

## Guidelines for Legal Defense Systems in the United States

*From 1974 to 1976, following consultations with the Attorney General and the Administrator of the Law Enforcement Assistance Administration, the National Legal Aid and Defender Association convened a 35-member National Study Commission on Defense Services, with LEAA grant support. The Commission's charter was to utilize the standards developed by the National Advisory Commission on Criminal Justice Standards and Goals in 1973 as a "basic underpinning for an extensive study of defense services aimed at preparing a blueprint of guidelines and procedures which would meet the nation's indigent defense needs." The National Study Commission was divided into six topical Task Forces: 1) Scope of Services, Eligibility and Recoupment; 2) Workload, Manpower and Budget Projections; 3) Defender System Structure; 4) Internal Defender Office Structure; 5) Assigned Counsel System Structure; and 6) The Defense Attorney's Role in Diversion and Plea Bargaining. Following extensive study and the preparation of a Draft Report, a three-day National Colloquium on the Future of Defender Services was convened in 1976 in Washington, DC, to which were invited all state chief justices, state bar presidents, LEAA state planning agency executive directors, and defender program heads from around the country. The Colloquium produced some 60 commentaries upon the Draft Report, which was then further reviewed by the Commission and Colloquium participants. The black letter "Summary of Recommendations" printed here constitutes 20 pages of the Commission's 560-page Final Report, omitting extensive commentary and discussion.*

### I. AVAILABILITY OF REPRESENTATION

#### 1.1 Nature of Cases and Proceedings for Which Counsel Should be Provided

Effective representation should be provided to all eligible persons:

- (a) In any governmental fact-finding proceeding, the purpose of which is to establish the culpability or status of such persons, which might result in the loss of liberty or in a legal disability of a criminal or punitive nature; and
- (b) In any proceeding to take affirmative remedial action relative to the scope of services set forth in part (a) of this section.

#### 1.2 Time of Entry

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

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

#### 1.3 Procedures for Providing Early Representation: Program Responsibilities

In order to ensure early representation for all eligible persons, the defender office or assigned counsel program should:

- (a) Respond to all inquiries made by, or on behalf of, any eligible person whether or not that individual is in the custody of law enforcement officials;
- (b) Establish the capability to provide emergency representation on a 24-hour basis;
- (c) Implement systematic procedures, including daily checks of detention facilities, to ensure that prompt representation is available to all persons eligible for services;
- (d) Provide adequate facilities for interviewing prospective clients who have not been arrested or who are free on pre-trial release;
- (e) Prepare, distribute and make available by posting in a conspicuous place in all police stations, courthouses and detention facilities a brochure that describes in simple, cogent language or languages the rights of any person who may require the services of the defender or assigned counsel

and the nature and availability of such services, including the telephone number and address of the local defender office or assigned counsel program; and

(f) Publicize its services in the media.

Upon initial contact with a prospective client, the defender or assigned counsel should offer specific advice as to all relevant constitutional or statutory rights, elicit matters of defense, and direct investigators to commence fact investigations, collect information relative to pre-trial release, and make a preliminary determination of eligibility for publicly provided defense services.

Where the defender or assigned counsel interviews a prospective client and it is determined that said person is ineligible for publicly provided representation, the attorney should decline the case and, in accordance with appropriate procedure, assist the person in obtaining private counsel. However, should immediate service be necessary to protect that person's interest, such service should be rendered until the person has had the opportunity to retain private counsel.

#### **1.4 Procedures for Providing Early Representation: Law Enforcement Responsibilities**

In order for defenders and assigned counsel to meet their responsibilities in providing early representation, it is also essential that it be the initial responsibility of the law enforcement authority having custody of any person to:

- (a) Determine whether such person is represented by counsel and if said person is so represented to immediately contact his attorney; or
- (b) If said person is not represented by counsel, to immediately contact the local defender office or assigned counsel program.

All employees of government who come into contact with any person who is without counsel should inquire into whether the initial responsibility of the custodial authority has been properly discharged. If it has not, this responsibility should extend, but should not be limited to, courts, prosecutors, parole and probation officers, personnel of pre-trial release programs, and their agents.

