews of program requirements and the educational sources from which relevant and high quality training is available.

In those counties in which private attorneys or law firms contract with the county for indigent defense services, the contract should clearly define the education and training

expectations for attorneys, which should be no less than those required of public defenders or assigned counsel program attorneys. The parties should specify appropriate providers, and should designate a person or committee to review compliance with the contract requirements.

#### B. Institutional Public Defenders

Institutional indigent defense providers ought to establish to the maximum extent feasible within their budgetary capacity and consistent with their in-house competency, formalized training designed to meet the distinct needs of employees new to an institutional indigent criminal defense enterprise as well as those possessing moderate and even considerable experience.

As the subject matter involved in the practice changes, and as new laws are enacted and evolution in case law jurisprudence occurs, and forensic science and other technical support and administrative competencies develop, the institutional defender should arrange for appropriate training to be provided.

The institutional defender should be proactive in seeking out and maintaining an awareness of training opportunities, locally, regionally, statewide, nationally and internationally and to seek out resources, grants, partial scholarships, tuition waivers and other inducements and reimbursements to ensure the institutional defender acquires and maintains necessary competence. This should include “train the trainer”<sup>16</sup> and shared faculty approaches.

Institutional defenders should seek to be involved at the outset in leadership positions in novel overtures and cutting edge approaches that bring the benefits of academic

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16. “Train the Trainer” describes a training system whereby a representative is sent to a training program with the mission of acquiring a complete understanding of relevant information with the intent of presenting it in a training program to be provided to the employees of the entity which sent the representative to the initial training symposium.

and other research into multi disciplinary efforts in dealing with human problems that end up under the purview of the courts staffed by institutional public defenders. Among the other benefits of such a commitment is that needed training and training resources are recognized early on and secured in a timely manner.

## VI. JUVENILE PRACTICE

Indigent defense providers provide virtually all of the representation in juvenile delinquency courts. Pursuant to Senate Bill 459<sup>17</sup> and California Rules of Court, rule 1479, the ambit of the defender's role has been extended tremendously. Previously, such defender's responsibility terminated at the time of disposition.

In contrast, now the defender must monitor how juvenile clients are faring in the Division of Juvenile Justice of the California Department of Corrections and Rehabilitation (formerly, California Youth Authority (CYA)) and whether they are receiving services intended and are in the programs expected, and if not, to vigorously advocate for these things to occur and return the juveniles back to court for a different placement or more explicit court orders. The same obligation now also exists for juvenile defenders regarding clients sent to camp, other placements, or released on probation.

Juvenile defenders are expected to perform resource advocacy such as securing special education services for those who need it, likewise, with those who qualify for services of the Regional Centers for Developmental Disability. Administrative law court advocacy is sometimes required in dealing with recalcitrant school districts and other agencies. Psychosocial assessments at intake by licensed clinical social workers are becoming the

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17. See California Welfare and Institutions Code § 731 et. seq.

norm. Indigent defense providers should be trained and they must often lead a multi-disciplinary team in this new era. For most indigent defense providers, additional resources are needed to accomplish this.

The Guidelines set out in the Juvenile Delinquency Guidelines<sup>18</sup> promulgated by the National Council of Juvenile and Family Court Judges at Reno, Nevada (Spring 2005) contain 16 major principles including No. 7 "Youth charged in the formal Juvenile Delinquency Court must have qualified and adequately compensated legal representation."

It should be noted that among the Guidelines of the National Council of Juvenile and Family Court Judges (NCJFCJ), it is provided that: It is the responsibility of counsel for youth to begin active representation of the client before the detention or initial hearing, that such counsel be experienced and not in an entry level position, that such counsel be trained in the development, education, substance abuse and mental health of youth, such counsel should be selected on the basis of their skill and competence and such counsel is responsible to represent the youth at all stages including post disposition matters.

