AMERICANBARASSOCIATION

Ten Principles of a Public Defense Delivery System

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Standing Committee on Legal Aid and Indigent Defense

AUGUST 2023

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The ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM were prepared by the ABA Standing Committee on Legal Aid and Indigent Defense.

The ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, black letter and commentary, were adopted by the American Bar Association House of Delegates, August 2023. The American Bar Association recommends that each jurisdiction swiftly assess its compliance with the ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM.

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on Legal Aid and Indigent Defense
2022-2023

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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENSE

SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE

RESOLUTION

RESOLVED, That the American Bar Association adopts the revised Ten Principles of a Public Defense Delivery System, dated August 2023, including black letter and commentary; and

FURTHER RESOLVED, That the American Bar Association recommends that each jurisdiction swiftly assess its compliance with the Ten Principles of a Public Defense Delivery System, dated August 2023, and implement any necessary legal and policy changes where deficiencies may exist.

INTRODUCTION

The Revised ABA Ten Principles of a Public Defense Delivery System were sponsored by the American Bar Association Standing Committee on Legal Aid and Indigent Defense (SCLAID) and approved by the ABA House of Delegates at the ABA's Annual Meeting in August 2023. The Revised Principles update the original Ten Principles, adopted by the ABA in February 2002, for modern public defense systems while retaining the original commitment to high-quality, well-funded, and independent indigent defense. As with the original Principles, the Revised Principles describe the fundamental criteria for jurisdictions to use when assessing their public defense systems. The ABA has adopted more detailed policy on the provision of indigent defense services elsewhere, such as the ABA Standards for Criminal Justice, Providing Defense Services (3d ed. 1992).[1]

ACKNOWLEDGMENTS

The Standing Committee on Legal Aid and Indigent Defense thanks everyone who contributed to the development of the Revised Principles. First and foremost, SCLAID acknowledges former SCLAID member and ABA Criminal Justice Section Chair Norm Lefstein. Mr. Lefstein, a law professor, law school dean, and public defender, was passionate about improving the quality of public defense, and instrumental in getting the Revised Principles off the ground. Mr. Lefstein died in 2019, but the tireless devotion to equal justice reflected in the Revised Principles bears his unmistakable imprint.

The Standing Committee also thanks the members of the Revised Ten Principles Committee, a group of public defenders, academics, and indigent defense experts recruited by SCLAID who volunteered countless hours researching, drafting, and reaching a consensus on these principles: Barbara Bergman, Bob Boruchowitz, Brendon Woods, Lauren Sudeall, Stephen Hanlon, Dawn Deaner, Carlos Martinez, and Malia Brink. Further, SCLAID is grateful to the ABA Criminal Justice Section and

[1] https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_toc/

Section of Civil Rights and Social Justice, whose members provided critically important input during the drafting process. Finally, SCLAID thanks the National Legal Aid and Defender Association, the National Association of Criminal Defense Lawyers, the Sixth Amendment Center, and the National Association for Public Defense, who also helped ensure the final version of the Revised Principles met the needs of indigent defense counsel and their clients.

Hon. Bryant Y. Yang
Chair, Standing Committee on Legal Aid and Indigent Defense

ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

PRINCIPLE 1: Independence

Public Defense Providers[1] and their lawyers should be independent of political influence and subject to judicial authority and review only in the same manner and to the same extent as retained counsel and the prosecuting agency and its lawyers.[2] To safeguard independence and promote effective[3] and competent[4] representation, a nonpartisan board or commission should oversee the Public Defense Provider.[5] The selection of the head of the Public Defense Provider, as well as lawyers and staff, should be based on relevant qualifications and should prioritize diversity and inclusion to ensure that public defense staff are as diverse as the communities they serve.[6] Public Defender Providers should have recruitment and retention plans in place to ensure diverse staff at all levels of the organization.[7] Neither the chief defender nor staff should be removed absent a showing of good cause.[8]