#### **1.5 Financial Eligibility Criteria**

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

- (a) Liquid assets include cash in hand, stocks and bonds, bank accounts and any other property which can be readily converted to cash. The person's home, car, household furnishings, clothing and any property declared exempt from attachment or execution by law, should not be considered in determining eligibility. Nor should the fact of whether or not the person has been released on bond or the resources of a spouse, parent or other person be considered.
- (b) The cost of representation includes investigation, expert testimony, and any other costs which may be related to providing effective representation.

#### **1.6 Method of Determining Financial Eligibility**

The financial eligibility of a person for publicly provided representation should be made initially by the defender office or assigned counsel program subject to review by a court upon a finding of ineligibility at the request of such person. Any information or statements used for the determination should be considered privileged under the attorney-client relationship.

A decision of ineligibility which is affirmed by a judge should be reviewable by an expedited interlocutory appeal. The person should be informed of this right to appeal and if he desires to exercise it, the clerk of the court should perfect the appeal. The record on appeal should include all evidence

presented to the court on the issue of eligibility and the judge's findings of fact and conclusions of law denying eligibility.

### **1. 7 Partial Eligibility**

If the accused is determined to be eligible for defense services in accordance with approved financial eligibility criteria and procedures, and if, at the time that the determination is made, he is able to provide a limited cash contribution to the cost of his defense without imposing a substantial financial hardship upon himself or his dependents, such contribution should be required as a condition of continued representation at public expense.

- (a) The defender office or assigned counsel program should determine the amount to be contributed under this section, but such contribution should be paid directly into the general fund of the state, county, or other appropriate funding agency. The contribution should be made in a single lump sum payment immediately upon, or shortly after, the eligibility determination.
- (b) The amount of contribution to be made under this section should be determined in accordance with predetermined standards and administered in an objective manner; provided, however, that the amount of the contribution should not exceed the lesser of (1) ten (10) percent of the total maximum amount which would be payable for the representation in question under the assigned counsel fee schedule, where such a schedule is used in the particular jurisdiction, or (2) a sum equal to the fee generally paid to an assigned counsel for one trial day in a comparable case.

## **II. STRUCTURE OF SYSTEMS FOR DEFENSE OF ELIGIBLE PERSONS**

### **2.1 Administrative Structures for Mixed Systems**

Where a jurisdiction is served by both a defender office and an assigned counsel program, there are two acceptable methods of coordinating these components:

- (a) The Defender Director may also serve as the assigned counsel administrator and bear the responsibility, in cooperation with the private bar, and with the guidance of an advisory board, for the establishment, maintenance and training of the panel and for all other administrative and support functions for the assigned counsel component; or
- (b) The defender office and the assigned counsel program may exist as two independent entities, but coordinate their efforts in such matters as training and support services to the extent that it is feasible and in the allocation of caseload. Where necessary to facilitate coordination, an advisory board should be utilized.

### **2.2 Allocation of Cases**

In a mixed defender and assigned counsel system, the percentage of cases handled by each component of the system should depend upon the relative sizes, expertise and availability of the defender staff and of the panel of private lawyers.

Cases should be allocated in accordance with a fair and well-promulgated plan. The administrator should be responsible for developing, promulgating and implementing this plan.

The plan should allocate a substantial share of cases to each component of the system and should not *a priori* preclude allocation of any specific type or types of cases from assignment to either component. Provision should be made for cases involving multiple defendants, conflicts of interest, and matters requiring special expertise.

### **2.3 Ad Hoc Appointment of Counsel**

Appointment of counsel on a random or *ad hoc* basis is explicitly rejected as an appropriate means of furnishing legal representation in criminal cases.

### **2.4 State Level Organization with Centralized Administration**

Defender services should be organized at the state level in order to ensure uniformity and equality of legal representation and supporting services, and to guarantee professional independence for individual defenders. The defender system should provide services by means of city, county, or multi-county programs to every jurisdiction in the state.

- (a) Except in the case of pre-existing agencies, the planning and creation of local or regional defender offices should be undertaken by a state defender office which is responsible for providing all defender services.
- (b) The role of the State Defender Director with respect to offices throughout the state should be as follows:
  - (1) The State Defender Director should appoint Deputy Defenders to head the local and regional offices and should set general policy and guidelines regarding the operation of such offices and the handling of cases; however, the daily administration of the local and regional offices and the handling of individual cases should be the responsibility of the Deputy Defenders.
  - (2) The State Defender Director should ensure that on-site evaluations of each defender office or assigned counsel program in the state, whether organized as part of the state defender system or as a preexisting entity, are conducted not less than once a year. The State Defender Director should be authorized to contract with outside agencies where necessary for this purpose.
  - (3) The State Defender Director should visit all offices and programs around the state on a frequent basis.
  - (4) The Office of State Defender should provide initial training for all new defender staff attorneys and conduct seminars for the continuing education of the staff of all defender offices and coordinated assigned counsel programs in the state.