Sections 137-155 of the NCJFCJ Guidelines describe the thorough mental health, substance abuse, educational and developmental evaluations and services and treatment necessary in the modern era of proper Juvenile Delinquency Court administration. They are virtually identical in intent and scope to those contained in these State Bar of California Indigent Defense Guidelines.

#### A. Assigned Counsel and Contract Systems

The foregoing discussion on independence, standards of representation, qualifications, quality control, and training applies to the representation of juveniles.

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18. Juvenile Delinquency Guidelines (National Council of Juvenile and Family Court Judges 2005).

As the role of the juvenile defender has expanded, so too has the need for education, training and resources in this specialized discipline.<sup>19</sup> To provide effective representation, juvenile practitioners should be provided with the necessary resources, including but not limited to, ancillary services such as investigators, social workers and other experts. These services are essential in light of the new requirements imposed upon juvenile defenders to ensure that the ordered services are being provided.

In addition, counsel should receive training in understanding child emotional and brain development, substance abuse, mental health issues and educational rights issues, such as special education and educational accommodation. With the scope of representation continually expanding, counsel shall be encouraged to exceed the mandatory minimum training required by the State Bar with special emphases on training in areas of juvenile practice.

#### B. Institutional Public Defenders

Institutional public defender systems should equip themselves to address not only the liberty interests of the children they represent but also the full panoply of child development needs, including educational, mental health, general health, chemical dependency and addiction issues as well as the requirement for a safe, effective and nurturing domicile.

In order to attain the requirements of this guideline, representation of children should constitute a significant high priority for an institutional provider. Deployment of staff members in juvenile assignments should emphasize the importance and value of advocacy on behalf of children. The assignment should constitute a viable platform for upward mobility for

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19. See also “Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems” (American Council of Chief Defenders National Juvenile Defender Center 2004); California Juvenile Dependency Practice (Continuing Education of the Bar 2002); “A Practical Guide to Juvenile Delinquency Law” (Law Offices of the Los Angeles County Public Defender, Special Services Division, Juvenile Services (2004)).

employees (i.e., promotional opportunities) as well as satisfactory long term or permanent assignment for some. Those staff members who are highly accomplished in their specialities as well as those who are experienced in child rearing should be considered for such assignments.

As a result of some previous practices and/or myths special care should be taken by institutional defenders to elevate the profile and provide positive recognition to those who perform well in assignments representing children.

In addition to the general guidelines articulated, the ten core principles for providing quality delinquency representation through indigent defense delivery systems promulgated jointly by the American Council of Chief Defenders (ACCD) and the National Juvenile Defender Center, endorsed by the NLADA, should also guide institutional defenders in juvenile court practice.

## VII. WORKLOAD

Indigent defense providers shall not accept nor be burdened with excessive workloads that compromise the ability of the provider to render competent and quality representation in a timely manner, without the risk of damaging the mental/physical health and motivation of the providers.

### A. Assigned Counsel and Contract Systems

The number and types of cases for which an attorney is responsible may impact the quality of representation individual clients receive. Administrators of assigned counsel and contract indigent defense systems should establish reasonable maximum caseload goals for

the organization after evaluating the workload that each type of case represents in the context of the criminal practices and procedures unique to that jurisdiction.

There are many variables to consider in evaluating the workloads of attorneys, including the seriousness and complexity of assigned cases and the skill and experience of individual attorneys. No attorney should be assigned more cases than he or she can effectively handle. Appropriate records should be kept by the administrator to avoid assigning an excessive number of cases to an attorney.

The administrator bears the ultimate responsibility for assuring that workloads are not excessive in volume for any attorney to whom cases are assigned. The administrator is also responsible for ensuring that cases are assigned only to lawyers who have the requisite knowledge, skill and experience to complete all of the tasks necessary to render effective representation.

Workloads can have a profound effect on the mental health of an attorney as well as the quality of representation he or she provides to the client. Administrators should look for signs of emotional fatigue and burnout in attorneys. A reduction in workload or a change in the types of cases assigned can often alleviate, or at least mitigate the effects of stress. In appropriate cases, the administrator should encourage lawyers to seek the assistance of a mental health professional. Failure of an administrator to effectively address the effects of workloads can result in personal civil liability and could put his or her license to practice law in jeopardy.

