

Draft Advisory Report of
The Director of the Governor's Office of Policy and
Management

Maine's Indigent Legal Defense System

March 5, 2014

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Executive Summary

Recognizing that there is an appetite for a review of the system through which Maine provides legal defense services to its indigent citizens, members of the Maine Office of Policy and Management (OPM) undertook an independent study of this system and produced recommendations to improve it. This Draft Advisory Report documents the results of this study and OPM's recommendations.

The United States Constitution and the Maine Constitution both require that poor criminal defendants, charged with crimes for which a jail sentence may be imposed, must be represented in court at public expense. Additionally, Maine statutes require that indigent parents in child protection proceedings and poor individuals facing involuntary commitment and seeking emancipation are provided representation. States and counties around the United States generally provide these services in one of three models – assigned counsel, contracts for indigent defense and public defenders. Each model has strengths and weaknesses.

Maine has always provided the required services through an assigned counsel system. Initially, this responsibility was shouldered by the Judiciary, however potential conflicts of interests led Maine to establish the independent Commission on Indigent Legal Services (MCILS) to oversee this function. The present form of the assigned counsel system in Maine has proven to require frequent large additional appropriations, has produced an acrimonious debate about reimbursement rates for attorneys, and has permitted no effective oversight of the quality of representation being provided to indigent clients.

Significant benefits are available to Maine if it adopts a Public Defender model. The Maine Public Defender's Office would be overseen by the MCILS and would have a Chief Public

Defender and eight District Defender Offices to parallel the District Attorneys' jurisdictions. For about the same expenditure of public funds being made today for its assigned counsel system, Maine could have a professional corps of Public Defenders who are exclusively dedicated to representation of indigent citizens. An independent Public Defender in Maine would provide significant budget elasticity and stability, would permit a much more extensive training and mentorship program for Assistant Public Defenders, would allow, for the first time, meaningful supervision and quality oversight to be implemented, and would satisfy the American Bar Association's Ten Principles of a Public Defense Delivery System.

The members of OPM are proud to offer the results of our research on this subject and our recommendations to improve the efficiency and effectiveness of Maine's governmental functions.

Section 1: The Legal Basis for the Right to Counsel

The underpinnings for the right to counsel are founded in the Sixth Amendment to the United States Constitution, which provides, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [*sic*].” Initially, this right had a narrower scope than today’s more familiar interpretation that, “if you cannot afford an attorney, one will be appointed for you.” General consensus is that as originally drafted and ratified, the Sixth Amendment’s right to counsel was limited to a guarantee that a defendant who wanted counsel and could afford to hire one would have the right to engage an attorney to mount a defense.¹ The Amendment was likely the Framers’ counter to an English common-law principle that prevented a defendant charged with serious crimes from retaining counsel.²

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. –
U.S. Const. amend VI.

The interpretation of the Sixth Amendment’s right to counsel began to develop its current scope starting in the 1930s. In 1938, the Supreme Court, in *Johnson v. Zerbst*, held that legal representation must be provided for those defendants without the means to obtain counsel in all federal criminal

¹ See *Scott v. Illinois*, 440 U.S. 367, 370 (1979). (“There is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense.”).

² See *U.S. v. Van Duzee*, 140 U.S. 169 (1891). (“The object of the constitutional provision was merely to secure those rights which by the ancient rules of the common law had been denied to them; but it was not contemplated that this should be done at the expense of the government.”). See also John D. King, *Beyond, Life and Liberty: the Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 6-8 (2013), available at http://harvardcrl.org/wp-content/uploads/2013/04/King_1-49.pdf, THE CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA ANALYSIS AND INTERPRETATION, S. Doc. No. 108-17, 2d Session 1525-1526 (2002), available at <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002.pdf>, and TOMKOVICZ, [THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION](#) (Greenwood Publishing Group 2002).

trials, unless the defendant “competently and intelligently” waives that right.³ The Court, however, did not initially extend this right to defendants in state courts. In fact, in the 1942 case *Betts v. Brady*, the Court found that the right to counsel was not essential to a fair trial; therefore, states were not required to provide counsel for defendants in every type of criminal case.⁴

Although the Sixth Amendment and corresponding case law did not initially apply to the states, for much of U.S. history states did, to some degree, provide indigent criminal defendants with counsel. Every state, aside from Virginia, had a constitutional right to counsel similar to that of the Sixth Amendment,⁵ and by the late 1950s most states had statutes that required them to provide counsel for indigent defendants in some cases.⁶ In Maine, for example, counsel would be appointed for indigent defendants facing a possible life sentence or in capital cases.⁷ As each state had different laws, and state courts did not necessarily interpret the state constitutional right to counsel in a fashion comparable to that of the Supreme Court, there was a lack of uniformity across the country.

This disharmony would gradually dissipate as the Supreme Court extended in a series of cases its interpretation of the right to counsel to state proceedings. The most notable case was the landmark 1963 decision *Gideon v. Wainwright*, which overruled *Betts*. In that case, the Court unanimously decided that states had the obligation to appoint counsel to indigent

³ Johnson v. Zerbst, 304 U.S. 458, 468 (1938).

⁴ *Betts v. Brady*, 315 U.S. 455 (1942). But see *Powell v. Alabama*, 287 U.S. 45 (1932) (The Court found that capital cases were the type of special circumstance in which States did need to provide counsel for indigent defendants, noting that “the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.”).

⁵ Jon Mosher, *The Post Betts Era*, Sixth Amendment Center (Jan. 20, 2013) at <http://sixthamendment.org/the-post-betts-era/>.

⁶ *Id.*

⁷ *Id.*

defendants charged with felonies in state courts by application of the Sixth Amendment through the Fourteenth Amendment.⁸

Subsequent Court decisions further expanded the right to counsel to various stages of criminal proceedings,⁹ and to defendants who are facing imprisonment for any amount of time regardless of whether the crime is categorized as a felony or a misdemeanor.¹⁰

In addition to what is constitutionally required, some states have expanded the right either through their own courts or via legislation. Some systems will represent indigent persons even in limited non-criminal proceedings. In New York, for example, indigent persons have the right to assigned counsel in family law cases, such as child custody, adoption, paternity, and termination of parental rights.¹¹ Under current law in Maine, the state will provide counsel to indigent people in certain civil cases – child protective cases,¹² involuntary commitment cases¹³, and emancipation cases.¹⁴

⁸ Gideon v. Wainwright, 372 U.S. 335 (1963).

⁹ See, e.g., *In re Gault*, 387 U.S. 1 (1967) (juveniles accused of crimes in a delinquency proceeding must be afforded many of the same due process rights as adults, including the right to counsel.); *Miranda v. Arizona*, 384 U.S. 436 (1966) (right to consult with an attorney before and during questioning.); *Brewer v. Williams*, 430 U.S. 387 (1977) (defendant has a right to counsel at or after the time that judicial proceedings have been initiated.); *United States v. Wade*, 388 U.S. 218 (1967) (right to counsel at a lineup held after indictment.); *Moore v. Illinois*, 434 U.S. 220 (1977) (right to counsel attaches at preliminary hearing when a suspect is identified.); *Coleman v. Alabama*, 377 U.S. 129 (1964) (right to counsel at preliminary hearings.); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (right to counsel at arraignments); *McMann v. Richardson*, 397 U.S. 759 (1970) (right to counsel during plea negotiations.); *Townsend v. Burke*, 334 U.S. 736 (1948) (right to counsel during sentencing); *Mempa v. Rhay*, 389 U.S. 128 (1967) (right to counsel in probation revocation or deferred sentencing hearings.); *Douglas v. California*, 372 U.S. 353 (1963) (the Fourteenth Amendment mandated extension of the right to counsel to all appeals of right), *but see Pennsylvania v. Finley*, 481 U.S. 551 (1987) (the right to counsel does not extend to discretionary appeals).

¹⁰ *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (The Sixth Amendment right to appointed counsel extends to misdemeanor prosecutions.).

¹¹ N.Y. FAM. CT. ACT §261, available at [http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=\\$\\$FCT261\\$\\$@TXFCT0261+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=07474694+&TARGET=VIEW](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$FCT261$$@TXFCT0261+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=07474694+&TARGET=VIEW)

¹² ME. REV. STAT. ANN. tit. 22 §4005(2)

¹³ ME. REV. STAT. ANN. tit. 34-B, §3864(1)

¹⁴ ME. REV. STAT. ANN. tit. 34-B, §3506-A(1)

Section 2: What Are Other States/Jurisdictions Doing?

As there was no specific guidance from the Supreme Court on how to carry out the mandate for indigent legal counsel, it is not surprising that a large variety of approaches are adopted by states and regional jurisdictions. This section provides a sampling of the many ways that indigent legal defense is handled across the country.

2.1 Structure of the Indigent Legal Defense Delivery Systems across the United States

To meet the *Gideon* mandate, states typically have employed at the state or county level some combination of a public defender system, an assigned counsel system, or a contract system. No single delivery system model universally works best, as each has its own strengths and weakness and every jurisdiction has its own diverse challenges. Therefore, every jurisdiction has to determine which model best meets its needs and resources. Consider that Massachusetts (an assigned counsel hybrid system), Wisconsin (public defender office), and Oregon (contract system) all have three starkly different programs, but are considered to be among the more successful systems in the country. Though no system is perfect, how the system is implemented, whether it has adequate funding, and the quality of personnel are more important than how the system is structured.

The **assigned counsel** model is the oldest of the models. Under this system, private attorneys are appointed by the court to handle specific indigent cases.¹⁵ This can be done in either a coordinated or *ad hoc* manner.¹⁶ The appointed model allows for flexibility, supports the private bar, provides opportunities for new lawyers to gain trial experience, and minimizes unwarranted

¹⁵ Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 DUKE L. REV. 32-33 (1995), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4264&context=lcp>.

¹⁶ Under an *ad hoc* system, the court will generally make the appointment of counsel without the benefit of a list or any formal criteria for attorneys. Under a coordinated system, there is generally an oversight body with minimum standards in place for attorneys.

political influence. If done correctly, this system can allow indigent persons access to some of the best trial attorneys available.

However, as the system is comprised of so many individual entities, conducting oversight and predicting and controlling costs can be difficult. As previously mentioned, indigent defendants may have access to the best attorneys, but on the other hand, they also could be represented by very inexperienced or even poorly performing attorneys if proper training and oversight mechanisms are not in place. Further, if the system does not adequately compensate attorneys, there is little incentive for any attorneys, let alone the best, to participate in the system.

In 2004, lawsuits were filed in Massachusetts alleging that the hourly rates of compensation for appointed counsel were so low that it resulted in a shortage of private attorneys willing to accept indigent

defense assignments.¹⁷ These lawsuits were a catalyst for reform of the Massachusetts system, which, among other things, included an increase in the compensation rate for attorneys and an enlargement of the state-wide public defender office.¹⁸

With an assigned counsel system, it is impossible to predict the total cost for the upcoming year. Variables affecting the cost of an assigned counsel system include the total number of cases assigned, whether any death penalty or complicated cases are filed, and whether there are drug sweeps resulting in multiple defendants. – Spangenberg, *supra* note 15, at 35.

¹⁷ Lavalley v. Justices, 812 N.E.2d 895, 899-901 (Mass. 2004) and Arianna S. ex rel. Weber v. Massachusetts, No. SJ 2004-0282 (Mass. Filed June 28, 2004).

¹⁸ 2005 MASS. ACTS 54, available at <https://malegislature.gov/Laws/SessionLaws/Acts/2005/Chapter54>. See also THE SPANGENBERG GROUP, INDIGENT DEFENSE IN MASSACHUSETTS: A CASE HISTORY OF REFORM (2005) available at <http://www.sado.org/fees/maindigdefreform2005.pdf> (“On July 29, 2005, the Massachusetts Legislature made significant changes to the Massachusetts system of indigent defense and substantially increased the appropriation for indigent defense services.”); and The Spangenberg Group, *Major Reform Legislation Passed in Massachusetts* (June, 1, 2006), at <http://www.spangenberggroup.com/news/MassReformLegislation.html> (“On July 29th a bill was finally passed that raised the rates of compensation to \$50 per hour in district court, CHINS, children and family law, care and protection, sex offender registry and mental health cases; \$60 per hour in superior court non-homicide cases including sexually dangerous persons cases; and \$100 per hour in homicide cases, and the rates were made

To create more structure, rein in costs, and respond to legal challenges about inadequate compensation of appointed counsel,¹⁹ some jurisdictions have adopted a **contract** model to deliver indigent defense. Under this system, the jurisdiction will contract with a private firm(s), attorneys, a bar association(s) or a not-for-profit(s) to provide legal services for the indigent defendants.²⁰ The contract can be for specific geographic areas, specific case types, or to handle the entire caseload. Proponents argue that the use of contracts can help to contain and more accurately project annual costs.²¹ Further, by reducing the number of participating attorneys and firms it can make performance oversight easier. Requirements regarding performance can be integrated into the contract.

Nonetheless, there are concerns with the contract model. As with all service contracts, the quality of the contracted service is very reliant on what is or is not in the contract. If the contract is drafted poorly, the system is likely to perform poorly. A good contract might contain requirements such as minimum training levels, caseload caps, independent oversight and monitoring, and a mechanism for performance evaluation.²² A factor that critics contend leads to

retroactive to July 1, 2005, the start of the fiscal year. The bill created 11 pilot public defender programs each with 10 attorneys, one investigator and two support staff handling district court cases.”).

¹⁹ BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, CONTRACTING INDIGENT DEFENSE SERVICES A SPECIAL REPORT, *prepared by the Spangenberg Group* (2000), available at <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf> (“In Mississippi and Oklahoma, successful challenges to the system for paying assigned counsel led defense attorneys to believe they would be better compensated for their work. Instead, contracts replaced many case-by-case assignment systems, nullifying the impact of the court decisions.”).

²⁰ Spangenberg, *supra* note 15 at 32. See also Kelly A. Hardy, *Contracting for Indigent Defense: Providing Another Forum for Skeptics to Question Attorney's Ethics*, 80 MARQ. L. REV. 1053 (1997), available at <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1515&context=mulr>

²¹ *Id.* at 35; Pauline Houlden & Steven Balkin, *Quality and Cost Comparisons of Private Bar Indigent Defense Systems: Contract vs. Ordered Assigned Counsel*, 76 J. CRIM. L. & CRIMINOLOGY 181 (1985), available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6473&context=jclc>.