## **2.5 Preexisting Agencies in a State Defender System**

The State Defender Director should be permitted to contract with preexisting qualified entities to provide defense services.

The State Defender Director should be responsible for ensuring compliance by contracted programs with national standards.

Where the on-going program has been determined to be in full compliance with national standards, it should be eligible to receive state funding for its program and the Office of the State Defender should provide any necessary back-up services.

Where the on-going defender or coordinated assigned counsel program fails to comply with national standards, that program should have 120 days in which to comply. If, upon reevaluation after that time, the program continues to fall short of national standards, the Office of State Defender should itself replace the prior program.

## **2.6 Private Defender Organizations**

Where a defender organization provides services pursuant to contract, in order to maintain continuity and attract qualified personnel to the position of Defender Director, provision should be made, either by law or by contract, for the continuation of the defender service beyond the contract period.

The scope of the services to be provided should be stated explicitly in the contract.

Contracts for defender services should not be let on the basis of competitive bidding.

The contract should specify the workload anticipated as it relates to the amount of funds being provided in order to provide a formula in the event that the anticipated workload is exceeded.

## **2.7 Location of Defender Offices**

In a state level defender system, the principal office should ordinarily be located in the state capital, and other offices should be located with reference to population and caseload factors and access to trial and appellate courts and penal institutions.

Local defender offices should be located near the appropriate courthouses, but never in such proximity that the defender offices become identified with the judicial and law enforcement components

of the criminal justice system. Defender offices should maintain interview and waiting rooms in the courthouse.

Regional, metropolitan and single county defenders should establish branch offices whenever operational efficiency, defender access to courts, or clients' access to defenders would be significantly enhanced thereby.

## **2.8 Regionalization of Defender Services**

In states which have not yet established the Office of State Defender, local political subdivisions having a sufficient number of cases to occupy two or more attorneys on a full-time basis should be required to establish an organized defender system. If a local political subdivision lacks a sufficient number of cases to occupy the full-time services of at least two attorneys, it should be required to combine with other political subdivisions to establish a regional, organized defender system.

Statewide regulations should be established in conformity with national standards governing the staffing and budgetary requirements of local and regional defender offices to ensure provision of uniformly high quality defender services and to protect the independence of the office from political and judicial influence. Staffing requirements for regional offices should be related to travel time for attending court and jail facilities as well as to approved caseload standards.

In the absence of full state funding, participating local governments should allocate costs among themselves. Alternative bases for allocation should include, but not be limited to, population, caseload, and equal sharing.

## **2.9 Full-time Defenders and Minimum Staff Size**

Defender Directors and staff attorneys should be full-time employees, prohibited from engaging in the private practice of law. No defender office should be staffed by less than two full-time defenders. Where this cannot be accomplished by regionalization, it should be accomplished by merging the criminal and civil legal aid functions.

## **2.10 The Defender Commission**

A special Defender Commission should be established for every defender system, whether public or private.

The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented.

Commission members should be selected under the following criteria:

- (a) The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director.
- (b) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics.
- (c) No single branch of government should have a majority of votes on the Commission.
- (d) Organizations concerned with the problems of the client community should be represented on the Commission.
- (e) A majority of the Commission should consist of practicing attorneys.
- (f) The Commission should not include judges, prosecutors, or law enforcement officials.

Members of the Commission should serve staggered terms in order to ensure continuity and avoid upheaval.

## **2.11 Functions of the Defender Commission**

The primary function of the Defender Commission should be to select the State Defender Director. The Commission should also:

- (a) Assist the State Defender Director in drawing up procedures for the selection of Assistants or Deputies;

- (b) Receive possible client complaints, initiate statistical studies of case disposition, and monitor the performance of the Defender Director;
- (c) Maintain a continuing dialogue with the State Defender Director in order to provide input and advice;
- (d) Assist in ensuring the independence of the defender system by serving as a buffer and educating the public regarding constitutional requirements and the functions of the defenders;
- (e) Serve as liaison between the legislature and the defender system upon request of the Defender Director; and
- (f) Remove the Defender Director from office in the event that good cause is shown.