Should an administrator determine that the present and incoming workload exceeds the capacity of the organization to provide necessary and competent representation without hazarding the health of the attorneys and other defense team members, it is incumbent on him



or her to secure the additional resources necessary or to decline to accept new cases to the extent that they exceed the capacity of the defense delivery system.

COMMENT:

Indigent defense services organizations have a professional obligation to take steps to reduce their pending or projected workloads when an excessive workload interferes with the “rendering of quality representation or lead(s) to the breach of professional obligations.” (ABA Standards for Criminal Justice Providing Defense Services, standard 5-5.3 (1992))

Describing the duty of indigent defenders to limit their workloads, Principle 5 of the ABA’s “Ten Principles of a Public Defense Delivery System” provides: “Counsel’s workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney’s nonrepresentational duties) is a more accurate measurement.” “Ten Principles of a Public Defense Delivery System” American Bar Association (2002). The American Council of Chief Defenders has recently issued an ethics opinion that states: “When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency’s attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases.” American Council of Chief Defenders, NLADA, Ethics Opinion 03-01 (April 2003).

The problem of excessive caseloads and their effect on the quality of legal representation by indigent defense organizations was first addressed on a national level in 1973 by the National Advisory Commission. (See “Report of the Task Force on the Courts,” National Advisory Commission on Criminal Justice Standards and Goals, standard 13.12 (1973)). The NAC published numerical caseload “standards,” which were: no more than 150 felonies per attorney per year; or no more than 400 misdemeanors per attorney per year; or no more than 200 juvenile cases per attorney per year; or no more than 200 “Mental Health Act” cases per attorney per year; or no more than 25 appeals per attorney per year. This attempt to “nationalize” caseload standards was formulated exclusively by estimates of how much time it should take to complete tasks during the pendency of a case rather than by an empirical study. These “educated guesses” were then averaged to produce the estimated amount of time needed to bring a particular type of case to a conclusion (See David J. Carroll, Director of Research and Evaluations for the National Legal Aid and Defender Association, “Indigent Defense Services in the State of Maryland: A

National Perspective.” Hearing of the Senate Sub-Committee on Public Safety, Transportation and the Environment (January 6, 2003)).

While the NAC standards may remain helpful as a point of general reference, it has become widely recognized that the assumptions and estimates that formed the basis for them nearly 32 years ago may have little to do with the practice of criminal law in a particular jurisdiction today. Experts in the management of indigent defense caseloads now recommend an empirical approach called “case-weighting.” “Case weight” is a term that refers to the amount of work (in time) that is required to bring a case to a conclusion. This method of evaluation requires the indigent defense organization to actually track the exact amount of time that it takes to reach a disposition in a wide variety of cases. By conducting such an empirical evaluation, the indigent defense organization can assess how much of a “workload” a numerical “caseload” actually represents, thus providing administrators with a more realistic jurisdiction-specific look at the number and types of cases individual lawyers can effectively handle.

Some examples of case-weighting results from other jurisdictions include: Colorado: 598 misdemeanors, 241 felonies, 310 juvenile. Oregon: 400 misdemeanors, 240 felonies, 480 juvenile cases. Tennessee: 500 misdemeanors, 233 felonies. Massachusetts: 400 misdemeanors, 200 felonies, 300 juvenile cases. Some of the targeted maximum caseloads from these jurisdictions are weighted – meaning that serious cases and less serious cases are averaged to reach the final number. See “Keeping Defender Workloads Manageable,” Bureau of Justice Assistance, U.S. Department of Justice, Indigent Defense Series No. 4 (The Spangenberg Group 2001). The wide difference in the numerical results of these empirical studies demonstrates both the importance of accounting for the unique aspects of criminal practice in each jurisdiction and the limited utility of national numerical caseload standards.