²² See Am. Bar Ass’n, *ABA Standards for Criminal Justice: Providing Defense Services*, Standard 5-3.3 (3rd ed. 1992), available at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/providing_defense_services.authcheckdam.pdf and the NAT’L LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guidelines 3-1 – 3-23 (1984), available at [http://www.nlada.org/Defender/Defender_Publications/Defender_Pubs_IndigentDefense#Guidelines for Negotiating and Awarding Indigent Defense Contracts](http://www.nlada.org/Defender/Defender_Publications/Defender_Pubs_IndigentDefense#Guidelines%20for%20Negotiating%20and%20Awarding%20Indigent%20Defense%20Contracts)

poor contracts is that the bidding process may emphasize cost over quality²³ and the system actually may cost more than an appointed system in the long run.²⁴ An additional concern with the model is that because it restricts participation in the system to a limited number of firms, the majority of the private bar who can be important advocates for indigent defense are left out.²⁵

When adequately funded and staffed, defender organizations employing full-time personnel are capable of providing excellent defense services. By devoting all of their efforts to legal representation, defender programs ordinarily are able to develop unusual expertise in handling various kinds of criminal cases. Moreover, defender offices frequently are in the best position to supply counsel soon after an accused is arrested. By virtue of their experience, full-time defenders also are able to work for changes in laws and procedures aimed at benefiting defendants and the criminal justice system. – ABA Standards for Criminal Justice Providing Defense Services, 3rd Edition, Standard 5-1.2

Some jurisdictions have opted for more direct control over their indigent defense system by adopting a **public defender office** model. Under this model, there is a public or non-profit organization with staff attorneys that provides for indigent defense.²⁶ The scope of the public defender's responsibility can be state-wide²⁷ or be limited either by geographic area or by type of cases, as in Massachusetts, North Carolina, Oregon, Virginia, and West Virginia.²⁸ Additionally, there is no requirement that the defender office be at the state level. Consider that twenty-two states have established a state-wide public defender office, while

twenty-seven states and the District of Columbia have a county based public defender's office.²⁹

²³ BUREAU OF JUSTICE ASSISTANCE, *supra* note 19, at 13.

²⁴ *Id.* at 11-12.

²⁵ HARDY, *supra* note 20, at 1055-1056.

²⁶ Am. Bar Ass'n, *supra* note 22, at Standard 5-1.2.

²⁷ *E.g.* Colorado, Connecticut, Delaware, Hawaii, Iowa, Kentucky, and Maryland. See THE SPANGENBERG GROUP, STATEWIDE INDIGENT DEFENSE SYSTEMS: 2005, prepared for the Am. Bar Ass'n Bar, available at <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/statewideinddefsystems2005.authcheckdam.pdf>

²⁸ THE SPANGENBERG GROUP, *supra* note 27 at 2 n.3

²⁹ LYNN LANGTON & DONALD FAROLE, JR. PH.D., BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, STATE PUBLIC DEFENDER PROGRAMS, 2007, 1 (2010), available at <http://www.bjs.gov/content/pub/pdf/spdp07.pdf>

Indigent Defense Systems of the 50 States^{*}

State-Based Public Defender	County-Based Public Defender	No Public Defender Office
Alaska	New Jersey	Alabama
Arkansas	New Mexico	Nevada
Colorado	North Dakota	Arizona
Connecticut	Rhode Island	New York
Delaware	Vermont	California
Hawaii	Virginia	Washington D.C.
Iowa	Wisconsin	Ohio
Kentucky	Wyoming	Oklahoma
Maryland		Georgia
Massachusetts		Idaho
Minnesota		Illinois
Missouri		Indiana
Montana		Kansas
New Hampshire		Louisiana
		Michigan
		Mississippi
		Nebraska
		Tennessee
		Texas
		Utah
		Washington
		West Virginia
		Maine

^{*} Based on information from LYNN LANGTON & DONALD FAROLE, JR. PH.D., BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, STATE PUBLIC DEFENDER PROGRAMS, 2007, 1 (2010), available at <http://www.bjs.gov/content/pub/pdf/spdp07.pdf>

The public defender model has grown in popularity among states and counties, with forty-nine states and the District of Columbia having a public defender office at either the state or county level.³⁰ As the chart above references, Maine is the lone outlier with no public defender office, opting instead for a coordinated appointment model (with the exception of Somerset County, in which there is a contract for defender services).

Proponents for the public defender model contend that the budgeting for such a system can be simpler and more predictable than estimating the costs to compensate numerous appointed private attorneys whose caseloads fluctuate every month.³¹ Increased government control also

³⁰ LANGTON, *supra* note 29, at 1.

³¹ See JAMES D. BETHKE, TASK FORCE ON INDIGENT DEFENSE, TRENDS IN INDIGENT DEFENSE — ASSIGNED COUNSEL, PUBLIC DEFENDER, AND ACHIEVING EXCELLENCE IN DETENTION ADVOCACY, 4 (2009), at <http://www.juvenilelaw.org/Education/2009/Presentations/Bethke.pdf>; BEXAR COUNTY TASK FORCE, THE PUBLIC DEFENDER MODEL, 5 (2011) at <http://www.bexar.org/Indigent/PublicDefenderModel20110309.ppt>; TEXAS TASKFORCE ON INDIGENT DEFENSE & THE SPANGENBERG GROUP, BLUEPRINT FOR CREATING A PUBLIC DEFENDER OFFICE IN TEXAS, (2008), available at <http://www.courts.state.tx.us/tidc/pdf/2008revisedblueprintfinal.pdf>; and TASK FORCE ON INDIGENT DEFENSE THE PUBLIC POLICY RESEARCH INST. AT TEXAS A&M UNIV., EVIDENCE FOR THE FEASIBILITY OF PUBLIC DEFENDER OFFICES IN TEXAS (2006), available at <http://ppri.tamu.edu/PublicReports>

allows for economies of scale that lead to additional savings. Aside from possible cost benefits, a centralized structure offers greater opportunities for attorneys to learn from one another and to gain expertise in criminal defense. There is also more flexibility to appropriately pair attorney experience to current work demands and to develop institutional practices, relationships, and knowledge. Additionally, by having the attorneys in-house there are quality control practices that can be used that are not available in a decentralized model.³² The American Bar Association (ABA) recommends, if conditions permit, that a public defender office be the primary component of any system.³³

On the other hand, setting up an office can be expensive³⁴ and the model may not be the most cost-effective delivery system in areas with low caseloads and large distances between cases.³⁵ Further, if not properly funded, there is a risk, as seen in some jurisdictions, of staff attorneys handling caseloads that are too large.³⁶ Under this model, the private bar will have the least amount of interaction with the system, which could remove an important voice in the continued development of indigent defense.³⁷

[/PD%20Feasibility_Final.pdf](#) (With a sufficiently large and stable infrastructure, workload should be able to fluctuate considerably without causing dramatic budgetary adjustments.).

³² TEXAS TASKFORCE ON INDIGENT DEFENSE, *supra* note 31, at 9.

³³ Am. Bar Ass’n, *supra* note 22, at Standard 5-1.2.

³⁴ BETHKE, *supra* note 31, at 4.

³⁵ See Spangenberg, *supra* note 15, at 37 (“In some states, such as New Hampshire and Vermont, it is not practical to operate staffed public defender offices in rural areas, so assigned counsel or contract programs have been developed for these regions.”); and TEXAS TASKFORCE ON INDIGENT DEFENSE, *supra* note 31, at 11.

³⁶ See NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 18 (Am. Bar Ass’n 2011), available at http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf; LAURENCE A. BENNER, WHEN EXCESSIVE PUBLIC DEFENDER WORKLOADS VIOLATE THE SIXTH AMENDMENT RIGHT TO COUNSEL WITHOUT A SHOWING OF PREJUDICE (2011) available at http://www.acslaw.org/files/BennerIB_ExcessivePD_Workloads.pdf; RUBIN BROWN, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (2014), prepared for the Am. Bar Ass’n, available at http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf.

³⁷ TEXAS TASKFORCE ON INDIGENT DEFENSE, *supra* note 31, at 9 (“Particularly at the outset, public defenders may be perceived as a threat to the private criminal defense bar. This perception may even present an insurmountable barrier to creation of a public defender, as discussed below. Candid, complete discussions with members of the organized or informal criminal defense bar are essential to the success of any public defender proposal.”). *But see*, Am. Bar Ass’n, *supra* note 22, at Standard 5-1.2 (“The primary component in every jurisdiction should be a public

As previously stated, there is no universal best model, but there are several studies attempting to compare the effectiveness of the systems. A 2011 report by Thomas Cohen at the Bureau of Justice Statistics indicated that conviction rates for felony defendants were higher for those defendants represented by assigned counsel (seventy-eight percent) than those represented by public defenders (seventy-three percent).³⁸ The differences were even more apparent when looking at prison incarceration rates –forty-six percent of convicted defendants represented by assigned counsel received a prison sentence compared to thirty-two percent of those represented by a public defender.³⁹

A similar study was conducted on murder case results in Philadelphia from 1994 through 2005, during which time, one in five indigent defendants was represented by a public defender while the remaining four were assigned private counsel.⁴⁰ This study found that “public defenders in Philadelphia reduce their clients’ murder conviction rate by 19%. They reduce the probability that their clients receive a life sentence by 62%. Public defenders reduce overall expected time served in prison by 24%.”⁴¹

Another study conducted by Radha Iyengar on federal criminal data from 1997-2001 revealed similar results.⁴² In that study, defendants represented by court-appointed attorneys

defender office, where conditions permit. The secondary component is an administered assigned counsel panel, which assures an appropriate level of participation by the private bar.”).

³⁸ THOMAS COHEN, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, WHO’S BETTER AT DEFENDING CRIMINALS? DOES TYPE OF DEFENSE ATTORNEY MATTER IN TERMS OF PRODUCING FAVORABLE CASE OUTCOMES 19-20 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876474.

³⁹ *Id.* (Of note, however, is that “the percent of defendants sentenced to incarceration did not differ significantly between defendants with public defenders or assigned counsel.”)

⁴⁰ James Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 Yale L.J. 154 (2012), available at <http://www.yalelawjournal.org/images/pdfs/1105.pdf>.

⁴¹ *Id.* at 159.

⁴² RADHA IYENGAR, AN ANALYSIS OF THE PERFORMANCE OF FEDERAL INDIGENT DEFENSE COUNSEL, (Nat’l Bureau of Econ. Research, Working Paper, No. 13187, (2007), available at http://www.nber.org/papers/w13187.pdf?new_window=1.

were more likely to be found guilty and receive a longer sentence.⁴³ The study suggests that some of the disparities are a result of “attorney performance when negotiating a guilty plea and the selection of which cases to plead rather than to take to trial.” Dr. Iyengar noted that the hourly wage structure for appointed counsel provides an incentive for assigned attorneys “to take longer on cases,” and estimates that “any cost-savings generated by paying them lower wages” is overwhelmed by higher court costs.⁴⁴ The study also found that on average, appointed attorneys had less legal experience and received degrees from “lower quality” law schools.⁴⁵

It is important, however, not to forget that comparing delivery models is not simple, as there are numerous measures that could be used to compare systems and many factors and variables that may explain the differing results. It is not clear, for example, that reductions in conviction rates and sentence lengths are necessarily desirable outcomes. Therefore, these studies should not be used as clear evidence that one model works best, but should be a part of the discussion into the favorability and performance of the models.

2.1.1 Commissions

One growing trend over the past twenty years is the establishment of a state-wide body, such as a commission, to provide some oversight and structure to the indigent defense system. As of 2013, twenty-nine states had established commissions.⁴⁶ Commissions can provide an independent, centralized authority, which not only can insulate the indigent defense system from improper political and judicial influence, but also can monitor costs, establish and oversee compliance of standards and policies, and be the advocate for resources with the legislature.

⁴³ *Id.* at 3.

⁴⁴ *Id.* at 4.

⁴⁵ *Id.*

⁴⁶ THE SIXTH AMENDMENT CENTER, RIGHT TO COUNSEL BRIEFING BOOK AN OVERVIEW OF INDIGENT DEFENSE SERVICES IN THE 50 STATES, 84 (2013).

Just as there is variance in delivery systems, there is variance in state commissions. This includes the extent of supervisory authority, funding control, and geographic area. Generally, the amount of authority of the commission corresponds to the amount of funding the state provides for the indigent defense system. Limited or partial authority commissions allow for the counties to retain ultimate control of the system. In Georgia, the commission only has authority over those counties that have opted into the statewide system⁴⁷ and, similarly, in Kansas, the authority of the commission is limited to specific types of cases.⁴⁸

Regardless of its authority, any commission's ability to change a poorly performing system is undercut if it lacks the proper resources or willingness to push for change.

2.1.2 Funding the Indigent Legal Defense Models

The Supreme Court was silent in its *Gideon* decision about how states should fund their indigent defense systems, and not surprisingly, states have sought a multitude of ways to try to cover what is an expensive endeavor. In FY 2008, there was nearly \$5.3 billion spent on indigent defense in the U.S., a twenty-nine percent increase from the \$4.1 billion spent in FY 2005.⁴⁹

Given all the competing priorities for government funding, it is not shocking that some indigent defense systems are chronically underfunded.⁵⁰ As the volumes and complexities of cases increase, the tension on limited resources becomes even more strained. Underfunded systems can be fraught with excessive caseloads, reduced training and oversight, and a lack of resources for investigators and expert witnesses. This in turn can lead to litigation against the

⁴⁷ THE SPANGENBERG GROUP, STATE INDIGENT DEFENSE COMMISSIONS 7 (2006), prepared for the Am. Bar Ass'n, available at <http://www.michigancampaignforjustice.org/docs/Spangenberg%20Group%20Feb%202007.pdf>.

⁴⁸ *Id.*

⁴⁹ THE SPANGENBERG GROUP, STATE, COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008, 7 (2007), prepared for the Am. Bar Ass'n Bar, available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf

⁵⁰ See THE CONSTITUTION PROJECT, JUSTICE DENIED AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT OF COUNSEL Chpt. 2 (2009), available at <http://www.constitutionproject.org/pdf/139.pdf>.

system, as has been seen in numerous jurisdictions across the country.⁵¹ It does not matter how good the delivery model is if the resources to run it properly are not provided.

It is also important to remember that funding decisions surrounding an indigent legal defense system are not made in a vacuum and there are many important governmental functions that are competing for sufficient resources. Funding that goes to support indigent legal systems is funding that cannot go to some other government function and vice versa. In the end, state and local jurisdictions have a responsibility to meet the constitutional requirement to provide a meaningful right to counsel and will need to find the proper funding balance with its other priorities.

To meet the fiscal demands of running an indigent defense system, states have primarily looked towards state general funds, county funds, or some combination of both. The current trend is to shift funding predominantly to the state, with twenty-four states fully funding the system and two systems fully-funded at the county level.⁵² The remaining states are funding their obligation through a mix of state and county resources.⁵³ Generally, advocates push for funding to come primarily from the state, in part to alleviate concerns over the ability of poorer counties to deliver quality defense services.⁵⁴

⁵¹ See Darryl Brown, *Epiphenomenal Indigent Defense*, 75 MO. L. REV. 907, 911 n.18 (2010), available at <http://law.missouri.edu/lawreview/files/2012/11/Brown1.pdf> and Vidhya Reddy, *Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the Gideon Right to Counsel*, Washington U. School of Law Working Paper No. 1279185. Available at SSRN: <http://ssrn.com/abstract=1279185>.