The Commission should not interfere with the discretion, judgment and zealous advocacy of defender attorneys in specific cases.

The Commission should meet on a regular basis and should be presided over by a chairperson elected by its members.

The Commission should serve without pay, and should be reimbursed for travel and other reasonable expenditures incurred as a result of membership.

A majority of commission members should constitute a quorum, and any resolution, policy adoption, or motion should require a vote of a majority of those present. However, selection of the Defender Director should require the vote of each member due to the importance of that decision. Voting by proxy should be prohibited.

## **2.12 Qualifications of the Defender Director and Conditions of Employment**

The Defender Director should be a member of the bar of the state in which he is to serve. He should 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.

The Defender Director's term of office should be from four to six years in duration and should be subject to renewal. The director should not be removed from office in the course of a term without a hearing procedure at which good cause is shown.

## **2.13 The Governing Body for Assigned Counsel Programs**

An assigned counsel program should be operated under the auspices of a general governing body. The majority of the members of the governing body should be attorneys but should not be judges or prosecuting attorneys. Its composition should conform to the criteria established for the Defender Commission.

The functions of the governing body should include the following: designing the general scheme of the system; specifying the qualifications for the position of administrator of the system; defining the function of the administrator and authorizing sufficient staff to support that function; prescribing salaries and terms of employment; adopting appropriate rules or procedures for the operation of the governing body itself, as well as general guidelines for the operation of the system; acting as a selection committee for the appointment of an administrator, or in the alternative, providing for a special selection committee; exercising general fiscal and organizational control of the system; seeking and maintaining proper funding of the system; ensuring the independence of the administrator and assigned counsel; and encouraging the public, the courts, and the funding source to recognize the significance of the defense function as a vital and independent component of the justice system.

## **2.14 Qualifications, Conditions of Employment, and Role of the Administrator**

An assigned counsel program should be administered by a qualified attorney licensed to practice in the jurisdiction where the system operates. In addition, the qualifications of the administrator should include, but not be limited to, the following: extensive experience in the field of criminal defense; experience in administration; ability to work cooperatively with other elements of the criminal justice system while retaining an independence of attitude to promote and protect the proper rendering of defense services; ability to maintain proper relations with the private bar; and, where the assigned counsel program co-exists with a defender system which has a separate administrator, the ability to maintain a cooperative working relationship with the defender system.

The functions of the administrator should include, but not be limited to, the following: developing and executing operational policy and control of the system; assisting the governing body in discharging its responsibilities; further assisting the governing body in the development of the budget, and in planning and establishing fee schedules and fiscal controls; acquiring such staff as is necessary to carry out the mission of the system; designing the internal operational and administrative controls necessary for the orderly disposition of cases; designing and implementing orientation and training programs for assigned counsel; and developing access to supporting services.

The administrator should have the authority to select the attorneys who will comprise the assigned counsel panel; to suspend or dismiss panel members for cause, subject to the review of the governing body; to hire and discharge such staff as is necessary to operate the system; to monitor the quality of the services being rendered and to take appropriate measures to maintain a competent level of services; to approve expenditures for the acquisition of supporting services; and to approve the payment of attorney fee vouchers. However, requests for fees exceeding the recommended maximum, or appeals from the administrator's action, should be received by a panel of attorneys appointed by the governing board.

The following terms of employment should apply to the assigned counsel administrator. The administrator's salary should be sufficient to attract a capable person and should be at least as high as that of the chief prosecutor in the area served. The administrator and staff should be allowed reasonable expenses to participate in continuing education programs and bar association and defender association functions. The administrator should serve for a definite term of years which should be no less than three nor greater than six years and should be eligible for reappointment for successive terms. The administrator should not be subject to removal from office in the course of a term without good cause being shown and should be afforded a hearing before the governing body.

### **2.15 Establishing the Assigned Counsel Panel**

In establishing the assigned counsel panel, the administrator should solicit all members of the practicing bar in the area to be served by the system. The administrator should appoint all of those attorneys who display a willingness to participate in the program and manifest the ability to perform criminal defense work at a competent level. Provision should also be made for attorneys who are willing to learn criminal defense work, or to become more proficient in such work, to be inducted into the program upon completion of an appropriate training regime.