Numerical caseload goals can be affected by many variables, such as the policies and procedures within a local jurisdiction. For example, overcharging practices and a district attorney’s policy of refusing to plea bargain can substantially affect attorney workload by increasing the necessity and frequency of trials and motion litigation. Local court calendar management practices, such as a “speedy trial project,” can also play havoc with attorney workloads as can legislative changes and new judicial decisions. What may appear to be a relatively small caseload can actually represent a tremendous workload depending on various state and local policies and procedures. Contracts for indigent defense services should

include a provision to assure the right of the defender organization to seek modification or cancellation of the contract when unforeseen changes in these practices occur so as to protect the quality of representation provided and avoid the financial disincentive to proper representation that may result from them.

## B. Institutional Public Defenders

Chief Defenders bear the ultimate responsibility for assuring that workloads are not excessive in volume for any individual institutional public defender employee. Likewise, it is such Chief Defenders who must ensure that the nature of the required tasks to properly prepare, settle or try each matter are accurately identified and that only employees competent to accomplish those tasks are assigned the duty to do so.

Employees new to the practice of indigent criminal defense work should be assigned a much less than normal workload volume until such time as appropriate orientation and training is completed. Moreover, some tasks are more complex than others and carry with them more services and weightier consequences. The Chief Defender is responsible for maintaining a workload assignment system that causes only those with the required knowledge, experience and motivation to be entrusted with the duty of completing such tasks.

The nature of the workload is often dynamic and the Chief Defender should take whatever steps are necessary to be cognizant of any changes and to adjust workloads commensurately.

In order to properly measure workload it is the responsibility of the Chief Defender to maintain a reliable mechanism of assessing the working conditions in each courtroom in which institutional defender cases are heard. What is reasonable to expect an individual defender to properly handle when dealing with one bench officer and the prosecutors assigned to such a courtroom may not be feasible when dealing with the bench officer and prosecutors in an

adjoining courtroom. Similarly, conditions may vary from courthouse to courthouse, police department to police department, and prosecuting agency to prosecuting agency.

Great care should be exercised by Chief Defenders to cause continuous monitoring of workload and to arrange for workload adjustments where necessary. New laws enacted and case law decisions often have an impact on workload. For example, the filing of much older cases as a result of cold case units in law enforcement and evolving forensic science developments often present greater challenges in case preparation by defenders after memories have faded, witnesses have moved and the trail has generally gone cold for the defense.

Chief Defenders are responsible for causing the health of the workforce to be monitored to avoid burnout and damage to employees. Changes in work assignments or temporary adjustments of workloads or efforts to refer such employees to outside medical or psychological services may be necessary. A change in work assignment for a period of time may replace one type of stress with another, yet is often sufficient to restore and replenish employees' health.

Should a Chief Defender determine that the combination of the existing and incoming workload exceeds the capacity of institutional defender employees (all of them not only lawyers) to provide necessary services in a competent fashion in a timely manner and without unduly risking the health of the defender workforce, it is incumbent upon such a Chief Defender to secure the additional resources necessary or to refuse to accept that portion of the incoming workload that exceeds the capacity of the defender program.

Failure of a Chief Defender to effectively address workloads may result in personal liability for an adverse civil judgment and jeopardize the right of the Chief Defender to practice law in any capacity.<sup>20</sup>

## VIII. RESOURCES

Indigent defense providers should enjoy parity, to the extent permitted by law,<sup>21</sup> on a relative scaled basis, with prosecutors in access to technology, criminal history information, other criminal justice databases such as those housing DNA information, legal research tools, investigators and investigative tools, including a travel budget, experts, paralegals, forensic labs, facilities, data processing and exhibit creation capability. The cost of these resources should not operate as a charge against the indigent defense provider to such an extent that the net personal compensation to the defender is diminished.<sup>22</sup>