PRINCIPLE 2: Funding, Structure, and Oversight

For state criminal charges, the responsibility to provide public defense representation rests with the state;[9] accordingly, there should be adequate state funding and oversight of Public Defense Providers. Where the caseloads allow, public defense should be a mixed system: primarily dedicated public defense offices,[10] augmented by additional Public Defense Providers[11] to handle overflow and conflict of interest cases.[12] The compensation for lawyers working for Public Defense Providers should be appropriate for and comparable to other publicly funded lawyers. Full-time public defender salaries and benefits should be no less than the salaries and benefits for full-time prosecutors.[13] Other provider attorneys should be paid a reasonable fee that reflects the cost of overhead and other office expenses, as well as payment for work.[14] Investigators, social workers, experts, and other staff and service providers necessary to public defense should also be funded and compensated in a manner consistent with this Principle.[15] There should

be at least parity of resources between public defense counsel and prosecution.[16]

PRINCIPLE 3: Control of Workloads

The workloads of Public Defense Providers should be regularly monitored and controlled to ensure effective and competent representation.[17] Workloads should never be so large as to interfere with the rendering of quality representation or to lead to the breach of ethical obligations.[18] Workload standards should ensure compliance with recognized practice and ethical standards and should be derived from a reliable data-based methodology. Jurisdiction-specific workload standards may be employed when developed appropriately,[19] but national workload standards should never be exceeded.[20] If workloads become excessive, Public Defense Providers are obligated to take steps necessary to address excessive workload, which can include notifying the court or other appointing authority that the Provider is unavailable to accept additional appointments, and if necessary, seeking to withdraw from current cases.[21]

PRINCIPLE 4: Data Collection and Transparency

To ensure proper funding and compliance with these Principles, states should, in a manner consistent with protecting client confidentiality, collect reliable data on public defense, regularly review such data, and implement necessary improvements.[22] Public Defense Providers should collect reliable data on caseloads and workloads,[23] as well as data on major case events,[24] use of investigators, experts, social workers and other support services, case outcomes, and all monetary expenditures.[25] Public Defense Providers should also collect demographic data on lawyers and other employees.[26] Providers should also seek to collect demographic data from their clients to ensure they are meeting the needs of a diverse clientele.[27] Aggregated data should be shared with other relevant entities and made publicly available in accordance with best practices.[28]

PRINCIPLE 5: Eligibility and Fees for Public Defense

Public defense should be provided at no cost to any person who is financially unable to obtain adequate representation without substantial

burden or undue hardship.[29] Persons[30] should be screened for eligibility in a manner that ensures information provided remains confidential.[31] The process of applying for public defense services should not be complicated or burdensome, and persons in custody or receiving public assistance should be deemed eligible for public defense services absent contrary evidence.[32] Jurisdictions should not charge an application fee for public defense services, nor should persons who qualify for public defense services be required to contribute to or reimburse defense services.[33]

PRINCIPLE 6: Early and Confidential Access to Counsel

Counsel should be appointed immediately after arrest, detention, or upon request. Prior to a client's first court appearance, counsel should confer with the client and prepare to address pretrial release and, if possible, probable cause.[34] Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information.[35] Waiver of the right to counsel and waiver of the person's right to court appearance should never be coerced or encouraged.[36] Before a person may waive counsel, they must be provided a meaningful opportunity to confer with a defense lawyer who can explain the dangers and disadvantages of proceeding without counsel and, if relevant, the implications of pleading guilty, including the direct and collateral consequences of a conviction.[37]

PRINCIPLE 7: Experience, Training and Supervision

A Public Defense Provider's plan for the assignment of lawyers should ensure that the experience, training, and supervision of the lawyer matches the complexity of the case.[38] Public Defense Providers should regularly supervise and systematically evaluate their lawyers to ensure the delivery of effective and competent representation free from discrimination or bias. In conducting evaluations, national, state, and local standards, including ethical obligations, should be considered. Lawyers and staff should be required to attend continuing education programs or other training to enhance their knowledge and skills. Public Defense Providers should provide training at no cost to attorneys, as well as to other staff.[39]

Public Defense Providers should ensure that attorneys and other staff have the necessary training, skills, knowledge, and awareness to effectively represent clients affected by poverty, racism, and other forms of discrimination in a culturally competent manner.[40] Public defense counsel should be specifically trained in raising legal challenges based on racial and other forms of discrimination.[41] Public defense counsel and other staff should also be trained to recognize biases within a diverse workplace.[42]

PRINCIPLE 8: Vertical Representation

To develop and maintain a relationship of trust, the same defense lawyer should continuously represent the client from assignment[43] through disposition and sentencing in the trial court, which is known as "vertical" representation. Representation by the defense lawyer may be supplemented by specialty counsel, such as counsel with special expertise in forensic evidence, immigration, or mental health issues, as appropriate to the case.[44] The defense lawyer assigned to a direct appeal should represent the client throughout the direct appeal.