Standards of performance and conduct should be developed and disseminated among all panel members and potential panel members. In the event that those standards are disregarded or breached, it should be cause for either admonishment, suspension or removal from the panel.

### **2.16 Assignment of Cases to Panel Members**

Although methods of assigning cases may vary with local procedures and conditions, the administrator, in designing the system and making assignments, should adhere to the following goals:

- (a) The cases should be distributed in an equitable way among the panel members to ensure balanced workloads through a rotating system with allowances for variance when necessary;
- (b) The more serious and complex cases should be assigned to attorneys with a sufficient level of experience and competence to afford proper representation; and
- (c) Apprentice members of the panel should only be assigned cases which are within their capabilities; however, they should be given the opportunity to expand their experience gradually under supervision.

### **2.17 Sources of Funding for Defense Systems**

The primary responsibility for funding of defense services should be borne at the state level. Each state should provide adequate funding for all defense services within its jurisdiction regardless of the level of government at which those services are administered.

The federal government should provide financial aid to the states for the purposes of establishing organized defense services where none exist and of ensuring uniformity in the quality of the services being provided in existing programs. This aid should take the form of long-term direct matching grants.

Defense systems should be empowered to seek and receive private funds. However, private funding is not a stable source of funds and should not be relied upon except for capital expenditures such as library acquisitions and equipment.

The private bar should not be required to provide defense services on a *pro bono* basis either as the primary delivery agent or for cases involving a conflict of interest with or overflow from the defender office.

## **2.18 Administration of Defense System Funds**

### ***(a) Defender Systems***

The defender system should be an independent agency and, as such, should prepare its own budget and submit its budget directly to the appropriating authority. Its budget should not be presented as part of the judicial or executive branch budgets, nor should it be subject to diminution or alteration by any branch of government other than the appropriating authority. The Defender Commission should review and advise the Defender Director on the budget before its submission and provide support for the budget request.

The defender system should operate under an annual or biennial lump sum appropriation which would enable the Defender Director to reallocate funds without prior approval of the appropriating authority. The payment of the defender on a case-by-case reimbursement basis, the direct provision of in-kind services or facilities to the defender system by the government, and other substitutes for providing a complete and sufficient budget are explicitly rejected as means of funding defender systems.

### ***(b) Assigned Counsel Programs***

The financial administration of assigned counsel program funds should be in the form of an open-ended budget whereby compensation would be paid in accordance with caseload and the nature and extent of the services rendered.

## **III. THE COST OF PROVIDING COUNSEL**

### **3.1 Assigned Counsel Fees and Supporting Services**

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

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

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

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

### **3.2 Defender System Salaries**

The Defender Director's compensation should be set at a level which is commensurate with his qualifications and experience, and which recognizes the responsibility of the position. The Director's compensation should be comparable with that paid to presiding judges, is professionally appropriate when compared with the private bar, and is in no event less than that of the chief prosecutor.



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

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

### **3.3 Projecting Defense System Personnel Needs**

Defense system personnel needs should be projected by means of detailed resource planning. Such planning requires, at a minimum, detailed records on the flow of cases through the criminal justice process and on the resources expended on each case at each step in the process.

### **3.4 Nonpersonnel Needs in Defender Offices**

Defender offices should have a budget for operating expenses that provides for a professional quality office, library and equipment comparable to a private law firm of similar size. Facilities and resources should be at least comparable to, and in no event less than, that provided for other components of the justice system with whom the defender must interact, such as the courts, prosecution, and the police.

Defender office facilities should include separate offices for management, legal and social work staff, shared space for investigators, paraprofessionals and other support staff, secure space for confidential records, equipment and petty cash, and reasonable allocations of ancillary space related to staff size for reception and client waiting areas, conference rooms and library, mailroom and reproduction, supplies and storage. Separate toilet facilities should be provided for staff. Parking should be provided for staff who require the use of an automobile for field tasks.

Defender office budgets should include funds for procurement of experts and consultants, ordering of minutes and transcripts on an expedited basis and for the procurement of other necessary services. Defender offices should not be required to seek prior approval or post-expenditure ratification of payments for such services except in those limited cases where the expenditure is extraordinary.

Defender offices should be equipped with quality communications and reproduction equipment. Where data requirements so warrant, defender offices should have data processing facilities and services on lease or contract which are designed for defender requirements. If the defender office is included in a criminal justice information system, the system should be required to meet defender specifications regarding reporting frequency, data definition and format.