### A. Assigned Counsel and Contract Systems

Indigent defense providers should enjoy parity with prosecutors and institutional public defenders, in accessing technology, DMV records, criminal history information, other criminal justice databases such as deoxyribonucleic acid (DNA) databases, legal research tools, travel budgets, expenses, paralegals, forensic laboratory fees and costs, including electronic data review and retesting of DNA evidence, office and library facilities, data processing, modern exhibit capabilities, investigators and qualified experts. The cost of these

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20. See Miranda v. Clark County, Nevada (2003), 319 F.3d 465, 471 C.A. 9 (Nev.); In Re Matter of Robert Pinto Public Defender San Benito County (California State Bar Court Case No. 93-0-10027); California Business & Professions Code § 6086.7(a)(2).

21. Where parity is not allowed under the current state of law, the indigent defense provider has a duty to engage in legislative efforts in pursuit of such parity.

22. See Ake v. Oklahoma (1985) 470 U.S. 68, 76-86, 105 S.Ct. 1087, 1092-1098; Doe v. Superior Court (1995) 39 Cal.App. 4th 538, 543-546, 45 Cal.Rptr.2d 888, 891-893; Corenevsky v. Superior Court (1984) 36 Cal.3d 307, 319-327, 204 Cal.Rptr. 165, 171-178.

resources should not operate as a charge against the indigent defense provider to such an extent that the net personal compensation to the defender is diminished.

B. Institutional Public Defenders

It is as important that indigents' cases be properly defended as it is that they be appropriately prosecuted. The combined resources of federal, state, regional and local law enforcement and prosecutors can be brought to bear upon a single indigent client. No one should expect a just result in such cases unless the institutional public defender has ready access to all of the resources necessary to properly prepare and litigate such cases.

It should be noted that prosecutors are bound by the maxim that no charges should be filed until and unless they are convinced they can prove each of them beyond a reasonable doubt. Consequently, when the defender first enters the case it is necessary to "play catch up"; otherwise the prosecutors and judges may become impatient and pressure the defender to proceed without having fully prepared. Institutional defenders should resist pressures to proceed with the case when not prepared and insist on immediate access to all the kinds of information and databases in the same format (e.g., automated information systems, search engines, etc.) as available to law enforcement and prosecutors.

Institutional defenders should take no shortcuts and should convince others that the system can only move as fast as its slowest necessary component. It is not permissible for indigents who are accused of wrongdoing to be convicted simply because of an imbalance in resources or lack of access to information or qualified experts, or court exhibits including animated or other so-called recreating of alleged criminal activity. Nor should such convictions occur because the defender is pressured into trial or disposition prior to an equal opportunity to prepare and present a defense. Moreover, the institutional defender should not have to

choose between promoting those who deserve it or hiring needed staff or paying for appropriate facilities and securing resources needed for adequate preparation and trial.

## IX. COMPENSATION

There should exist, at a minimum, parity between full-time indigent defense providers and full-time prosecutors in net compensation, as well as benefits or an amount sufficient to provide benefits of the same value. Total compensation of indigent defense providers should bear a clear relationship to the relative importance of their responsibility in providing the spectrum of indigent defense services.

Care should be taken to avoid violation of other Guideline sections when addressing compensation. Conflicts between providers' interests in obtaining and/or retaining indigent defense services and pressures to reduce compensation can lead to substandard representation and conflicts of interest.<sup>23</sup> Compensation must be adequate in order to provide competent representation for the client and fair payment for counsel and ancillary services.

### A. Assigned Counsel and Contract Systems

Reasonable compensation should be provided to appointed attorneys in assigned counsel and contract indigent defense systems. Rates of compensation should be sufficient to assure effective assistance of counsel on the basis of the factors set forth in Section 987.3 of the California Penal Code.

Taking into account the expense of office overhead, in no event should the net hourly compensation for assigned counsel be less than the aggregate hourly compensation of an institutional defender of the same level of skill and experience.

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23. See People v. Barboza (1981) 29 Cal.3d 375.