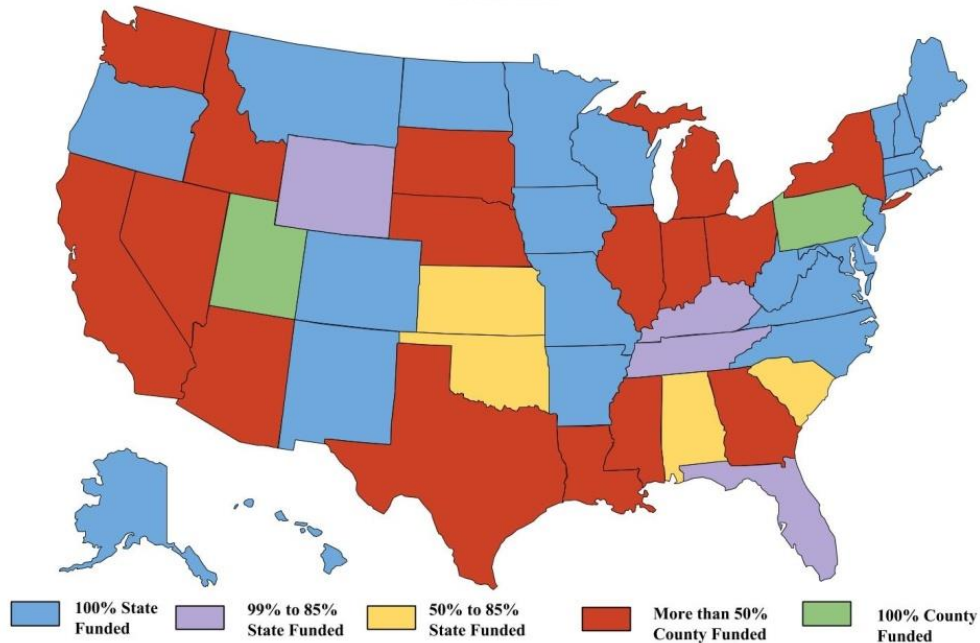
⁵² THE SIXTH AMENDMENT CENTER, *supra* note 46, at 83.

⁵³ *Id.* See also, THE SPANGENBERG GROUP, *supra* note 49.

⁵⁴ The Constitution Project, *supra* 50, at 54-55.

Funding Sources For Indigent Legal Defense Systems

as of 2013



Even by shifting funding to the state, there is no guarantee that a system will have sufficient funding. This is highlighted by the chronic concerns about high caseloads for state-wide public defender offices. The National Advisory Commission on Criminal Justice Standards and Goals recommends that the caseload of a public defender office per attorney should not exceed more than 150 felony, 400 misdemeanor, 200 juvenile, 200 mental health, or 25 appeals a year.⁵⁵ In contrast, each lawyer in the Rhode Island public defender office in 2009 reportedly was handling, on average, 1,517 misdemeanor cases and 239 felonies a year.⁵⁶ Further, a survey conducted by the U.S. Department of Justice found that in 2007 fifteen out of the nineteen states surveyed exceeded the guidelines for cases per attorney.⁵⁷

⁵⁵ NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE ON COURTS, THE DEFENSE, Chapter 13.2 (1973), available at http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense#thirteentwelve.

⁵⁶ LEFSTEIN, *supra* note 36, at 18.

⁵⁷ LANGTON, *supra* note 29 at 12-13. ("Fifteen of the 19 reporting state programs exceeded the maximum recommended limit of felony or misdemeanor cases per attorney.").

As the cost of providing defender services has increased, and remains largely unsupported by the federal government, states have tried a variety of ways to control and defray the costs. A somewhat controversial trend in funding is to push some of the costs onto the defendants through recoupment measures or through contribution, such as imposing application fees when counsel is assigned. Although the approaches differ in their objectives, as the ABA notes, it “is the same, in each: to obtain repayment for the costs of counsel to the state from some defendants who can afford to make such payments...”⁵⁸

Recoupment measures, which seek recovery of costs from a defendant after disposition of the case⁵⁹ have encountered significant opposition.⁶⁰ A lot of the disapproval focuses on the timing of the decision, as a defendant may not be informed until sentencing, there is an “arguable unfairness inherent in first affording a defendant the ‘right’ to appointed counsel and then compelling him to pay for the ‘right.’”⁶¹ This is also coupled with concerns about a chilling effect that requiring repayment could have on the right to counsel if there is a cost or the appearance of a penalty associated with exercising the right. The ABA recommends limiting

⁵⁸ Am. Bar Ass’n, *supra* note 22, at Standard 7-9.2.

⁵⁹ Also known as reimbursement. THE SPANGENBERG GROUP, PUBLIC DEFENDER APPLICATION FEES: 2001 UPDATE 2 (2002), *prepared for the Am. Bar Ass’n, available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/pdapplicationfees2001_narrative.authcheckdam.pdf

⁶⁰ *Id.* See also *Fuller v. Oregon*, 417 U.S. 40 (1974) (The Supreme Court held that a state is allowed, under circumscribed conditions, to require a convicted defendant to repay a portion of the cost of defensive services (recoupment) as long as recovery does not create a “manifest hardship” for the defendant.). For further discussion about concerns with recoupments see also Helen Anderson, *Penalizing Poverty: Making Indigent Criminal Defendants Pay for their Court-Appointed Counsel through Recoupment and Contribution*, 42 U. MICH. J. OF L. REFORM 323 (2009) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337728##, Kate Levine, *If You Cannot Afford a Lawyer: Assessing the Constitutionality of Massachusetts’s Reimbursement Statute*, 42 HARV. C.R.-C.L. L. REV. 191 (2007), available at http://www.law.harvard.edu/students/orgs/crcl/vol42_1/levine.pdf, and Zoran Dragutinovich, *Recovery of Court-Appointed Defense Costs: Framework for a Model Recoupment Statute*, 57 CHI-KENT L. REV. 457 (1981), available at <http://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=2411&context=cklawreview>.

⁶¹ Dragutinovich, *supra* note 60, at 460.

recoupment to only those cases in which fraud is involved in obtaining the determination of eligibility.⁶²

More problematic, however, is that as a funding stream, recoupment is not always a reliable mechanism.⁶³ There are costs associated with determining which defendants financially can afford to pay and then there can be significant administrative resources needed to collect the funds. This creates a risk that a recoupment program will actually cost more to administer than the amount of money it is able to collect.⁶⁴

Despite this, a study by the Department of Justice showed that as of 2007, all states with a state public defender office permit cost recoupment, except for Iowa, Minnesota, and Rhode Island.⁶⁵ A similar study of county-level public defender offices revealed that eighty-two percent allow for some form of cost recoupment.⁶⁶

Some jurisdictions with hopes of getting a higher rate of return have opted for partial indigent programs or marginally indigent programs.⁶⁷ Under a partial indigent program, defendants will normally be assessed at the start of the case to determine whether they have sufficient resources to pay a portion of their defense. There is some evidence that programs that collect fees before proceedings start, rather than at the end, are more successful at obtaining

⁶² Am. Bar Ass’n, *supra* note 22, at Standard 7-9.2, 91-92.

⁶³ Anderson, *supra* note 60, at 332.

⁶⁴ THE SPANGENBERG GROUP, *supra* note 59, at 29 n.6. (“By definition, clients of public defenders have few resources with which to pay court order recoupment. Thus collection of recoupment invariably require significant expenditure to pay for the administration of the program....In the experience of The Spangenberg Group, we have reviewed cost recovery programs where the administrative cost of collection exceeded the total revenue generated.”). See also Susan Herlofsky & Geoffrey Isaacman, *Minnesota’s Attempts to Fund Indigent Defense*, 37 WM. MITCHELL L. REV. 573 (2011);

⁶⁵ LANGTON, *supra* note 29, at 9.

⁶⁶ LYNN LANGTON & DONALD FAROLE, JR. PH.D., BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007, 6 (2010), available at <http://www.bjs.gov/content/pub/pdf/clpdo07.pdf>.

⁶⁷ ROBERT L. SPANGENBERG ET AL., CONTAINING THE COSTS OF INDIGENT DEFENSE PROGRAMS: ELIGIBILITY SCREENING AND COST RECOVERY PROCEDURES 4 (1986), prepared for the U.S. Dep’t of Justice, available at <https://www.ncjrs.gov/pdffiles1/Digitization/103682NCJRS.pdf>.

payment.⁶⁸ Because the payments are required prior to the disposition of the case, defendants may have more financial resources available to them. This timing also helps to alleviate some concerns about due process that arise under recoupment programs.

Although partial payment programs do “avoid some of the practical and legal constraints faced by recoupment programs, and offer the potential to recover costs from many more individuals,”⁶⁹ there are still concerns about a potential chilling effect on the right to counsel and whether the payments received are enough to warrant the cost to administer the program.

Another avenue explored in some states and other jurisdictions to further defray costs is the adoption of a contribution fee. One common approach is employing an application fee for indigent defense services. This fee generally ranges between \$10 and \$480⁷⁰ and normally can be waived if the defendant is financially unable to pay.⁷¹ The fee can be tied to specific crimes,⁷² particular situations, or a flat fee can be required of anyone who uses the service.⁷³

As of 2006, the use of fees was implemented by half of the states.⁷⁴ According to a 2010 report, thirteen out of fifteen states studied authorized a contribution fee to be applied to indigent defendants just for applying.⁷⁵ The ABA’s *Criminal Justice Providing Defense Services Standards* is more tolerant towards the use of contribution fees than it is of recoupment, but does

⁶⁸ SPANGENBERG, *supra* note 59, at 28. (Fayette County, which collects a fee before the proceeding, collects four times the revenue as Jefferson County, which collects after the case has been disposed of.).

⁶⁹ SPANGENBERG, *supra* note 67, at 50

⁷⁰ Anderson, *supra* note 60, at 333.

⁷¹ *Id.*

⁷² *Id.*

⁷³ ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, N.Y.U SCHOOL OF LAW, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 7 (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>.

⁷⁴ Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 Wm. & Mary L. Rev. 2045, 2052 (2006) available at <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1261&context=wmlr>.

⁷⁵ BANNON, *supra* note 73, at 1.

recommend that the fees be collected at the start of a case and do not impose a long-term debt upon the defendant.⁷⁶

Fees also have a mixed record as a reliable funding stream. Tennessee has a fee (\$50 to \$200) that is to be applied when an indigent defendant is appointed counsel.⁷⁷ In 2009, of the 210,294 defendants who were assigned counsel, 44 percent (92,429) had that fee waived. In total, the state received \$1,395,245, which equaled, “an average collection per person ordered to pay the fee of \$11.84 and an average of \$6.64 per all indigent defendants.”⁷⁸ A study done by the Spangenberg Group found, in the jurisdiction they researched, only six to twenty percent of contribution fees were collected.⁷⁹

Some jurisdictions collect fees from outside of the indigent defense system. In Alabama, approximately forty-six percent of the indigent defense budget derives from monies derived from a filing fee for civil court matters.⁸⁰ In Louisiana, sixty-six percent of its system’s indigent defense funding for trial-level representation comes from fees assessed on traffic tickets.⁸¹ About fifteen percent of Kentucky’s indigent defense budget derives from non-general fund sources, including a portion of a fee imposed on DUI cases.⁸² However, there is concern that these types of fees are just disproportionately shifting the costs of the system to a smaller portion of taxpayers who may or may not receive any benefit from the system.

When it comes to alternative funding streams, states and other jurisdictions can be imaginative, though some of the mechanisms have proved unreliable. If used correctly, such

⁷⁶ Am. Bar Ass’n., *supra* note 22, at Standard 5-7.2.

⁷⁷ TENN. CODE ANN. §40-14-103

⁷⁸ TENNESSEE ADMINISTRATIVE OFFICE OF THE COURTS, TENNESSEE’S INDIGENT DEFENSE FUND, A REPORT TO THE 107TH, TENNESSEE GENERAL ASSEMBLY, 25 (2011), available at http://www.nlada.net/sites/default/files/tn_aocindigentdefensefundreport_01152011.pdf.

⁷⁹ THE SPANGENBERG GROUP, *supra* note 59, at 29.

⁸⁰ THE SIXTH AMENDMENT CENTER, *supra* note 46, at 4.

⁸¹ *Id.* at 31.

⁸² THE CONSTITUTION PROJECT, *supra* note 50, at 58. See also THE SPANGENBERG GROUP, *supra* note 59, at 9-11.

alternatives could supplement general funds, but are unlikely to be a panacea for the continual underfunding of indigent defense.

Proponents of having indigent defendants contribute to their own defense contend there are other potential, non-financial, benefits to such a system. Contributions can provide political goodwill by showing taxpayers that defendants are contributing something to offset costs. It can help to assuage defendants' concern that they are not getting a "real" lawyer and help improve the attorney client relationship by making the defendant feel that this is his or her lawyer as opposed to a disinterested party. Furthermore, if defendants have some "skin in the game" financially they may have a greater appreciation for the valuable service they receive.

2.2 Defining Indigence

A central aspect of an indigent defense system is how indigence is defined and determined. As expected, a wide range of definitions and methods are used across the country. In *Gideon v. Wainwright*, the Court simply said it was a person "too poor to hire a lawyer."⁸³ There are court cases, predominantly at the state level, which have provided some further guidance. Importantly, federal and state courts have consistently held that indigence does not require complete destitution.⁸⁴ Examples of other state court rulings include a California ruling that it is improper not to appoint counsel purely because the defendant was able to procure bail,⁸⁵ and a Florida court holding that indigence is based on the defendant's own financial means and not the financial resources of the defendant's relatives.⁸⁶

⁸³ *Gideon*, *supra* note 8, at 344.

⁸⁴ *See, e.g.*, *Adkins v. E.I. Dupont Co.*, 335 U.S. 331 (1948); *Hardy v. U.S.*, 375 U.S. 277 (1964); and *Morgan v. Rhay*, 470 P.2d 180 (1970).

⁸⁵ *Williams v. Superior Court of Stanislaus*, 226 Cal. App. 2d 666 (1964).

⁸⁶ *Sapio v. State*, 223 So. 2d 759 (Fla. Dist. Ct. App. 1969) ("...the financial abilities of a defendant's relatives have no bearing on the question of the defendant's solvency."). For further discussion on indigency determinations *see* THE SPANGENBERG GROUP, DETERMINATION OF ELIGIBILITY FOR PUBLIC DEFENSE 2 (2002), *prepared for* The Am. Bar Ass'n., available at <http://www.americanbar.org/content/dam/aba/migrated/legal services/downloads/sclaid/indigentdefense/determinationofeligibility.authcheckdam.pdf> and Elizabeth Neeley & Alan Tomkins, *Evaluating*

The most common entities responsible for determining indigence are the public defender's office, judges, and court personnel.⁸⁷ The ABA recommends that indigence determinations be made by "defenders, contractors for services, assigned counsel, a neutral screening agency, or by the court."⁸⁸ It further recommends that a questionnaire be used in the process.⁸⁹

Many states look to federal standards to set the level for who is or is not indigent, but even then there are variances. Virginia and Iowa consider a person to be indigent for legal defense purposes if a defendant's income is below one-hundred twenty-five percent of the federal poverty guidelines, while in Utah and Florida a defendant's income needs to be below one-hundred fifty and two-hundred fifty percent respectively of the guidelines.⁹⁰

Other states use even more ambiguous terms. Alabama and Oregon use the standard of "substantial hardship" and "need."⁹¹ In addition to financial resources, in Washington State, a court is to "consider the anticipated length and complexity of the proceedings and the usual and customary charges of an attorney," and specifically prohibits looking at the resources of relatives other than the spouse.⁹² For additional information see the following table on the criteria used by some states to determine indigency.