Defender offices should be exempt from governmental public bidding requirements for purchasing where the public bidding process cannot be completed for timely acquisition of services or equipment.

## **IV. TAILORING SPECIFICATIONS TO DIVERSE DEFENDER PROGRAMS**

### **4.1 Task Allocation in the Trial Function: Specialists and Supporting Services**

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

Proper attorney supervision in a defender office requires one full-time supervisor for every ten staff lawyers, or one part-time supervisor for every five lawyers.

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

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

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

The primary responsibility for managing, evaluating and coordinating all services provided to a client should be borne by the attorney. The attorney should conduct the initial interview with the client and make an evaluation of the case prior to entry by specialists and supporting staff into the case with the exception of specific ministerial duties necessary to start the attorney's file.

Except where an assigned counsel plan provides such services, defender organizations should provide appointed counsel with specialist and supporting services in cases not involving a present or potential conflict of interest.

Defender offices should employ staff to gather and maintain information on all aspects of the available pre-trial diversion options and to assist defense counsel and defendants both in determining the suitability of any given program and in expediting the client's entry into a program when the client so desires.

## **4.2 Task Allocation and Supporting Services in Rural Programs**

Defender programs in rural areas which are staffed by only two or three attorneys should meet standards prescribed for larger programs except that specialization should be avoided and case assignments and routine administrative and public relations duties should be rotated to ensure that each staff attorney is fully familiar with the operation of the program and with all components of the criminal justice system.

## **4.3 Relationship of Appellate and Trial Functions; Task Allocation**

The appellate and post-conviction functions should be independent of the trial function in order to accomplish free and unrestricted review of trial court proceedings.

Where the appellate office is part of a defender system which includes both trials and appeals, the appellate function should be as organizationally independent of the trial function as is feasible.

- (a) Counsel on appeal should be different from trial counsel and capable of exercising independent review of the competence and performance of trial counsel.
- (b) An appellate defender should not have responsibility for any trial work while in an appellate capacity and should remain in appellate work for a substantial period of time in order to provide continuous representation to a client throughout the appellate process.
- (c) While the appellate function should be separate from the trial function, under certain circumstances the trial attorney should be permitted to handle the appeal provided that there is an independent review of the record by appellate personnel.

Where the appellate defender office is separate from the trial office, it is essential to ensure the following coordination:

- (a) Appellate counsel should contact and fully discuss the appeal with trial counsel; and
- (b) The trial defender office should have the capacity to process interlocutory and emergency appeals.

Where paraprofessionals and law students are utilized in the appellate process, the defender assigned to a client should establish a personal relationship with the client through personal interviews and continued contact.

A copy of all pleadings affecting the merits of the case filed for a client by the defender should be automatically forwarded to the client. Because the client is not present at most appellate proceedings, the

client should be informed of the occurrence of all substantial hearings, rulings and decisions affecting the case.

The responsibility for handling a case on appeal should be borne by the attorney. The attorney should supervise all supporting staff who work on a case.

The following services and facilities should be available to appellate defender offices:

- (a) Adequate resources for the hiring of expert witnesses and investigative services;
- (b) Administrative personnel to maintain docket control cards, open files, accumulate all court records before the case is assigned to a defender, and set up initial appointments with and explain the appellate process to clients;
- (c) Word processing systems and equipment; and
- (d) An adequate library and brief-bank with access to a complete resource library.
  - (1) Adequate personnel should be available to operate the library and maintain and index the brief-bank.
  - (2) Individual staff attorneys should be provided with a functional working library for their own offices.
  - (3) All slip sheet opinions released by the jurisdiction's appellate courts should be obtained by the office upon release, indexed and immediately distributed to the appellate attorneys.

#### **4.4 Use of Law Students**

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

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

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

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

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

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

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

#### **4.5 Prisoner Legal Assistance Programs**

Every defender system should make an assessment of the availability of post-conviction representation of the criminally confined in its jurisdiction and, if indicated, establish a separate division to deliver that representation in a comprehensive fashion.

The defender system should seek to utilize and incorporate existing community resources including, but not limited to, law students, paraprofessionals, jailhouse lawyers and volunteers to assist in delivering

the services. These individuals, however, should be carefully selected, properly trained and supervised, and their duties precisely defined.