The method of compensation should assure that the attorney is adequately compensated for all work necessary for the representation of each client, and should never place the client's right to vigorous representation in conflict with the attorney's need for adequate compensation. The amount of compensation should bear a direct relationship to the time and effort reasonably invested by the attorney in the defense of his or her clients.

The terms of any indigent defense contract should avoid any actual or apparent financial disincentives to the attorney's obligation to provide clients with competent legal services. Fixed-period, bulk or flat rates should not be utilized unless based on reliable statistical caseload data, and only in conjunction with a method, specified in the contract, for increasing compensation to account for increases in caseload size or the cost of defending extraordinary cases. Indigent defense contracts should not be based on any compensation system that does not realistically assess the cost of providing competent representation, including the costs of trial, investigation, expert assistance, or extraordinary expenses, and should take into consideration objective standards of representation consistent with those set forth in other sections of these guidelines. Contracts should provide for regular, periodic payments to the indigent defense organization, and payments should not be withheld until completion of any case or cases.

COMMENT:

California Penal Code § 987.3 specifies the following factors to be considered in awarding reasonable compensation to appointed counsel: 1) customary fees in the community for similar services by privately retained counsel; 2) time and labor required; 3) difficulty of the defense; 4) novelty or uncertainty of the law; 5) degree of professional ability, skill and experience required; and 6) professional character, qualification and standing of the attorney.



Flat rate compensation that does not link attorney time and effort to the level of remuneration encourages attorneys to do what is most profitable for them and what is efficient for the system but not what is in the best interests of clients. (See ABA Standards for Criminal Justice Providing Defense Services, standard 5-2.4 (1992)) On the other hand, fee schedules that include hourly rates that compensate attorneys for actual work performed do not penalize thorough preparation and aggressive advocacy. In all serious felonies and other complex cases attorneys should be compensated at an hourly rate, without distinction between services performed in and out of court. Activities outside court, such as directing investigation, negotiation, tactical planning, etc., require no less legal skill and expertise than in-court appearances, and are at least as important, if not more so, to quality representation.

For ease of administration, compensation of misdemeanors and routine felony cases that are concluded without litigation of motions and/or trial can be based on an event-based fee schedule or a per-case rate. Such systems of compensation are appropriate if the fees set bear a direct relationship to the time that the experience of the defender organization demonstrates would ordinarily be spent in such cases, and if provision is made for attorneys to seek additional compensation within established guidelines where unusual amounts of time were necessary to properly represent the client.

All claims for compensation should be reviewed by the administrator and/or her or his staff, and should be approved unless there is cause to believe the amount claimed is unwarranted. In lengthy cases, periodic billing and payment during the course of representation should be provided. Attorneys should neither seek nor accept payments from clients or other sources on behalf of clients that are in addition to fees and expenses authorized by the defender organization.

Setting fee caps to avoid inflation acts as a disincentive to quality representation, as in the case of flat rates. However, this should not discourage the setting of benchmark criteria of fees based on the Program's experience.

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

B. Institutional Public Defender

A guarantee of at least full parity for all employees of institutional public defenders with employees of the prosecution agency which is the counterpart of the institutional defender should exist. This includes salary, fringe benefits, retirement, vacation, reimbursement, special bonuses and student loan repayment assistance or forgiveness.

It is at least as important that institutional defenders are able to attract talented candidates and retain them and properly compensate them to support positive morale as it is for prosecutors to do so. Currently some prosecutors offices in California cite the competitive advantage of federal student loan forgiveness of Perkins loans (up to \$40,000) for their attorneys and investigators when recruiting. That is a benefit not available currently to institutional public defender employees.

All of these factors combined could support the notion that to attract and retain high quality defenders their compensation should exceed that of prosecutors. However, the guideline merely supports the notion that in no event should the compensation for institutional defender employees be less than that for employees of prosecution offices.