Court Processes for Determining Indigency, CT. REV. J. AM. JUDGES ASS'N 4 (June 21, 2007), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1006&context=ajacourtreview>.

⁸⁷ Langton, *supra* note 29, at 6.

⁸⁸ Am. Bar Ass'n, *supra* note 22, at Standard 5-7.3.

⁸⁹ *Id.*

⁹⁰ THE SPANGENBERG GROUP, *supra* note 86, at 2.

⁹¹ *Id.*

⁹² WASH. REV. CODE §10.101.020

Criteria used to determine whether a defendant qualified for public counsel representation, by state, 2007⁹³

State	Defendant's										
	Number of Factors Considered ^a	Income Level	Receipt of public assistance	Sworn Application	Debt Level	Federal Poverty guidelines	Residence in public institution ^b	Judge's Discretion	Unsworn Application	Ability to post bail or bond	Other ^c
Total		21	17	16	15	13	11	9	7	6	9
Alaska ^d	4	X		X	X						X
Arkansas	7	X	X	X	X	X	X	X			
Colorado	8	X	X	X	X	X	X	X		X	
Connecticut	7	X	X		X	X		X	X	X	
Delaware	6	X	X	X			X	X			X
Hawaii	6	X	X		X		X		X		X
Iowa	4	X		X	X	X					
Kentucky	8	X	X	X	X	X		X		X	X
Maryland	6	X	X	X		X	X				X
Massachusetts	7	X	X	X	X	X	X			X	
Minnesota	7	X	X		X	X	X	X	X		
Missouri ^e	4	X		X						X	X
Montana	6	X	X		X	X	X		X		
New Hampshire ^f	0										
New Jersey	4	X	X	X	X						
New Mexico ^g	6	X	X			X	X		X		X
North Dakota	6	X	X	X	X	X		X			
Rhode Island	7	X	X	X	X	X	X		X		
Vermont	8	X	X	X	X	X	X	X			X
Virginia	4	X	X	X				X			
Wisconsin	6	X	X	X					X	X	X
Wyoming	3	X		X	X						

^a The 2007 Census of Public Defender Offices (CPDO) included questions about 10 factors used to determine indigency.

^b Includes residence in a public mental health institution or a correctional institution.

^c Includes family status, number of dependents, monthly expenses, worker's compensation or disability, bankruptcy, liquid assets, letters from employers, and judicial discretion.

^d Criteria used to determine eligibility for representation in Alaska were obtained from Alaska Statute 18.85.120(b), Determination of Indigency; Repayment. (See Alaska Legal Resource Center, Web. 5 Jan. 2009 <<http://www.touchngo.com/lglcntr/akstats/Statutes/Title18/Chapter85/Section120.htm>>.)

^e Criteria used to determine eligibility for representation in Missouri were obtained from Missouri Revised Statute 600.086.(1), Eligibility for representation, rules to establish indigency, how determined, procedure, appeal, false statements, penalty investigation authorized. (See Missouri revised statutes, Web. 28 Aug. 2009 <<http://www.moga.mo.gov/statutes/C600-699/6000000086.htm>>.)

^f New Hampshire did not use formal or written criteria to determine indigency.

^g Criteria used to determine eligibility for representation in New Mexico were obtained from New Mexico Statutes Annotated 1978: Section 31-15-7. (See New Mexico Public Defender Department, Web. 26 Oct. 2009 <http://www.pdd.state.nm.us/aboutus/clientinfo_guideline.html>.)

⁹³ LANGTON, *supra* note 29, at 6 table 4.

Section 3: The Maine System

3.1 Historical Perspective

In Maine, the Judiciary initially oversaw and ran the indigent legal defense system, an *ad hoc* assigned counsel model in which individual judges appointed attorneys as needed from a list composed of volunteers.⁹⁴ As there was no specific budget line, funding was drawn from the general Judiciary budget to pay for the system.⁹⁵ Over time, it became increasingly evident that this model, although it met the Constitutional standard, had significant flaws.⁹⁶

A fundamental flaw was that the system lacked proper independence from the Judiciary, an important principle for an effective public defense system.⁹⁷ As Associate Justice Clifford noted in his testimony before the Joint Standing Committee on the Judiciary in 2009, “...the State’s current system of providing legal services to the indigent is subject to a serious conflict of interest: the Judiciary is charged with appointing and paying attorneys to represent defendants in

⁹⁴ INDIGENT LEGAL SERVICES COMM’N, REPORT OF THE INDIGENT LEGAL SERVICES COMMISSION 2 (2009), available at [http://www.courts.state.me.us/reports_pubs/reports/pdf/Report%20of%20ILSC%202009%20\(2-13-09\).pdf](http://www.courts.state.me.us/reports_pubs/reports/pdf/Report%20of%20ILSC%202009%20(2-13-09).pdf). The exception to appointed counsel system was in Somerset County, where the Supreme Judicial Court contracted for court-appointed counsel services starting in 1991. The contract continues under the new system. See also NAT’L LEGAL AID & DEFENDER ASS’N, *GIDEON REVIEWED: THE STATE OF THE NATION 40 YEARS LATER* 3, available at <http://www.nlada.org/DMS/Documents/1047416381.38/Gideon%20Reviewed%20-%20The%20State%20of%20the%20Nation%2040%20Years%20Later.pdf>. (Though the State of Maine funds 100% of indigent defense funding, services are provided 100% through ad-hoc assigned counsel systems with no state oversight. Attorneys are not provided on-going training or professional development opportunities, and are not monitored for compliance with the most basic attorney performance standards.).

⁹⁵ *Id.* at 3.

⁹⁶ J. Harrison, *Indigent Defense Solutions Sought in Maine*, BANGOR DAILY NEWS, Jun. 21, 2008, <http://archive.bangordailynews.com/2008/06/21/indigent-defense-solutions-sought-lawyers-judges-discuss-funds-crisis/> (“The state earns a failing grade on nine out of 10 benchmarks designed to measure how well its residents’ right to court-appointed counsel is being met.”); See also Indigent Legal Services Commission, *supra* note 94; Ronald W. Schneider, Jr., *A Measure of Our Justice System: A Look at Maine’s Indigent Criminal Defense Delivery System*, 48 ME. L. REV. 335 (1996); Peter Avery Anderson, *Defense of Indigents in Maine: The Need for Public Defenders*, 25 ME. L. REV. 1 (1973); and JOINT STANDING COMM. ON JUDICIARY, STUDY OF THE FINANCIAL FEASIBILITY OF A PUBLIC DEFENDER PROGRAM, AND ISSUES IN IMPLEMENTING A COST EFFECTIVE PROGRAM, 114th, 1st Reg. Sess., (Me. 1988).

⁹⁷ AM. BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

criminal cases and indigent parents in child protection cases, cases which, that very Judiciary is called upon to decide.”⁹⁸

This conflict was aggravated by a funding structure that put the financial needs of the defense system in direct competition with other Judiciary functions. This resulted not only in the underfunding of the indigent defense system, but also in reduced funding for courts, judges, facilities, and personnel.⁹⁹ The strains on funding were further exacerbated by the escalation in the demand for defenders’ services. Between 1999 and 2008, there was a twenty-three percent increase in vouchers in the District Court and a one hundred twenty-five percent increase in the Superior Court.¹⁰⁰ Correspondingly, expenditures for indigent legal services in the District Court increased from about \$1.6 million to \$2.5 million, or by fifty-nine percent, and the expenditures in the Superior Court increased from about \$1.9 million to \$4.5 million, or by one hundred thirty-five percent.¹⁰¹

Another flaw in how Maine historically organized its indigent defense model was the lack of a centralized oversight structure for appointed attorneys. Under the constitutional standard for right to counsel, it is not sufficient to merely ensure that the defendant has access to counsel, the defendant

⁹⁸ *An Act to Establish the Maine Commission on Indigent Legal Services: Hearing on L.D. 1132 before the Joint Standing Committee on Judiciary*, 124th Legislature 2 (2009) (statement of Robert W. Clifford, Chair, Indigent Legal Services Commission).

⁹⁹ See Me. State Bar Ass’n., *Summer Meeting Focuses on Judicial Budget Cut Impacts, Indigent Defense*, 10 THE SUPPLEMENT 2 (2008) (“Because the state’s indigent defense fund is part of the judiciary budget, paying rising indigent defense costs means taking money from other judiciary budget accounts, which in turn has forced such measures as temporary court closures.”); *An Act to Establish the Maine Commission on Indigent Legal Services: Hearing on L.D. 1132 before the Joint Standing Committee on Judiciary*, 124th Legislature 1 (2009) (Statement of Barry Hobbins, Senator) (“As the cost for indigent legal services has risen, the Judicial Branch has been required to take resources from other areas of the justice system to fund these constitutionally required services.”) and Clifford, *supra* note 98, at 3 n1 (“When faced with shortfalls in the funds needed to fund indigent legal services the Legislature has had to take that money from the judiciary budget. This has led to substantial vacancies in clerk and security positions, and to delays in the delivery of judicial services.”).

¹⁰⁰ INDIGENT LEGAL SERVICES COMM’N, *supra* note 94, at app. 3.

¹⁰¹ *Id.*

also has “the right to the effective assistance of counsel.”¹⁰² Effective assistance of counsel requires that the defense attorney’s performance be “reasonable ... under prevailing professional norms.”¹⁰³

In Maine, however, there was no mechanism to properly check attorney performance or to improve the quality of participating attorneys. As Ron Schneider, the former Chair of the Maine Commission on Indigent Legal Services noted, “Maine [had] no application process for attorneys, no eligibility requirements for lawyers seeking appointment, no training for new court-appointed lawyers, no performance standards, no mandatory vehicle for defense-specific continuing legal education, no administrator to ensure professional independence, and no other checks on attorneys that the State appoints to represent the poor.”¹⁰⁴ The lack of an effective oversight system created a significant risk within the system.¹⁰⁵

There were a number of reports and articles that highlighted these and other concerns with Maine’s system,¹⁰⁶ but efforts to address them in a comprehensive way were slow in coming. Then in 2008, the Chief Justice established the Indigent Legal Services Commission, with the mission to “[r]eview all aspects of the current court appointed counsel system.”¹⁰⁷ This Commission found that a “timely reorganization of legal defense services is necessary and should not be delayed.”¹⁰⁸ The legislature, in 2009, acted on the recommendations of the Commission and established the Maine Commission on Indigent Legal Services (the Commission or MCILS) to reconstitute the indigent defense system outside of the Judiciary and to act as the oversight body.¹⁰⁹ This Commission serves as the foundation of Maine’s current system.

¹⁰² *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

¹⁰³ *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

¹⁰⁴ Schneider, *supra* note 96, at 1.

¹⁰⁵ See Me. State Bar Ass’n., *supra* note 99, at 2. (“Superior Court Justice Michaela Murphy, a veteran former defense lawyer, said that not all veteran defense lawyers are good at it, and need mentoring or other help. She has seen some, she said, “who don’t know how to pick a jury.” She’s seen some “who should not be doing this. Unless they are weeded out, we are going to continue to have problems.””)

¹⁰⁶ See footnote 96.

¹⁰⁷ INDIGENT LEGAL SERVICES COMM’N, *supra* note 94, at app. 2.

¹⁰⁸ Clifford, *supra* note 98, at 6.

¹⁰⁹ 2009 Me. Law Chpt. 419.

3.2 The Current Maine System

Maine's current system is a coordinated court appointed system with the exception of Somerset County, in which there remains a contract for defender services. An indigent person will be provided an attorney in criminal, child protective, involuntary commitment, and emancipation cases.¹¹⁰

Under this system, the Commission and the Judiciary both have roles to play. The courts determine indigence and assign counsel, while the Commission is generally responsible for all other functions, including paying the bills and overseeing a roster of over four hundred attorneys available for assigned defense work.

3.2.1 The Commission

The Maine Commission on Indigent Legal Services is an independent body whose mission is to oversee Maine's indigent legal defense system.

3.2.1.1 Structure and Responsibility

The structure of the Commission is fairly simple, consisting of five members appointed by the Governor and confirmed by the Senate. The authorizing statute provides the Commission with broad authority to implement indigent legal services and is designed to address many of the issues that hampered the previous system.¹¹¹ As outlined on the Commission's website, its duties consist of:

- Implementing a system of assigned private counsel and contract counsel to provide quality and efficient indigent legal services;
- Establishing minimum experience, training and other qualifications for assigned counsel and contract counsel;

¹¹⁰ ME. CONST. art. I, §6-A; ME. REV. STAT. ANN. tit. 22 §4005(2); ME. REV. STAT. ANN. tit. 34-B, §3864(1); and ME. REV. STAT. ANN. tit. 34-B, §3506-A(1)

¹¹¹ 4 ME. REV. STAT. ANN. §§ 1801 -1806.

- Processing and authorizing payment of assigned counsel vouchers;
- Establishing standards for the delivery of indigent legal services;
- Providing training and support to attorneys to ensure the delivery of quality representation and to maintain an adequate pool of qualified attorneys;
- Reviewing requests for funds for case related expenses such as investigators and experts and authorizing payment for these services; and
- Establishing an administrative review and appeal process for attorneys who are aggrieved by a decision of the Executive Director, including but not limited to, decisions regarding payment of vouchers, assignment of cases, and awarding of contracts.¹¹²

For the day-to-day administration of the system, the Commission has a small staff. As of March 2014, the staff consisted of an executive director, a deputy executive director, an office assistant, an accounting technician, and six financial screeners.¹¹³

3.2.1.2 What Attorneys Participate and How They Are Overseen

As noted above, a primary function of the Commission is to implement a system of assigned private counsel to provide indigent legal services. The authorizing statute provides broad authority to establish such a structure. To meet this responsibility, the Commission developed a three part approach:

- creation of eligibility qualifications;
- adoption of performance standards; and
- institution of low-cost training.