Since the legal claims of prisoners may require of defender staff attorneys many skills and/or substantive law knowledge not necessarily possessed by criminal law practitioners, this fact should be reflected in the program's hiring policies, training programs, law library content and internal office structure.

In the event that the defender system opts, due to lack of available resources, lack of expertise, or for others reasons to limit its inmate representation to certain specified types of cases, the Defender Director should identify and coordinate with alternative prison legal services programs and initiate an effective referral system for inmate requests.

## **V. CORE QUESTIONS RELATING TO INTERNAL OPERATIONS**

### **5.1 Establishing Maximum Pending Workload Levels for Individual Attorneys**

In order to achieve the prime objective of effective assistance of counsel to all defender clients, which cannot be accomplished by even the ablest, most industrious attorneys in the face of excessive workloads, every defender system should establish maximum caseloads for individual attorneys in the system.

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

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

### **5.2 Statistics and Record-keeping**

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

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

### **5.3 Elimination of Excessive Caseloads**

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

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

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

- (a) Declining additional cases and, as appropriate, seeking leave of court to withdraw from cases already assigned;
- (b) Actively seeking the support of the judiciary, the Defender Commission, the private bar, and the community in the resolution of the caseload problem;
- (c) Seeking evaluative measures from the appropriate national organization as a means of independent documentation of the problem;

- (d) Hiring assigned counsel to handle the additional cases; and
- (e) Initiating legal causes of action.

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

#### **5.4 Supervision and Evaluation of Defender System Personnel**

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

#### **5.5 Monitoring and Evaluation of Assigned Counsel Program Personnel**

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

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

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

#### **5.6 Accreditation and Specialization**

An accreditation program for defender offices and assigned counsel programs should be developed within the appropriate national professional organization to encourage compliance with national standards and to promote the general improvement of defense services.

A certification program for criminal law specialists should be considered.

#### **5.7 Training Staff Attorneys in a Defender System**

The training of defenders should be systematic, comprehensive and at least equal in scope to that received by prosecutors. Every defender office should provide an orientation program for new staff attorneys. Intensive entry-level training should be provided at the state or local level and, to the extent possible, defender hiring practices should be coordinated to facilitate an entry-level training program during which newly hired attorneys are not assigned to regular office duties.

In-service training programs for defender attorneys should be provided at the state and local level so that all attorneys are kept abreast of developments in criminal law, criminal procedure and the forensic sciences. As a part of in-service training, defender attorneys should be required to read appellate slip opinions, loose-leaf services and legal periodicals.

Every defender office should seek to enroll staff attorneys in national and statewide training programs and courses that have relevance to the development of trial advocacy skills.

Defender offices should provide training for investigative staff.

#### **5.8 Training Assigned Counsel**

A single person or organization should assume the responsibility for training of assigned counsel panel members. Where there is an administrator, that individual should bear the responsibility.

Training programs should take into consideration the prior experience and skills of the attorneys. Special programs should be established for those less experienced attorneys who wish to qualify for the assigned counsel panel.

Formal training programs stressing lectures, demonstrations, and supervised participant involvement should be regularly scheduled. Joint sponsorship of such programs by defender organizations, local bar groups, and/or national organizations should be encouraged.

Reasonable attendance at training programs should be required of attorneys in order to remain on the panel.

If the operating budget is not sufficient, funds should be requested from outside sources to initiate formal training or to further develop formal training programs.

Assigned counsel should be encouraged to periodically attend other criminal law-related seminars in addition to the regular formal training programs.

Facilities for training programs should include audio and video tapes. Further, a national organization should consider providing, as a service, such tapes to defender offices and bar associations concerned with training attorneys who regularly accept appointments in criminal cases.

In addition to formal training programs, those responsible for the adequacy of assigned counsel performance should make the following resources available: an apprenticeship program, an initial hand-out or package of materials, an evaluation procedure, a motion and brief bank, a complete law library, information on experts, a newsletter, access to other attorneys for consultation, and law student assistance.

## **5.9 Recruitment, Hiring, Promotion and Removal of Defender Office Personnel**

Defender offices should actively recruit the best qualified attorneys available for staff positions by advertising on the local, state and national levels, and by formulating and promulgating hiring criteria and policies. Recruiting should include special efforts to employ attorney candidates from minority groups which are substantially represented in the defender office's client populations.

A national referral and placement service should be instituted in order to facilitate nationwide defender recruitment and placement.