X. ETHICS

Indigent defense providers must ensure that the interests of the clients supercede all else. Such providers should not be put in a disadvantageous position as a result of living up to ethical tenets, nor should they allow a financial disincentive to influence or determine what they do or refrain from doing. (i.e., it is improper to refrain from declaring a conflict due to a desire to avoid a negative impact on the budget; likewise, it is forbidden to unduly restrict investigations and/or to avoid securing experts.)

In appropriate situations the indigent criminal defense provider must refuse to undertake an excessive workload or a workload that exceeds the skill of the provider. In cases of so-called glass wall or ethical wall providers,<sup>24</sup> all concerned must scrupulously comply with the Bar's provisions (e.g., complete separation of facilities, not permitting access or use of resources of one by the other, confidentiality of files, etc.)

A. Assigned Counsel and Contract Systems

1. Oversight: An administrator and/or a Board of Governors should oversee the assigned counsel system. Because of the possibility of conflict, or the appearance of conflict, the administrator should not be allowed to maintain a private criminal law practice.

2. Assignments: An attorney shall not be assigned more cases than he or she can competently handle. No attorney should accept an appointment to a case which is beyond his or her skill level, regardless of the opinion of the appointing party.

3. Conflicts: (1) The contract should acknowledge that the attorney's professional responsibility may require that he or she decline representation in certain cases because of conflicts of interest or other ethical considerations; (2) the attorney should be required to establish a system for screening new appointments upon intake to discover such cases and to immediately notify the affected client and move to be relieved as counsel; (3) the attorney should be required to adopt a uniform method for determining which client to accept in situations in which the attorney must decline representation of one client while seeking relief from further representation of another; (4) in no event should the contract provide any financial

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24. A structure under which two or more separate public law firms operate under the management of a single managing general partner.

disincentives against identifying and declaring conflicts of interest,<sup>25</sup> and (5) the administrator should determine a method for choosing between clients in conflict situations in order to protect the attorney from charges of “case dumping” -- the practice of selecting the “easier” case while “conflicting out” of the more difficult.

#### B. Institutional Public Defenders

Institutional public defenders should promulgate written policies or guidelines and provide training to staff regarding the ethical rules binding employees of such defenders and explaining the process whereby ethical issues are resolved. There should be a special emphasis on ensuring that defender managers are fully conversant with the California Rules of Professional Conduct, statutory and case law progress, county regulations and internal defender ethical provisions, and be available to defender employees to provide guidance in how to avoid ethical dilemmas or how to sort them out once they occur. In particular, great care must be taken to avoid the possibility of an ethical conflict occurring as a result of flawed performance that may constitute inadequate assistance of counsel (IAC) or malpractice.

### XI. DEMOGRAPHICS/DIVERSITY/CULTURE

Indigent defense service providers in California serve a clientele that is diverse in race, ethnicity, culture, language, national origin, gender, sexual orientation, gender identity,

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25. The constitutional right to counsel entitles a defendant to conflict free representation by an attorney who is not serving the potentially competing interests of two parties. (See Wood v. Georgia (1981) 450 U.S. 261, 271-274, 101 S.Ct. 1097, 1103-1105; Culver v. Sullivan (1980) 446 U.S. 335, 346-350, 100 S.Ct. 1708, 1717-1719). Conflicts of interest can arise in a multitude of situations in addition to the typical multiple defendant case; for example, where the "victim" or prosecution witness is a current or former client. (See Leveresen v. Superior Court (1983) 34 Ca1.3d 530.) These and other situations documented in ethics codes and case law requires careful attention, and may be addressed in a written conflict policy.

Contracts which contain financial disincentives for declaring conflicts, such as a bonus if conflicts are avoided, have been condemned by the California Supreme Court. (See People v. Barboza, *supra* at 381.) The Barboza opinion points out that “[n]ot only is there an ‘appearance of impropriety’ [in such contracts], there is also a real and insoluble tension ... between the defender’s conflicting interests [his professional obligation to his client and his own financial stake].” (Ibid.) This suggests that the financial terms of a contract can provide great potential for conflicts of interest.

age and disability. In order to become a better informed workforce with broad cultural competencies, it is important that such service providers strive to attract, hire and retain a highly qualified staff that reflects the communities which they serve.