¹¹² ME. COMM’N ON INDIGENT LEGAL SERVICES, ABOUT THE COMMISSION , at <http://www.maine.gov/mcils/about/index.html>

¹¹³ Meeting with Steven Carey, Commissioner and John Pelletier, Executive Director, Me. Comm’n on Indigent Legal Services in Augusta, Me. (Nov. 21, 2013) and ME. COMM’N ON INDIGENT LEGAL SERVICES, STAFF DIRECTORY , at <http://www.maine.gov/mcils/about/staff.html>

While under the previous system any attorney, regardless of experience, could sign up to represent indigent defendants, under the approach outlined above the Commission has adopted rules requiring minimum experience and proficiency for attorneys to be eligible for the attorney roster.¹¹⁴ Attorneys new to the system must complete a training course approved by the Commission in the area of practice for which the attorney wants to receive assignments. There are additional eligibility thresholds that an attorney must meet in order to accept more specialized cases, such as homicide, child protective or juvenile defense.¹¹⁵

Beyond the admission requirements, all accepted attorneys are required to annually complete eight hours of Commission-approved continuing legal education.¹¹⁶ The Commission does offer some low cost annual training for participating attorneys,¹¹⁷ although the classes are still fairly limited.

The Commission has adopted performance standards providing guidelines on how attorneys should conduct an indigent defense case. These rules touch on everything from the information an attorney provides to a client at the initial interview, to workload, to preparing for sentencing.¹¹⁸ However, some of the flaws highlighted under the previous model persist. The Commission has a difficult time evaluating attorney performance against the established standards and enforcing the standards, as they lack a systematic mechanism for doing so.

¹¹⁴ Me. Comm'n on Indigent Legal Services, *Standards for Qualifications of Assigned Counsel*, Chpt. 2, at <http://www.maine.gov/mcils/rules/rules/Chapter%202%20-%20Final%20as%20submitted%20to%20SOS.pdf>

¹¹⁵ Me. Comm'n on Indigent Legal Services, *Eligibility Requirements for Specialized Case Types*, Chpt. 3, at <http://www.maine.gov/mcils/rules/rules/CHAPTER%203%20-%20FINALLY%20ADOPTED,%20Passed%20by%20Comm.%20Leg.%20Gov%20.pdf>

¹¹⁶ Me. Comm'n on Indigent Legal Services, *supra* 114, at 2.

¹¹⁷ See Me. Comm'n on Indigent Legal Services, Current MCILS Sponsored Trainings, at <http://www.maine.gov/mcils/training/Sponsored%20Trainings.html> For example, the Commission has offered an eight-hour training course in 2013 on juvenile, child protective, and emancipation cases. When we met with the Commission, Executive Director Pelletier also spoke about criminal law minimum standards training that they do in conjunction with the Maine Bar Association's "Bridging the Gap" seminar.

¹¹⁸ E.g., Me. Comm'n on Indigent Legal Services, *Standards of Practice for Attorneys who Represent Adults in Criminal Proceedings*, Chpt. 102, available at <http://www.maine.gov/mcils/rules/rules/Adult%20Crimina%20Standards%20Final%20Adopted%20to%20SOS%20effdate.pdf>.

3.2.1.3 The Voucher System

The Commission, as with the previous system, adopted a voucher program as its payment method. To receive payment for a case, an attorney must submit a voucher to the Commission within ninety days of the disposition of the case, detailing the time spent and claims for reimbursement, along with any supporting documents.¹¹⁹ Commission staff reviews the voucher, checking for reasonableness, anomalies, duplication, and errors. The Commission has invested in an electronic system (Justice Work's defenderData web-based voucher system) to aid in voucher management.

Currently, attorneys are paid \$50 per hour for work on assigned cases, but as of July 2014, the rate will increase to \$55 per hour.¹²⁰ This is the first increase since 1999.¹²¹ In addition, attorneys can be reimbursed for certain other expenses such as travel, discovery materials, some non-routine expenses, and subpoena services fees within limits.¹²² There is also a cap on the maximum allowed fee that can be provided to the attorney.¹²³ The capped amount of reimbursement depends on the type of case. Depending on circumstances, the executive director can decide to exceed the cap on any given case if it is deemed justified.¹²⁴

¹¹⁹ Me. Comm'n on Indigent Legal Services, *Fee Schedule and Administrative Procedures for Payment of Commission Assigned Counsel*, Chpt. 301, available at <http://www.maine.gov/mcils/rules/rules/Chapter%20301,%20Fee%20Schedule%20-%20FINAL%20ADOPTED%20TO%20SOS%2008-16-11.pdf>

¹²⁰ 2013 Me. Law Chpt. 368, § A-42. *Also note*, as of the passage of the FY 2014-2015 budget, a change in attorney fees by the Commission is considered to be a substantive rule change which has to be reviewed by the legislature.

¹²¹ *An Act Making Unified Appropriations and Allocations for or the Expenditures of State Government, General Fund and Other Funds and Changing Certain Provisions of the Law Necessary to the Proper Operations of State Government for the Fiscal Years Ending June 30, 2013, June 30, 2014 and June 30, 2015: Hearing on LD 1509 before the Joint Standing Committee on Appropriations and Financial Affairs*, 126th Legislature 1 (2013) (Statement of John Pelletier, Executive Director, Maine Commission on Indigent Legal Services), available at <http://www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=3857>. (“As set forth in the testimony of Commission Chair David Mitchell, the Commission has determined that the current \$50/hr. rate paid to attorneys providing indigent legal services is inadequate. The hourly rate has remained unchanged since 1999. For the reasons set forth by Chair Mitchell, the Commission believes the hourly rate should be increased to \$70/hr. beginning July 1, 2013, and to \$75/hr. beginning July 1, 2014.”)

¹²² Me. Comm'n on Indigent Legal Services, *supra* note 119.

¹²³ *Id.* at 2-3.

¹²⁴ *Id.*

Under the previous system, there were concerns about delays in payments and a lack of standards the court would use to review vouchers. Aaron Fenke, a lawyer from Searsport, stated in his testimony before the legislature in 2009, “Like many of my colleagues, I have seen my vouchers (at the rate of \$50 per hour for several years now) cut with rarely an explanation. I have seen out of pocket expenses go uncompensated without cause. I have gone months without payment...”¹²⁵ Centralizing this process within the Commission has helped to create greater consistency by establishing rules, standards, and reducing the number of people involved in the processing, accepting and approving of vouchers.¹²⁶

3.2.1.4 Available Support Services – Expert Witnesses and Investigators

As stated by United States Supreme Court Justice Marshall, “*Griffin v. Illinois* and its progeny establish the principle that the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners.”¹²⁷ National standards include access to support services, such as expert witnesses and private investigators, as part of those basic tools.¹²⁸

The Commission will provide for expert witnesses and private investigators, but at the approval of the Commission’s executive director. The director’s opinion on the request is provided in writing.

¹²⁵ *An Act to Establish the Maine Commission on Indigent Legal Services: Hearing on L.D. 1132 before the Joint Standing Committee on Judiciary*, 124th Legislature 1 (2009) (Statement of Aaron Fethke, Esq.).

¹²⁶ Meeting with Maine Ass’n of Criminal Defense Lawyers in Portland, Me., (Oct. 28, 2013) [hereinafter MACDL], and meeting with Steven Carey, Commissioner and John Pelletier, Executive Director, Me. Comm’n on Indigent Legal Services in Augusta, Me. (Nov. 21, 2013).

¹²⁷ *Britt v. North Carolina*, 404 U.S. 226 (1971).

¹²⁸ Am. Bar Ass’n, *supra* note 22, at Standard 5-1.4. (A *sine qua non* of quality legal representation is the support personnel and equipment necessary for professional service.). See also *Ake v. Oklahoma*, 470 U.S. 68 (1985). (U.S. Supreme Court holds that an indigent criminal defendant had a right to a state provided psychiatric evaluation to be used in the defendant's behalf if he needed it.).

Similar to the concern about receiving payments for vouchers, there were inconsistencies in the handling of requests for private investigators or expert witnesses under the previous system. These concerns appear to have largely abated under the Commission.¹²⁹

3.2.2 The Judiciary – Role and Responsibilities

Although the Judiciary’s role in the indigent legal system was decreased with the formation of the Commission, it still maintains some important tasks under the current system.

3.2.2.1 Determining Indigence

Maine Rule of Criminal Procedure 44(b) assigns the court the duty of determining if a defendant has a right to counsel provided by the state. To make this finding the court is to consider the defendant’s income, credit, assets, living expenses, dependents, outstanding obligations, and the finances of the defendant’s parents if the defendant is a minor who lives with his/her parents.¹³⁰ Defendants may also be determined to be partially indigent, with the court requiring the defendant to pay a portion of the cost of the defense in scheduled payments.

In order to obtain assigned counsel, the defendant will first have to fill out a motion for assignment of counsel and a financial affidavit.¹³¹ To assist the court in making a determination about indigence, the Commission hired six screeners, each responsible for a particular geographic area of the state,¹³² to examine the financial eligibility of defendants and has adopted indigence guidelines¹³³ to be used to help in determining a person’s eligibility. Unfortunately the Commission does not have the funding to hire enough screeners to evaluate everyone requesting

¹²⁹ MACDL *supra* note 126, and Me. Comm’n on Indigent Legal Services *supra* note 126.

¹³⁰ ME. R. CRIM. P. 44(b)

¹³¹ Me. Comm’n on Indigent Legal Services, *Frequently Asked Questions for the Public*, at http://www.maine.gov/mcils/faqs/citizen_faq.shtml

¹³² The FY2014/2015 budget included funding for additional screeners. See 2013 Me. Law Chpt. 368, § A-42.

¹³³ Me. Comm’n on Indigent Legal Services, *Guidelines for Determination of Financial Eligibility for Assigned Counsel and Reimbursement for Assigned Counsel Costs*, Chpt. 401, available at <http://www.maine.gov/mcils/rules/rules/Indigency%20Guidelines%20Final%20Adopted%20to%20SOS%20revised%20Appendix%20A%202013.pdf>

appointed counsel in criminal cases, and seldom if ever screens applicants for appointed counsel in child protection cases. In situations in which a screener is unavailable, the lawyer of the day, if present, can assist the process, otherwise the judge will make the decision without any additional input aside from that which is provided by the defendant. In courts where there are screeners, the general consensus is that the ability to determine eligibility is improved.¹³⁴ Ultimately, whether the defendant is indigent or partially indigent is up to the discretion of the judge,¹³⁵ who may or may not follow the recommendation of the screener. According to the Commission, in most cases the Judge follows the screener's recommendation.¹³⁶

3.2.2.2 Attorney Assignment

If the defendant is determined to be eligible for court-appointed counsel, the court will assign a counsel. The court will select an attorney from the list of eligible attorneys created by the Commission.¹³⁷ The defendant will learn the name of the assigned attorney either that day, if the court participates in the Unified Criminal Docket, or by mail. The Judiciary's case management system and the Commission's case management system are currently unable to communicate with each other. The court notifies the Commission of attorney assignments through fax, email, or mail. According to the Commission, the Judiciary has suspended talks to establish a link between the two systems as they decide on how to implement a new e-filing system. The Commission has hopes that once the two systems are able to communicate, the Commission

¹³⁴ Meeting with Judicial Department Leadership in Portland, Me., (Dec. 20, 2013) and Me. Comm'n on Indigent Legal Services, *supra* note 126. *See also* Me. Comm'n on Indigent Legal Services meeting minutes in which public comments indicate concerns about the screening process namely that there should be a system in place to flag defendants who were determined initially to be either ineligible or partially indigent and whose situations may have changed to be rescreened and concerns about courts not accommodating screeners' schedules. *See e.g.*, Me. Comm'n on Indigent Legal Services, Meeting Minutes for April 9, 2013, May 14, 2013, Aug. 13, 2013, and September 10, 2013, available at http://www.maine.gov/mcils/meetings/past_meetings.html.

¹³⁵ ME. R. CRIM. P. 44(b)

¹³⁶ Me. Comm'n on Indigent Legal Services, *supra* note 126.

¹³⁷ ME. R. CRIM. P. 44(a)

could take over the actual assignment of attorneys.¹³⁸

3.3 Is this the best system that Maine can have?

It was important, as OPM reviewed the current system, to meet with a number of interested parties, including judges, prosecutors, and defense attorneys, to learn their views and experiences with Maine's system. Through this review process it became evident that most interested parties agreed that the recent reforms, which led to the creation of the Commission, improved the quality and performance of the system, but that flaws remain.

Although there was encouragement from many to pursue reforms, not surprisingly there was not complete agreement on what the exact issues are and what reforms are feasible. There was praise for the work and effort of the Commission, but apprehension about how much can actually be achieved within the existing system, given the Commission's size and resources.

While there were a number of concerns voiced by interested parties, OPM's focus is on the most prominent challenges facing Maine's system – budget, attorney compensation, and oversight. Various parties interviewed for this report described considerations that are beyond the focus of this report, but bear mentioning:

- The Judiciary is generally underfunded, and the availability of more judges would take pressure off of the system;
- Mental health issues produce tremendous stresses on the judicial system;
- Civil violations for marijuana possession should be moved off of the criminal docket and handled by the Violations Bureau;
- Prosecutors should pay more attention to the determination of which cases carry a risk of jail time, as that triggers the requirement for appointment of counsel for indigent defendants; and

¹³⁸ Me. Comm'n on Indigent Legal Services, *supra* note 126.

- There should be a statewide prosecution coordinator.

3.3.1 The Budget

One of the inherent weaknesses of the present system is that costs are highly dependent on the number and complexity of cases that must be handled by appointed counsel. The Commission bases its budget request on a caseload estimate, but since it is impossible to perfectly predict caseloads and case complexity year over year, costs can rise very quickly and unexpectedly. As the majority of funding goes to pay for private attorney vouchers, there are few opportunities for economies of scale or to shift funds to cover shortfalls. The tools that the Commission does have to offset unforeseen expenses are primarily limited to going to the legislature for supplemental funding or reducing payments to attorneys.¹³⁹

Historically, the Commission has sought supplemental funds to cover their shortfalls, receiving almost \$1.5 million in supplemental funding from different bills during the 125th Legislature.¹⁴⁰ It was thought that with the passage of the 2014-2015 biennial budget the Commission was fully funded for the first time since its creation, but in December 2013, the Commission informed attorneys that funds for the quarter had run out, so payment on all remaining vouchers would not be paid until the start of the next quarter in January.¹⁴¹ The reason for the shortfall was attributed to an increase in caseloads. Between April and September of 2013, there was an unexpected increase in the number of cases as compared to the same

¹³⁹ See Me. Comm'n on Indigent Legal Services, Meeting Minutes for April 10 2012.

¹⁴⁰ 2011 Me. Law Chpt. 1 (an additional \$201,160 for FY2010-11); 2011 Me. Law Chpt. 28, (an additional \$550,000 for FY2010-11); 2012 Me. Law Chpt. 657, 25 (an additional \$450,000 for FY 2012-13); 2012 Me. Law Chpt. 655 (an additional \$750,000 for FY 2011-12 and \$3,110 for FY 2012-13); and 2012 Me. Law Chpt. 477 (a decrease of \$260,203 for FY2012-2013).