PRINCIPLE 9: Essential Components of Effective Representation

Public Defense Providers should adopt a client-centered approach to representation based around understanding a client's needs and working with them to achieve their goals.[45] Public Defense Providers should have the assistance of investigators, social workers, mitigation specialists, experts, and other specialized professionals necessary to meet public defense needs.[46] Such services should be provided and controlled by Public Defense Providers.[47] Additional contingency funding should be made available to support access to these services as needed.[48] Public Defense Providers should address civil and non-legal issues that are relevant to their clients' cases.[49] Public Defense Providers can offer direct assistance with such issues or establish collaborations with, or provide referrals to civil legal services organizations, social services providers, and other lawyers and non-lawyer professionals.[50]

PRINCIPLE 10: Public Defense as Legal System Partners

Public Defense Providers should be included as equal participants in the legal system. Public Defense Providers are in a unique position to identify and challenge unlawful or harmful conditions adversely impacting their clients. Legislative or organizational changes or other legal system reforms should not be considered without soliciting input from representatives of the defense function and evaluating the impact of such changes on Public Defense Providers and their clients. To the extent any changes result in an increase in defender workload or responsibilities, adequate funding should be provided to Public Defense Providers to accommodate such changes.

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[1] The term "Public Defense Providers" refers to public defender agencies and to programs that furnish assigned lawyers and contract lawyers who provide defense services at public expense. The term "Public Defense Providers" is also used in the *ABA Eight Guidelines of Public Defense Related to Excessive Workloads* (2009).

[2] Independence should extend to the selection, funding, and payment of Public Defense Providers and lawyers. "The selection of lawyers for specific cases should not be made by the judiciary or elected officials but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs." *ABA Standards for Criminal Justice: Providing Defense Services*, Standard 5-1.3(a) (3rd edition, 1992). *See also* Nat'l Ass'n for Public Defense, *Statement on the Importance of Judicial Independence*, July 1, 2016, https://www.publicdefenders.us/positionpapersstatements. Establishing independence from political and judicial influence is also critically important to effective public defense at the federal level. *See* Ad Hoc Committee to Review the Criminal Justice Act, *2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act* (2017); Nat'l Ass'n of Criminal Defense Lawyers, *Federal Indigent Defense 2015: The Independence Imperative* (2015), https://www.nacdl.org/Document/FederalIndigentDefense2015IndependenceImperative.

[3] The Sixth Amendment right to counsel requires "reasonably effective assistance of counsel pursuant to prevailing professional norms of practice." *See* Strickland v. Washington, 466 U.S. 668, 688 (1984). In *Strickland*, the U.S. Supreme Court noted that the ABA Criminal Justice Standards on Defense Function are guides to determining what is reasonably effective. A quarter of a century later, the Court described these standards as "valuable measures of the prevailing professional norms of effective representation." Padilla v. Kentucky, 559 U.S. 356 (2010). The Court has also held that criminal cases must be subject to "meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 658-59 (1984).

[4] Under the ethical rules, lawyers are required to provide clients "competent" representation. *ABA Model Rules of Professional Conduct*, Rule 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). These rules have been adopted by every state throughout the country.

[5] The board's mission should be to advocate for and provide high-quality, well-funded public defense that ensures effective assistance of counsel for all eligible defendants. The selection process for members of the board or commission should ensure the independence of the Public Defense Provider. Appointments of members should be divided among the different branches of government and may also include appointments from interested organizations such as bar organizations, law schools, and organizations representing the client community. No members should be judges, prosecutors, law enforcement officials or current Public Defense Providers. Members should serve staggered terms to ensure continuity. *See* National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976); National Legal Aid and Defender Association, *Standards for the Administration of Assigned Counsel Systems*, Standard 3.2.1 (1989). The structure of board oversight may be adjusted based upon the organization of Public Defense Providers. It may consist of a single board or multiple separate boards requiring separate governing bodies. *See ABA Standards for Criminal Justice: Providing Defense Services*, Standard 5-1.3(b) (3rd edition, 1992) ("An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned counsel and contract-for-service components for defender systems should be governed by such a component. Board of Trustees should not include prosecutors or judges. The primary function of Boards of Trustees is to support and protect the independence of the defense services program.").