Defender staff attorney appointments should be made by the Defender Director, based upon merit, entirely free of political and other irrelevant factors. Upon appointment, staff attorneys should be required to make a time commitment of from two to five years to defender work.

Defender office investigative staff should be systematically recruited, selected and supervised to ensure that the investigative function is properly discharged.

Defender promotion policies should be tied to merit and performance criteria, and removal of staff attorneys should be only for cause, except during a fixed probationary period which an office may employ for newly hired attorneys.

## **5.10 Attorney, Client Relationships in a Defense System**

Defenders and assigned counsel should be mindful that their primary loyalty is to their clients. They should seek to instill an attitude of trust and confidence in clients, and should scrupulously adhere to ethical dictates regarding confidentiality.

The defense attorney should frequently consult with his client so that the client fully understands the nature and scope of the legal representation which will be provided to him. Particular emphasis should be placed upon informing the client of the following:

- (a) The nature and frequency of court appearances;
- (b) The possibility of delays in the legal process; and
- (c) The factual and legal bases for recommendations made by counsel to the client concerning pleas or trials.

Defense systems should devise means of obtaining feedback from clients in a systematic way. Information thus developed should be used for tenure and promotion purposes and to enhance the system's sensitivity to client needs and improve the general quality of representation.

## **5.11 Continuity of Representation**

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

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

### **5.12 Choice of Counsel in Defense Systems**

In a mixed system where both defender and assigned counsel programs exist, the client should be given the option of selecting either system.

The initial assignment of attorneys in defender and assigned counsel programs should be an internal administrative function. However, to the extent administratively feasible and consistent with the overall effectiveness of the system, the client should be afforded an opportunity to choose a particular attorney.

Whenever an attorney-client relationship has been established between an eligible accused and his attorney, the defense system should not terminate or interfere with that relationship without great justification, and the attorney should resist efforts by the court to terminate or interfere with that relationship.

Whenever it reasonably appears to counsel for an eligible accused that he is unable, for any reason, to furnish effective representation to a particular client, he should withdraw from the case with the consent of the client and the approval of the court, and should assist the client in securing new counsel. The defense system should not seek to prevent the individual attorney's withdrawal under these circumstances.

Whenever an eligible accused requests that different counsel be assigned to his case, the defense system should investigate the grounds for the request and should assign new counsel if (1) this constitutes the client's first such request, or (2) the investigation discloses that the attorney, for any reason, is unable to provide effective representation to the client. In all other cases the defense system should refuse to reassign the case, and should inform the client of his right to petition the court for reassignment of counsel.

### **5.13 Role in the Community and the Criminal Justice System**

Every defense system should strive to instill in its members a high standard of professionalism and excellence.

The relationship between defense system attorneys and prosecuting attorneys should be characterized by the same high level of professionalism that is expected between other responsible members of the litigating bar.

Defense system attorneys should be especially sensitive to the image that they project to clients, and should accordingly refrain from demonstrations of camaraderie in and around the courthouse, the police station and the detention facility with prosecuting attorneys and other law enforcement personnel.

Defense systems attorneys should consult regularly with members of the judiciary in order to promote understanding and resolution of problems. However, they should be subject to judicial influence and supervision only in the same manner and to the same extent as are lawyers in private practice.

The defense system should strive to eliminate areas of conflict and to develop areas of mutual cooperation with fellow members of the legal community and organized bar, recognizing that bar support can assist the defense system in securing an appropriate budget, resisting political pressures, instituting criminal justice reforms, and gaining the support of the legal community. Defense system attorneys should involve themselves in programs and committees of the bar.

Subject to procedures for early representation, defense systems should scrupulously decline to represent defendants who are ineligible for defender services as determined by prevailing standards. Adherence to this policy is designed to minimize the economic impact of the defense system upon the private bar and to avoid thereby unnecessary conflict with this important source of potential support. Where the accused has been determined eligible for defender services, the attorney should withdraw from the case in deference to private counsel only upon request of the accused.

The defense system's Director should educate the community about the purpose and function of the defense system. He should develop and maintain relations with community organizations to promote understanding of program operations and to assist in improving defense services. He should include

police, judges, prosecutors and corrections-personnel in training programs. The defense system should make speakers available for school and community organizations and should encourage media coverage and issue regular press statements. Every defense system should have an official among whose responsibilities is press liaison and should have a procedure by which media requests for information are channeled to the appropriate official.