¹⁴¹ Dolan, Scott, *Funding Shortage Hits Maine's Court-Appointed Lawyers in December*, PORTLAND PRESS HERALD, Dec. 6, 2013, available at http://www.pressherald.com/news/Funding_shortage_hits_Maine_s_court-appointed_lawyers_in_December_.html. See also Me. Comm'n on Indigent Legal Services, Meeting Minutes for July 9, 2013 ("Director Pelletier indicated that he is confident that the Commission will not face another budget shortfall going forward.") and Me. Comm'n on Indigent Legal Services, Meeting Minutes for Dec. 10, 2013, 1-3, available at <http://www.maine.gov/mcils/meetings/minutes/January%2013,%202014%20agenda.minutes.operations%20reports.pdf>.

period in 2012 – a fifteen percent increase in criminal cases, a more than eleven percent increase in protective custody cases, and a more than five percent increase in juvenile cases.¹⁴² As a result, the Commission had to once again ask the legislature for supplemental funding, \$860,000 and \$1,015,000 for fiscal years 2014 and 2015 respectively.¹⁴³

This constant need for supplemental funding disrupts the entire state budget process, and causes hard feelings between the attorneys who do this work and their government. It is unlikely that the legislature would deny outright a funding request for a constitutionally-required service, but since the state budget by law must remain balanced, the Legislature and the Governor are forced to take money from other areas of state government to meet this obligation. This can aggravate funding problems in other important state programs and functions. Continual budget uncertainty also can drive attorneys away from participating in the system over concerns that payments may be delayed.

The cost for any indigent legal defense services system will be reactive to caseload and caseload complexity, but the system as designed in Maine has very little elasticity, leaves very little room for error when establishing the biennial budget, and leads to frequent cost overruns that must be shouldered by Maine tax payers. To improve the system, measures to stabilize the budget and introduce predictability should be adopted.

¹⁴² Dolan, *supra* note 141. See also Me. Comm’n on Indigent Legal Services, Meeting Minutes for Nov. 12, 2013, (“Submitted vouchers for Q1 exceeded budget projections by \$203,000.”), available at <http://www.maine.gov/mcils/meetings/minutes/December%2010%202013%20agendaminutesoperations%20reports.pdf> and Me. Comm’n on Indigent Legal Services, Meeting Minutes for Dec. 10, 2013, available at <http://www.maine.gov/mcils/meetings/minutes/January%2013,%202014%20agenda,minutes,operations%20reports.pdf>.

¹⁴³ ME.OFFICE OF FISCAL AND PROGRAM REVIEW, FISCAL YEAR 2014 SUPPLEMENTAL BUDGET PROPOSAL, at http://www.maine.gov/legis/ofpr/appropriations_committee/materials/FY14_Supplemental_Budget_Proposals.pdf; and ME.OFFICE OF FISCAL AND PROGRAM REVIEW, FISCAL YEAR 2015 SUPPLEMENTAL BUDGET PROPOSAL, at http://www.maine.gov/legis/ofpr/appropriations_committee/materials/FY15_Supplemental_Budget_Proposals.pdf.

3.3.2 Attorney Compensation

A challenge for any system dependent upon private attorneys is ensuring there is incentive for good attorneys to participate in the system; this is usually achieved by providing a decent and timely compensation for services rendered. As stated previously, Maine attorneys are currently paid fifty dollars per hour for work on assigned cases. The FY 2014-15 Biennial Budget included a five dollar increase in the hourly rate so that on July 1, 2014 attorneys will earn fifty-five dollars per hour. This was the first increase since 1999. The increase is still under the sixty dollar per hour rate that was advocated for fourteen years ago,¹⁴⁴ substantially under the rates of seventy dollars in fiscal year 2014 and seventy-five dollars in fiscal year 2015 advocated for by the Commission in their biennial budget proposal,¹⁴⁵ and less than the amounts considered by the Joint Standing Committee on Judiciary in LD 396, as amended, during the first session of the 126th Legislature.¹⁴⁶

The national average for appointed counsel is \$65 an hour.

Wisconsin has the lowest rate for appointed counsel at \$40 an hour for all non- capital cases.

¹⁴⁴ *An Act Making Unified Appropriations and Allocations for or the Expenditures of State Government, General Fund and Other Funds and Changing Certain Provisions of the Law Necessary to the Proper Operations of State Government for the Fiscal Years Ending June 30, 2013, June 30, 2014 and June 30, 2015: Hearing on LD 1509 before the Joint Standing Committee on Appropriations and Financial Affairs, 126th Legislature 1 (2013) (Statement of David J. Mitchell, Chairman, Maine Commission on Indigent Legal Services), available at <http://www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=3856>. (Private counsel, and in some cases contract counsel, provide the representation and are compensated at a rate of \$50.00 per hour, a rate that was implemented in 1999, despite the fact that the rate recommended at that time was \$60.00 per hour.)*

¹⁴⁵ *Id.*

¹⁴⁶ LD 396, as originally introduced, included a rate increase to \$70 per hour in FY 2014 and \$75 per hour in FY 2015, but an amendment adopted by the Joint Judiciary Committee reduced the rate increase to \$60 and \$65. The committee reported out the bill as “ought to pass and amended.” It was subsequently carried over to the 2nd Session of the 126th Legislature. For more detailed discussion about the rate see *An Act to Appropriate Sufficient Funds for Indigent Legal Service: Hearing on LD 360 before the Joint Standing Committee on Appropriations and Financial Affairs, 126th Legislature (2013) (Statement of Charles Soltan, Esq., Me. Ass’n of Criminal Defense Lawyers) available at <http://www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=4628>.*

Though the increase does signify recognition by the Governor and the Legislature of the need for better compensation, it remains an open question as to whether the five dollar rate increase will be sufficient to incentivize attorneys to join or remain on the roster. In the April 2013 MCILS meeting minutes, Commissioner Carey noted that some attorneys with whom he spoke were “insulted” even with a decrease from the proposed seventy dollar rate to the sixty dollars put forward in the LD 396 amendment.¹⁴⁷

In his March 2013 testimony, David Mitchell, chair of the Commission, outlined why the attorney rate of compensation “needs to increase more substantially and more quickly,” than the five dollar increase included in the Biennial Budget. He noted that some qualified and seasoned attorneys have withdrawn from the rolls, others have decided not to join, and some of those who are active on the roster have indicated that they are considering withdrawing.¹⁴⁸ The Maine Bar Association in its

In the federal court system, attorneys representing indigent non-capital defendants in federal court are compensated at a rate of \$126 an hour and limits attorney compensation to \$9,800 in the case of non-capital felonies and \$2,800 in the case of misdemeanors.

In 2013, South Dakota had rate of \$84 an hour for appointed counsel. By law, the fee rate increases in an amount equal to the cost of living increase that state employees received that year.

testimony noted that it “is very concerned that the increase in the rate of pay provided for in the biennial budget is not sufficient” as “the current rate does not cover the overhead of running a legal

¹⁴⁷ Me. Comm’n on Indigent Legal Services, Meeting Minutes for April 2013, 3. Available at <http://www.maine.gov/mcils/meetings/minutes/May%202013%20agenda,%20minutes,%20operations%20reports.pdf>. (“Of the ones he has spoken to about it, he said it was a 50-50 split; half are insulted at the \$60 rate and half think that a little increase is better than no increase at all.”)

¹⁴⁸ Mitchell, *supra* note 144, at 1-2.

practice. This deficient rate has driven attorneys away from this work and without a substantial increase, the indigent legal services system is threatened.”¹⁴⁹

The Commission’s ability to ensure that the constitutional rights of the indigent are met is heavily dependent on the cooperation of Maine’s legal community. Attorneys in Maine have displayed a clear commitment to public service, but a continued low compensation rate jeopardizes the integrity of the system. It would be unfortunate to be forced to retain poorly performing attorneys because compensation rates are not attracting high-performing and experienced lawyers.

3.3.3 Performance oversight

The Commission’s efforts to establish standards and qualification requirements for attorneys are to be applauded as they are certainly a step up from the “unofficial” requirements of the previous system, but there is a legitimate question as to whether they are enough. OPM’s review revealed that the Commission’s ability to measure attorney performance is unknown. There are no performance evaluations to monitor improvements and a lack of performance metrics. As a result OPM had to glean attorney performance from the opinions of those dealing with the system daily – attorneys, judges, and prosecutors – and to compare Maine’s standards and qualification requirements to those of other states.

During this review, appreciation was shown for the performance and ability of many of the attorneys, but there was an acknowledgement that some attorneys in the system cannot handle the cases to which they are appointed. This was attributed to attorneys being new and inexperienced, as well as to attorneys who are ill-suited for criminal law. As there is not a large enough caseload to

¹⁴⁹ *An Act Making Unified Appropriations and Allocations for or the Expenditures of State Government, General Fund and Other Funds and Changing Certain Provisions of the Law Necessary to the Proper Operations of State Government for the Fiscal Years Ending June 30, 2013, June 30, 2014 and June 30, 2015: Hearing on LD 1509 before the Joint Standing Committee on Appropriations and Financial Affairs, 126th Legislature 1 (2013) (Statement of Me. State Bar Ass’n), available at <http://www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=3859>[http://www.maine.gov/mcils/meetings/minutes/May 14, 2013 agenda, minutes, operations reports.pdf](http://www.maine.gov/mcils/meetings/minutes/May_14,_2013_agenda_minutes_operations_reports.pdf).*

support all of the attorneys on the roster full-time, attorneys cannot focus their attention on becoming criminal experts and must rely on other types of casework to support themselves.

As previously noted, there is an overall lack of performance measures. This means there is no mechanism to mentor and monitor new attorneys, or identify poorly performing attorneys who should be removed from the roster altogether. Currently, staff conducts a billing practice evaluation and has access to information on the final disposition of cases, but is without a formalized system in place to use that information uniformly. The system's only check on inexperienced or bad lawyers appears to be a reliance on judges, who can assign counsel to defendants based on their knowledge and experience with the attorneys.

The Commission does have the statutory authority to do more to evaluate the performance of attorneys; however, the general consensus is that the Commission is doing what they can with what they have. The focus on and blame for the lack of a robust oversight framework was attributed by the stakeholders to the Commission's lack of resources.

Maine's performance requirements are not as robust in comparison to those established in other New England states, such as New Hampshire and Massachusetts. New Hampshire, which has a public defender's office operated as a not-for profit, requires new attorneys to participate in a five-week training program before they can take on a case.¹⁵⁰ There is on-going training throughout the year, including a mentoring program and mock trials.¹⁵¹ There are also performance evaluations conducted in the first, third, and fifth year of employment to ensure the attorneys meet the standards required to be public defenders.¹⁵²

¹⁵⁰ NEW HAMPSHIRE PUBLIC DEFENDER, *Working at NHPD*, at <http://www.nhpd.org/employment/working-at-nhpd.aspx>.

¹⁵¹ *Id.* and meeting with Randy Hawkes, Executive Director, New Hampshire Public Defender, January 2014.

¹⁵² *Id.*

Massachusetts, whose system is more similar to Maine’s in relying heavily on appointed counsel, is arguably the best model when it comes to oversight of court-appointed attorneys.¹⁵³ The Committee for Public Counsel Services (CPCS) is the state agency that oversees the hybrid appointed public defender system. The CPCS works in cooperation with the county-based not-for-profit “Bar Advocate Programs” to administer and supervise the approximate 3,000 private attorneys in the system.

To be eligible to receive appointments, an attorney must become a member of a county Bar Advocate Program and become certified by the CPSC in a practice area.¹⁵⁴ To be certified for district court cases (misdemeanor and low-risk felony cases) an attorney must complete a required training program, such as the five-day seminar “Zealous Advocacy in the District and Juvenile Courts.”¹⁵⁵ Training also continues after the attorney is certified. New attorneys will “reconvene monthly throughout the balance of their first year for additional one and two-day training modules.”¹⁵⁶

Similar to Maine, Massachusetts requires additional training and qualifications for attorneys who want to be appointed to more specialized cases. To be eligible for murder cases, for example, an attorney must have five years of criminal experience, attend specialized training programs and have served as lead counsel in at least ten jury trials of complex cases within the past five years.¹⁵⁷ Attorneys who wish to take cases in child and family law, mental health, and post-conviction

¹⁵³ The SPANGENBERG GROUP, *supra* note 18, at 2.

¹⁵⁴ The practice areas include: district court cases (lesser felony and misdemeanor cases); superior court (felony cases), murder cases, juvenile cases, juvenile delinquency cases, or appeals and post-conviction cases.

¹⁵⁵ COMM. FOR PUBLIC COUNSEL SERVICES, *District Court Cases*, at http://www.publiccounsel.net/certification_requirements/criminal_cases/district_court_cases.html

¹⁵⁶ COMM. FOR PUBLIC COUNSEL SERVICES, *Training and Supervising*, at http://www.publiccounsel.net/practice_areas/criminal_public_defender_division_pages/training_supervision.html

¹⁵⁷ COMM. FOR PUBLIC COUNSEL SERVICES, *Murder Cases*, at http://www.publiccounsel.net/Certification_Requirements/criminal_cases/murder_cases.html.

assignments must, in addition to any training requirements, also participate in the mentorship program.¹⁵⁸

To provide supervision over the private attorneys, the CPSC contracts with county “Bar Advocate Programs.” These not-for-profit corporations provide, in cooperation with the CPSC, training for attorneys, supervising attorneys, and mentors for the participating attorneys.¹⁵⁹ They also assess any complaints filed against assigned counsel and conduct performance evaluations.¹⁶⁰ In addition, the CPSC has an internal Audit and Oversight Unit to review expenditures.¹⁶¹

The Massachusetts system, however, does not come cheaply. In fact, it is one of the most costly systems in the country. Among states with a one-hundred percent state-based system, only Florida, a state with three times the population of Massachusetts, spent more.¹⁶² To further illustrate the point, Maryland, a state of similar population to Massachusetts and which has a state-wide public defender office, spent \$89 million in FY 2008 while Massachusetts spent \$208 million.¹⁶³ The Massachusetts Governor points to the high cost of relying primarily on the private bar as opposed to a public defender office for indigent defense services as a significant cost driver.¹⁶⁴

Overseeing private attorneys spread out across Maine is not an easy task, but it is important to ensure that proper performance measures are in place going forward. To address the current system’s deficiencies, a more robust model that evaluates and enforces performance measures must be established without becoming overly burdensome or imposing significant costs to the state.

¹⁵⁸ COMM. FOR PUBLIC COUNSEL SERVICES, ASSIGNED COUNSEL MANUAL POLICIES AND PROCEDURES, CERTIFICATION AND ASSIGNMENT PROCEDURES (2013), at http://www.publiccounsel.net/private_counsel_manual/CURRENT_MANUAL_2013/MANUALChap3-Revised_8-12-13.pdf.

¹⁵⁹ LEFSTEIN, *supra* note 36, at 203-204.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*, at 193 n.6

¹⁶² MASSACHUSETTS EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE, FY2013 PUBLIC COUNSEL SERVICES REFORM PROPOSAL 5, available at <http://www.mass.gov/anf/docs/anf/fy13/2-6-2012-edits-final-fy13-cpcs-reform-stakeholder-presentation-01-31-12.ppt>.