A. Assigned Counsel and Contract Systems

Due to the diverse cultural and socioeconomic backgrounds of clients, indigent defense providers should maintain sensitivity with regard to various aspects of a client's background, including race, ethnicity, culture, language, national origin, gender, sexual orientation, gender identity, age and disability. Serving such clients effectively requires an awareness and understanding of a client's background and personal experiences that contribute to the client's current circumstances today.

Indigent defender organizations should engage in outreach efforts to encourage attorneys of diverse backgrounds to become involved in representing indigent defendants and to ensure a broad and culturally diverse bar.

B. Institutional Public Defenders

Institutional defenders should adopt a proactive stance in doing outreach activities not only to serve the purpose of successfully recruiting a highly diverse and qualified staff but also to embrace the people in the communities they serve. This will help eliminate any negative myths that may have developed and help create a constituency supporting the institutional defender, which may be useful at budget time as well as in local, statewide or national legislative advocacy and in media relations.

A diverse staff serves the purpose of enriching the collective wisdom of the institutional defender and makes it more likely that better and more effective relations with clients, witnesses and jurors occur. Further it helps each staff member feel comfortable that all

members of the institutional defender are fully valued and appreciated for the merit of their performance.

## XII. MANAGEMENT/LEADERSHIP

It is the responsibility of anyone occupying an administrative, management or leadership position in an indigent defense provider to ensure that all of the above-mentioned guidelines are fully met.

### A. Assigned Counsel and Contract Systems

Assigned counsel programs should have a management structure that allows the leadership, whether an administrator, oversight committee or board, to properly run their delivery system consistent with these guidelines. When possible, the indigent defense system should include a salaried administrator who is responsible for the operation of the program. The local funding source should approve an adequate budget that includes the program director position and support personnel as needed. The program's board of directors or advisory committee should provide support for the program, guidance for the administrator, and in some cases hear appeals brought from decisions made by the administrator.

The administrator should exert a leadership role for the organization in the overall criminal justice community. Such efforts should assure that exemplary practice standards are encouraged and that any new programs reflect the values supported by the general defense community. When feasible, the administrator should help educate, and create policy reforms in the broader regional, state or national forum. The administrator should promulgate ideas for better community legal education and seek the assistance of qualified volunteers to support

such efforts. Such efforts should, when practicable, include lobbying efforts to add or amend proposed legislation.

**B. Institutional Public Defenders**

Institutional defenders should maintain a management structure responsible for properly running all of the offices of the institutional defender consistent with these guidelines. In addition, the institutional defender should occupy a leadership role in the local criminal justice community to co-manage the entire criminal justice system in collaboration with the leaders of the other criminal justice agencies and branches of government responsible for the justice system.

To the extent that the institutional public defender is capable, the leadership should include conceiving and implementing criminal justice policy on a national, state, regional and local level. This includes maintaining an affirmative legislative agenda as well as addressing the proposals submitted by other entities.

The leadership of institutional defenders should define the role of the defender program, be a force for high standards of practice, be involved in suggesting new programs or in the inception of those proposed by others to ensure that values supported by defenders are incorporated at the outset of such activities.

The leadership of institutional defenders should be personally involved in and support the activities of defender employees in providing educational outreach through the media and in various public forums so that a constituency is built strongly supporting the defenders.

The institutional defender leadership should enthusiastically undertake additional responsibility and be accountable for results insofar as no violation of the defenders' core

mission occurs. For example, the defender leadership may accept the task of determining indigency if it is delegated by the court. Likewise, the defenders' leadership may chair collaborations to facilitate the building out of criminal justice information systems, establish and guide a system of substance abuse treatment and/or mental health treatment in the criminal justice system, provide a system of assessment and special resource advocacy on behalf of children in the juvenile courts, and seek and allocate criminal justice grant resources to all components of the criminal justice system.