¹⁶³ *Id.*

¹⁶⁴ *Id.* See also, Governor’s Budget FY2012, Indigent Defense Reforms, at http://www.mass.gov/bb/h1/fy12h1/exec_12/hbudbrief22.htm.

Improving performance metrics will ensure there is a strong roster of defense attorneys to provide the people of Maine and participants in the justice system a greater degree of confidence in the Judiciary.

Section 4: New System for Maine

Reforming Maine’s existing indigent defense system should have three objectives: (1) meet the Ten American Bar Association (ABA) Principles of a public defense delivery system; (2) promote professionalism, and (3) stabilize the budget.

4.1 ABA Ten Principles

In 2002, the ABA approved a set of ten principles for a public defense delivery system (“ABA Ten Principles”).¹⁶⁵ These ten principles represent national standards for a public defense model. They highlight, among other things, the importance of an independent system, early appointment of counsel, reasonable caseloads, and resource parity with prosecutors.

As stated by of the ABA Standing Committee for Legal Aid & Indigent Defendants, the principles “constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney.”¹⁶⁶

¹⁶⁵ AM. BAR ASS’N, *supra* note 97.

¹⁶⁶ *Id.*, at introduction.

ABA Ten Principles

- 1** The public defense function, including the selection, funding, and payment of defense counsel, is independent.
- 2** Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
- 3** Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients’ arrest, detention, or request for counsel.
- 4** Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
- 5** Defense counsel’s workload is controlled to permit the rendering of quality representation.
- 6** Defense counsel’s ability, training, and experience match the complexity of the case.
- 7** The same attorney continuously represents the client until completion of the case.
- 8** There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
- 9** Defense counsel is provided with and required to attend continuing legal education.
- 10** Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards

Meeting these interdependent principles should be an aim of any reform to Maine's indigent legal system.

4.2 Professionalism

An important pillar of any successful indigent legal defense system is a focus on professionalism. In order to meet this goal, the system must have mechanisms to ensure that attorneys are qualified, have the proper training, receive appropriate compensation, have access to adequate support services, including administrative and investigative, and are overseen in a comprehensive and systematic way.

4.3 Budget

Creating stability and predictability in the budgeting process for the indigent legal defense system should be a priority of any reform. Budgeting is not a perfect process, especially when unexpected events occur, but establishing a system that allows for some flexibility and elasticity to cover unanticipated costs is a feasible objective.

As an initial rough measure, the funding for the indigent legal defense system should be proportional to other components of the justice system with whom the defense attorneys must interact.

Section 5: A New Maine System: Providing legal representation to indigent individuals, as is required by the U.S. and Maine Constitutions and Maine statutes

5.1 Design of the system

It is time for Maine to gain the benefits discussed earlier by instituting a Public Defender system to provide legal representation to indigent criminal defendants, parents in child protection matters, people subject to involuntary commitment and individuals seeking emancipation.

We envision a system administered by the existing Maine Commission on Indigent Legal Services (MCILS or “the Commission”), who would retain their role in establishing rules and standards. The Maine Public Defender’s Office (MPDO) would consist of offices in eight districts, parallel to the existing Prosecutorial Districts, each of which would be led by a District Public Defender (DPD) and staffed by professional Assistant Public Defenders (APDs). Cases within the offices would be assigned on an individual basis to APDs, based on the experience of the APD, the complexity of the matter and any special expertise required by the case.¹⁶⁷

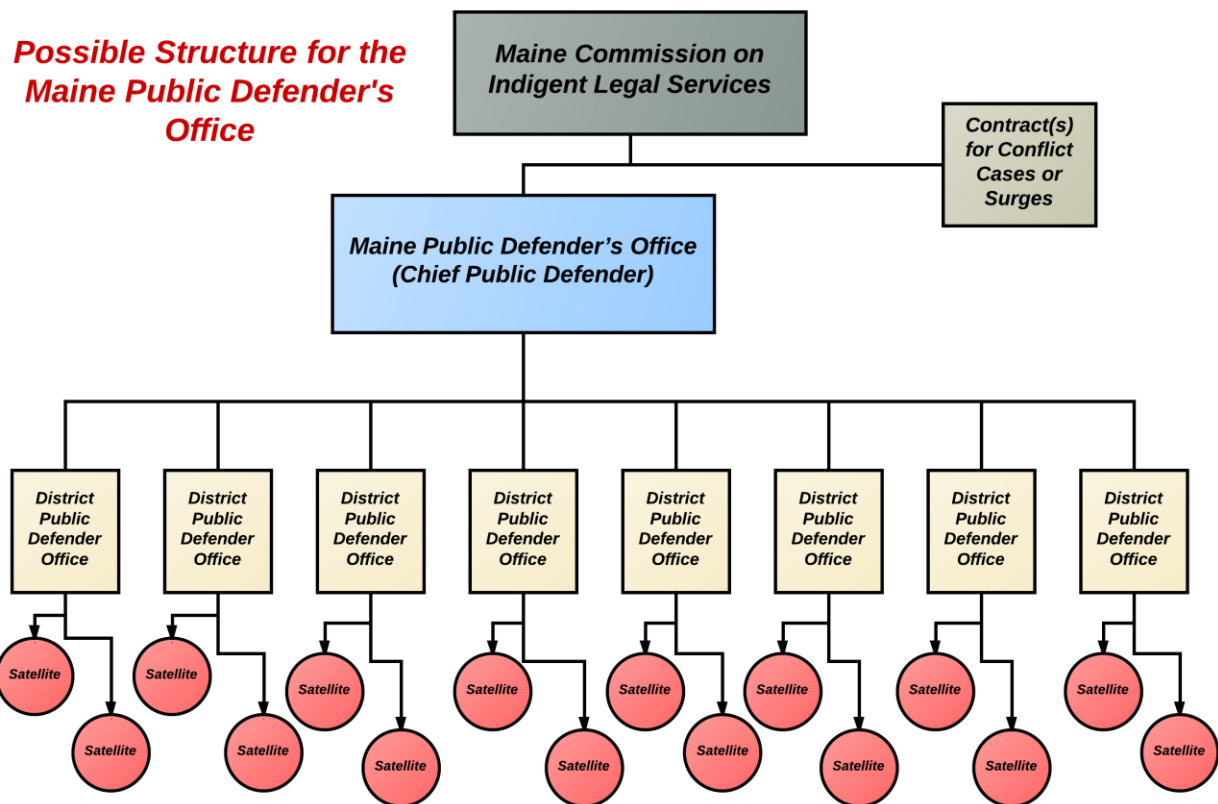
The MCILS would hire a single Chief Public Defender (CPD) to provide leadership and administrative support to the Districts. We expect that the MPDO would employ at least the same number of attorneys who presently serve in the District Attorneys’ offices, along with investigators and a number of support staff members. Defenders’ Offices would have funds to hire experts when they are necessary to an adequate defense.

There are at least two potential organizing principles for the MPD; it can be a state agency or a private entity. Each form of organization has strengths and weaknesses. Organized as a state

¹⁶⁷ For example, homicides, sexual assaults, juvenile criminal matters and child protection cases might benefit from a given APD’s experience and special expertise. We expect as the Public Defenders’ Offices mature that some APDs within the offices will gain expertise in these specialized areas of the law and will handle most of these cases when they come in to the Public Defender.

agency, the MPD would have the benefit of participating in the state's existing Human Resources infrastructure, including its salary ladder and retirement system, and would be relatively quick to establish.

Another option would be to contract with a private entity, probably organized as a not-for-profit corporation, which would be more nimble and flexible than a state agency, and would serve as an excellent counterbalance to the state's role in prosecution of criminal defendants. In this instance, the state would contract with a single private Maine Public Defender entity or several entities, each providing services in one or more Defense Districts.



5.1.1 An Independent and Reactive System

We believe that organization as a private entity or entities would be most beneficial to Maine, combining the nimbleness of those organizations with the more complete legal separation from the state's role in criminal prosecutions and child protection matters. This form of organization has worked very well for New Hampshire,¹⁶⁸ and would fulfill the first of the ABA's Ten Principles of a Public Defense Delivery System ("ABA Ten Principles"), "The public defense function, including the selection, funding, and payment of defense counsel, is independent."¹⁶⁹

The Public Defender system must be able to quickly accommodate temporary surges in case volumes and the occasional conflict case. The nature of a Public Defender's office, particularly if it is organized as a single statewide entity, would provide it with a significant degree of elasticity to respond to changing case volumes and conflicts. This form of organization should allow Defender Districts to assist each other with temporary surges and most conflicts. Furthermore, it would be a good backup to give the MCILS or the individual Public Defenders' Offices the ability to enter into contracts with attorneys and law firms to ameliorate the effects of surges in case volumes and difficult conflicts.

This contact with the private bar, along with the composition of the MCILS itself of private members of the bar, will be healthy for the indigent defense system, and will satisfy the second of the ABA Ten Principles, "Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar."¹⁷⁰ The size and elastic nature of the planned Public Defender office and the ability of District Defender offices to work together or to contract with private attorneys also fulfills the fifth of the ABA's

¹⁶⁸ Hawkes, *supra* note 151.

¹⁶⁹ AM. BAR ASS'N, *supra* note 97 at 2.

¹⁷⁰ *Id.*

Ten Principles, “Defense counsel’s workload is controlled to permit the rendering of quality representation.”¹⁷¹

5.1.2 Identifying the Indigent

Indigence screening and determination would continue to be important functions of the MCILS, but they would be decentralized to the District Defender offices. Presently, screeners have no access to any means of verifying an applicant’s income or assets; it is important for the credibility of the indigence determination that screeners for a Public Defender system can refer to one of several commercially available databases to verify income and assets. In this way, the determination of eligibility would be made by the Public Defender’s offices, as would the immediate assignment of an APD to each case. These functions are currently required of the judge in each case.

In the Maine Public Defender system, the judge would then be available to consider appeals of the determination of indigence in those cases in which the assistance of the Public Defender was denied to an individual or a monetary contribution to his or her defense was required of the defendant. This is a much more appropriate role for the judge in these cases. This arrangement would also satisfy the third of the ABA Ten Principles, “Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients’ arrest, detention, or request for counsel.”¹⁷²

5.1.3 Fees and Payments

We also believe that it is entirely just and crucial to the credibility of the system for representation of indigent clients that an application fee is required of those seeking this service

¹⁷¹ *Id.*, at 1.

¹⁷² *Id.*, at 2.

and that assessments for legal services to those found partially indigent are collectible. Representation of indigent clients is a very valuable service, and we feel that the citizens receiving this service will appreciate its value more if they have some “skin in the game.”¹⁷³ It would be the rare recipient of these services who could not raise an application fee of fifty to one hundred dollars if it is required by statute. Judges should consider this fee mandatory, and should rarely waive it. One possible finding in a screening for indigence is “partial indigence.”

Under the existing system in Maine, there is no mechanism for collecting this contribution from clients; it is collected by court clerks if the person decides to pay it. The new Maine Public Defender system should collect this money from its clients through the screeners, assisted by a new criminal contempt statute that provides penalties for those who are able to pay something and refuse to do so after having had the benefit of legal representation.

5.1.4 Ensuring Proper Sized and Confidential Space for Indigent Defense

While the District Attorneys generally operate in office space provided by the counties in Maine,¹⁷⁴ it would be unrealistic to expect counties to provide office space to the Public Defender. Office space in the county courthouses is at a premium, and is nearly all occupied by the existing operations of the courthouses around the state. While counties nationwide share the economic responsibility for administration of justice, and it might be desirable to require a contribution from Maine’s counties toward representation of their indigent citizens, current county budgets in Maine, funded largely by property taxes imposed by cities and towns, could not easily accommodate this additional expense. We expect, therefore, that each District Defender’s office will lease adequate office space at state expense for its operations. Some

¹⁷³ See Section 2.1.2, *Funding the Indigent Legal Defense Models*, at 17-19, for more discussion about the use of administrative fees.

¹⁷⁴ The non-attorney staff in the District Attorneys’ offices is paid for by the counties as well.

districts will require satellite offices, as is the case with the District Attorneys. When selecting space to lease for the District offices, the Public Defender should take heed of Principle number four of the ABA's Ten Principles, "Defense counsel is provided sufficient time and a confidential space within which to meet with the client."¹⁷⁵

5.1.5 Ensuring Access to Necessary Resources for a Proper Indigent Defense

It can be important for attorneys doing criminal defense work to have access to investigators, for example in order to check alibis and find and interview witnesses. In the existing appointed counsel system, an attorney appointed to a case must decide whether the case requires investigatory resources, apply to the MCILS for approval and, if approved, find and hire an investigator. In a Maine Public Defender system, investigators would be hired to be full-time staff in the Defenders' Offices. They could be available to any APD at any stage in their case preparation to help investigate their cases. There would also be funding available at the Defenders' Offices to hire experts when they are necessary to an adequate defense.

There has been a long and acrimonious disagreement among attorneys doing appointed work, the state's budgeters and the public regarding the reimbursement rate for appointed attorneys. This disagreement has been covered extensively recently by the media,¹⁷⁶ with attorneys arguing that the current fifty dollar per hour reimbursement rate is inadequate to allow them to do appointed work, the budgeters agreeing to raise the rate to fifty-five dollars an hour but unwilling to meet the seventy-five dollar an hour rate the attorneys are requesting, and the public generally

¹⁷⁵ AM. BAR ASS'N, *supra* note 97 at 1.

¹⁷⁶ See, e.g., Judy Harrison, *Court-Appointed Attorneys Seek Raise to \$75 Per Hour to Keep Pace with Cost of Living*, BANGOR DAILY NEWS, Jan. 21, 2013, available at <http://bangordailynews.com/2013/01/21/news/bangor/court-appointed-attorneys-seek-raise-to-75-per-hour-to-keep-pace-with-cost-of-living/>; Dolan, Scott, *Maine's Court-Appointed Lawyers Face Fiscal Crunch*, PORTLAND PRESS HAROLD, Feb. 2, 2013, available at http://www.pressherald.com/news/court-appointed-lawyers-face-fiscal-crunch_2013-02-03.html?pagenum=full; and *Our Opinion: Court-appointed lawyer system needs overhaul*, THE KENNEBEC JOURNAL, Feb. 5, 2013, available at http://www.kjonline.com/opinion/court-appointed-lawyer-system-needs-overhaul_2013-02-04.html.

unsympathetic with the attorneys' request.¹⁷⁷ The attorneys doing appointed work were further aggravated recently when it became public information that the Attorney General has agreed to pay three hundred dollars an hour to outside attorneys, and one hundred fifty dollars an hour to paralegals, to defend DHHS in a potential lawsuit.¹⁷⁸ One possible result of this situation within the existing appointment system is that more attorneys may refuse to take appointed cases. Another very beneficial effect of adoption of a Public Defender system is that this harmful and hurtful debate will no longer be necessary, since all of the attorneys representing indigent clients will be salaried employees of the Public Defender's Office. We expect the Public Defender's Offices to be significant sources of professional expertise for the entire public and private bar, particularly as some Assistant Public Defenders leave public service to establish themselves as private attorneys.

5.1.6 Maintaining and Monitoring Indigent Defense Performance

A few of the primary benefits of a Public Defender system for Maine include expanded opportunities for training, mentorship, supervision and evaluation of the attorneys providing legal representation for indigent Mainers. We envision a training program for new APDs that includes formal classroom training, a period of in-house training and long-term mentorship by a more experienced APD. This training program would be much more extensive than that which is possible in the present appointed counsel system. APDs would also be required to attend at least the eleven hours annually of Continuing Legal Education that are required of all attorneys in Maine, but would be expected to complete this training within directly relevant topics. This training program, along with the professionalism and specialized expertise that will develop

¹⁷⁷ *Id.*

¹⁷⁸ Patty B. Wight, *Subpoenas Issued in Maine Document Shredding Scandal*, Me. Public Broadcast Network, Feb. 21, 2014, available at <http://www.mpbn.net/Home/tabid/36/ctl/ViewItem/mid/5347/ItemId/32393/Default.aspx>; Scott Thistle, *Maine pays lawyers \$300 to \$333 per hour to defend CDC officials in whistle-blower case*, Me. Sun J., Feb. 19, 2014, available at <http://www.sunjournal.com/news/1494283>.

within a system of full-time public defenders, will go a long way towards satisfying the sixth and ninth of the ABA's Ten Principles, "Defense counsel's ability, training, and experience match the complexity of the case,"¹⁷⁹ and, "Defense counsel is provided with and required to attend continuing legal education."¹⁸⁰ Furthermore, the supervision, evaluation and quality control over the representation of indigent clients that is not possible within the present system would be built into the Maine Public Defender system. The design of the Public Defenders' Offices, with a supervisory hierarchy, will easily lend itself to the kind of supervision and evaluation of the performance of APDs that ensures a very high quality and consistency of representation for indigent clients. ABA Principle number ten will thereby be effectively satisfied, "Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards."¹⁸¹

In designing the Maine Public Defender system, we will heed the good advice provided by the seventh and eighth of the ABA Ten Principles, "The same attorney continuously represents the client until completion of the case,"¹⁸² and, "There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system."¹⁸³

We believe that the present budget of approximately fifteen million dollars for appointed counsel if redirected to a Public Defender system will permit implementation of a system that satisfies all of the ABA's Ten Principles and provides significant budget stability that does not exist in the current system.

¹⁷⁹ AM. BAR ASS'N, *supra* note 97 at 1.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

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Appendix A: Sample Budget for a Maine Public Defender's Office

Facts:

- The present budget for the Maine Commission on Indigent Legal Services (MCILS) is approximately \$15 million, including the requests for the end of FY 2015.¹
- The average annual number of cases handled by the MCILS is 27,750. This is an average of all types of cases from FY 2011 and FY 2012.²
- The National Legal Aid and Defender Association has established standards for caseloads in a Public Defender's Office. They are: not more than 150 felonies per attorney per year, not more than 400 misdemeanors (excluding traffic) per attorney per year, not more than 200 juvenile court cases per attorney per year, and not more than 25 appeals per attorney per year.³
- Contracts and coordinated attorney appointments for conflict cases will be necessary.
- The Maine biennial budget currently pays for 75 Assistant District Attorneys statewide.
- National averages are approximately one investigator for every six attorneys in a Public Defender's Office and one additional staff member for each two attorneys.⁴

Assumptions:

- Generous fully-loaded salary assumptions for employees of a Public Defender's Office are:
 - Prosecutors - \$90 thousand (\$60 thousand salary and \$30 thousand benefits);
 - Investigators - \$60 thousand (\$40 thousand salary and \$20 thousand benefits);
 - Staff - \$60 thousand (\$40 thousand salary and \$20 thousand benefits).

¹ MCILS Biennial Budget, 1509, FY 2015 LD, June 26, 2013
<http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP1079&item=44&snum=126> and MCILS Fiscal Year 2015 Supplemental Budget Proposals

² MAINE COMMISSION ON INDIGENT LEGAL SERVICES, ACTIVITY REPORT BY CASE TYPE, June 31, 2012.

³ NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE ON COURTS, THE DEFENSE, Chapter 13.2 (1973), available at http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense#thirteentwelve.

⁴ LANGTON, LYNN & DONALD FAROLE, JR. PH.D., BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007 (2010), available at <http://www.bjs.gov/content/pub/pdf/clpdo07.pdf>.

- Each Public Defender's Office will be able to find suitable rental space for an average of \$120 thousand per year, for a statewide total of \$960 thousand annually.
- First year startup costs will be greater than ongoing operating costs, due to the necessity for supply and furniture purchases, the cost of establishing a computer network, and the likelihood of overlap for several months with the existing appointed counsel system. This budget illustrates sample ongoing costs.
- Money collected from indigent clients as Application Fees and reimbursement for partial indigence would serve to offset the costs listed below. If approximately 80% of those who apply for appointed counsel pay just \$50.00 as an application fee, an additional \$1,000,000 will be available to offset costs.
- Implementation of this Maine Public Defender's Office model might best be accomplished in three one-year phases. The first phase would see establishment of the Chief Public Defender's Office in Districts 3, 4, and 5 – the mid-sized Districts. With the lessons learned from that rollout, District Defender's Office would be opened up in Districts 1 and 2, the largest Districts. Finally, the smallest and most rural Districts, 6, 7 and 8, would receive District Defender's Offices.
- The budget described below can meet national standards for caseloads. Eighty-one attorneys applied to 27,750 cases of all types, criminal, juvenile, child protection, and others, averages 343 cases per year per attorney. This caseload would be further reduced by the funds budgeted for conflicts, and any fees collected for applications or partial indigence. Actual staffing and conflict funding requirements may be adjusted as the Public Defender's Office gains experience in its operations.

Personal Services Budgets:

<u>District</u>	<u>% of cases (number)</u>	<u>Attorneys</u>	<u>Investigators</u>	<u>Staff</u>	<u>Personal Svc.</u>
1 – York	18% (4995)	15	3	8	\$2,010,000
2 – Cumberland	18% (4995)	15	3	8	\$2,010,000
3 – And/Ox/Fr	15% (4163)	12	2	6	\$1,560,000
4 – Ken/Som	14% (3885)	11	2	6	\$1,470,000
5 – Penob/Piscat	13% (3608)	10	2	5	\$1,320,000
6 – Sag/Lin/Kn/Wal	10% (2775)	8	2	4	\$1,080,000
7 – Wash/Han	6% (1665)	5	1	3	\$690,000

8 – Aroostook	6% (1665)	5	1	3	\$690,000
Chief Public Defender’s Office		1		2	\$190,000
<u>Totals</u>	(27,750)	82	17	44	\$11,020,000

Other Budget Items:

<i>Per diem</i> and travel	\$600,000
Office rental - \$120,000/District	\$960,000
Computer and IT costs	\$300,000
Other equipment, supplies, training, experts and services	\$800,000
Conflict counsel contracts and coordinated attorney appointments	\$1,320,000

Grand Total **\$15,000,000**

Appendix B: Snapshots of Maine, Massachusetts, Oregon, and Wisconsin.

Indigent Defense Systems -Analysis-

State Comparison

Maine

Assigned Counsel

- Funding System: State
- State Funding: 100%
- State Commission: Yes

Massachusetts

Assigned Counsel

- Funding System: State
- State Funding: 100%
- State Commission: Yes

Wisconsin

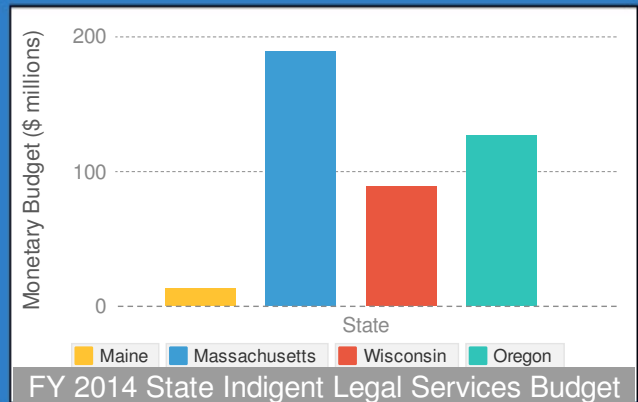
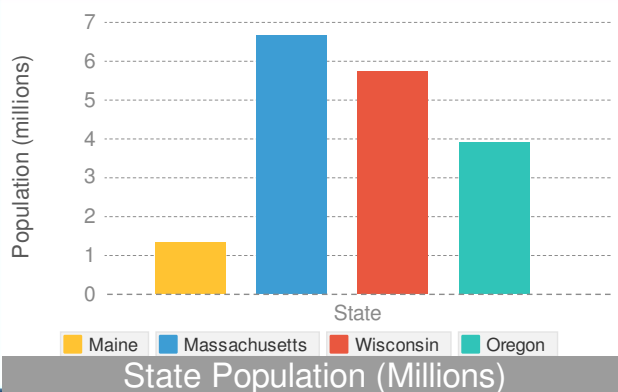
Public Defender

- Funding System: State
- State Funding: 100%
- State Commission: Yes

Oregon

Contract System

- Funding System: State
- State Funding: 100%
- State Commission: Yes



Governor's Office of Policy and Management - January 2014

<http://www.maine.gov/economist/>



MAINE

Assigned Counsel System

MAINE COMMISSION ON INDIGENT LEGAL SERVICES

Primary Purpose:

To provide efficient, high-quality representation to indigent citizens who are entitled to counsel at state expense under the United States Constitution or under the Constitution or statutes of Maine.



1

Independent Body

5 commission members are appointed by the Governor and confirmed by the Senate.



2

Governing Body

Oversees the provision of right to counsel services across the state.



3

Central Administrative Office

Tasked with enforcing the commission's policies and processing private attorney vouchers for payment.

COMMISSION DUTIES:

- Implement a system of assigned counsel and contract counsel.
- Establish qualifications for assigned counsel and contract counsel.
- Process and authorize payment of assigned counsel vouchers.
- Generate performance standards for indigent legal services.
- Provide training and support to maintain quality attorneys.

ASSIGNED COUNSEL REQUIREMENTS:

- Licensed to practice and comply with commission's procedures.
- Maintain a private office space to ensure client confidentiality.
- Complete Commission's Minimum Standards Training for specific area of desired assignments.

CURRENT ASSIGNED ATTORNEYS:

- 460 Attorneys

MASSACHUSETTS

Hybrid Indigent Defense System

COMMITTEE FOR PUBLIC COUNSEL SERVICES

Primary Purpose:

To provide efficient, high-quality representation to indigent citizens who are entitled to counsel at state expense under the United States Constitution or under the Constitution or statutes of Maine.



1

Board of Directors

15-member independent board to oversee Committee for Public Counsel Services.



2

Governing Body

Oversees the provision of legal representation to indigent persons in criminal and civil cases.



3

Administrative Body

Central administrative office oversees administrative proceedings in which there is a right to counsel.

1

PRIVATE ATTORNEY DIVISION

-Deputy chief of counsel to head Division

-500 staff attorneys for Superior, District, Juvenile, and Probate and Family Court cases.

-3,000 private attorneys trained and certified to be appointed to represent clients in 4 divisions:

4 Divisions



Private Counsel

Criminal cases and related matters.



Child & Family Law

Child welfare cases.



Youth Advocacy

Delinquency, youthful offender, and GCL revocation cases.



Mental Health

Guardianship and mental health/substance abuse commitments.

2

PUBLIC DEFENDER DIVISION

-Deputy chief of counsel to head Division.

-200 staff public defenders in regional District Court and Superior Court offices.

-18 trial offices, staffed with investigators and social services advocates.

-Training, supervision, and caseload monitoring maintain quality representation.

OREGON

Contract Indigent Defense System

PUBLIC DEFENDER SERVICES COMMISSION

Primary Purpose:

To establish "a public defense system that ensures the provision of public defense services in the most cost efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice."



1

Independent Body

7 commission members are appointed by Chief Justice of the Oregon Supreme Court.



2

Governing Body

Governs the Office of Public Defense Services, effectively overseeing public counsel services.



3

Performance

Sets standards of quality and efficiency for public defender service processes and employees.

OFFICE OF PUBLIC DEFENSE SERVICES

-Manage and Evaluate Public Defense Services

-6 Divisions

CONTRACTS

Distribution

1. Private not-for-profit public defender offices
2. Small local law firms
3. Individual private attorneys
4. Collective private attorneys



Description

- Enforcement mechanism for state's standards
- Specific performance criteria
- Failure to comply, contracts not renewed

DIVISIONS



FINANCIAL SERVICES

Process requests & payments for non-contract fees & services.



GENERAL COUNSEL'S OFFICE

Provides administrative & infrastructure support.



APPELLATE DIVISION

--35 attorneys--
--25 paralegals--
Representation in criminal cases, juvenile dependency cases, and inmate appeals.



HUMAN RESOURCES & OPERATIONS

Provides administrative & infrastructure support.



CONTRACT SERVICES

--4 Analysts--
Administers contracts that provide trial-level and some appellate representation.



RESEARCH & IT SERVICES

Provides administrative & infrastructure support.

WISCONSIN

Public Defender System

OFFICE OF STATE PUBLIC DEFENDER BOARD

Primary Purpose:

"To promote justice throughout Wisconsin by providing high-quality legal services, protecting individual rights, and advocating as a criminal just partner for effective defender services and a fair and rational criminal justice system."



1

Independent Body

9 board members are appointed by the Governor with advice and consent of the Senate.



2

Governing Body

Generates policies and directives for the state public defense system.



3

Appointment

Appoints the State Public Defender, chief attorney of the public defense system.

OFFICE OF THE STATE PUBLIC DEFENDER

-Independent, executive-branch state agency
-4 Divisions, 3 offices

Staffing

579. 85 Full-Time Equivalent (FTE) Positions:

---346.20 FTE Attorneys and Attorney Managers
---233.65 FTE Administrative and Support Staff

State Offices

1. Legal Counsel
2. Training and Development
3. Information Technology

Office Building Distribution

- 37 Local Trial Offices
- 2 Appellate Offices
- 1 Central Administration Office



DIVISIONS



TRIAL DIVISION

--318.7 Attorneys--
Legal representation to eligible persons charged with adult crimes and juvenile offenses, certain family disputes.



APPELLATE DIVISION

--27.5 Attorneys--
Provide assistance to indigents involved in appeals, including post-conviction and post-commitment proceedings.



ADMINISTRATIVE DIVISION

Provide staff support services in areas such as human resources, payroll, budget preparation and analysis, accounting and purchasing, and collections and verification.



ASSIGNED COUNSEL

Oversees certification, appointment, and payment of private attorneys who represent State Public Defender clients as needed