[6] In Florida and Tennessee, and in some cities in the United States, public defenders are popularly elected. *See* Ronald F. Wright, *Public Defender Elections and Popular Control over Criminal Justice*, 75 Mo. L. Rev. 803, 814 (2010). The ABA has not endorsed popular election of chief public defenders.

[7] 16AM113 (encouraging "all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys").

[8] *See ABA Standards for Criminal Justice: Providing Defense Services*, Standard 5-4.1 (3rd edition, 1992) ("The chief defender should be appointed for a fixed term of years and be subject to renewal. Neither the chief defender nor staff should be removed except upon a showing of good cause. Selection of the chief defender and staff by judges should be prohibited.")

[9] *See* Gideon v. Wainwright, 372 U.S. 353 (1963) (right to counsel in felony cases);

Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel in misdemeanor cases); In re Gault, 387 U.S. 1 (1967) (right to counsel in juvenile delinquency cases); Alabama v. Shelton, 535 U.S. 654 (2002) (right to counsel attaches to any case in which there is a potential for active jail or prison time, including suspended sentences). For federal criminal charges, the responsibility for adequate funding and oversight rests with the federal government. Local governments should also provide funding and resources as needed or constitutionally required.

[10] Full-time public defenders, working in a fully staffed office, develop valuable expertise in handling criminal cases and working with persons charged with crimes. *See, e.g., ABA Criminal Justice Standards: Providing Defense Services,* Standard 5-1.2 ("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.")

[11] These additional Public Defense Providers may be a second public defender office for handling conflict cases and/or assigned counsel operating pursuant to a defense service contract. The appointment process for assigned counsel should be according to a coordinated plan directed by a lawyer-administrator familiar with private lawyers, investigators and other vital defense services in the jurisdiction. *See, e.g., ABA Criminal Justice Standards: Providing Defense Services,* Standard 5-1.2 ("The participation should be through a coordinated assigned counsel system and may also include contracts for services.").

[12] Absent substantial private practitioners to augment the representation of full-time public defenders, public defenders are likely to become overwhelmed with cases. *See id.,* at Commentary to Standard 5-1.2 ("In some cities, where a mixed system has been absent and public defenders have been required to handle all of the cases, . . .[c]aseloads have increased faster than the size of staffs and necessary revenues, making quality legal representation exceedingly difficult."). In rural areas, it may be appropriate to consider regional Public Defense Providers. Adherence to all of the Principles is critically important to an effective public defense system irrespective of whether a jurisdiction relies on public defender offices or solely on a system of appointed counsel.

[13] Public defense counsel should also receive raises and promotions commensurate with prosecutors and other publicly funded lawyers in order to encourage retention of experienced counsel.

[14] *ABA Criminal Justice Standards: Providing Defense Services,* Standard 5-2.4. The fee rate should be subject to regular increases to ensure the ongoing availability of quality

counsel and reviewed regularly. Contract selection should be based on factors such as counsel training and experience in public defense representation and should not merely be awarded to the lowest bidder. Counsel should not be paid on a flat fee basis, as such payment structures reward counsel for doing as little work as possible. *See* Wilbur v. Mt. Vernon, No. C11-1100RSL, U.S.D.C. D. Wash., at 15 (Dec. 4, 2013) (district court finding that a flat fee contract "left the defenders compensated at such a paltry level that even a brief meeting at the outset of the representation would likely make the venture unprofitable.").

[15] The importance of these providers is discussed in more detail in Principle 9.

[16] In determining appropriate funding and resources, jurisdictions should consider that while prosecutors can often draw upon separately funded resources for investigations such as police departments and state crime labs, Public Defense Providers normally must pay for investigative and other ancillary services. In many jurisdictions, defender offices face a significant funding gap with prosecutors despite this distinction. Bryan Furst, *A Fair Fight: Achieving Indigent Defense Resource Parity* 9 (Brennan Center for Justice, Sept. 9, 2019), https://www.brennancenter.org/our-work/research-reports/fair-fight (discussing the lack of investigators and other support staff in public defender offices as compared prosecutorial investigatory resources).

[17] Excessive caseloads impinge upon a lawyer's ability to provide competent and effective representation to all clients. *See ABA Eight Guidelines of Public Defense Related to Excessive Workloads*, Commentary to Guideline 1 ("[A]n excessive number of cases create[s] a concurrent conflict of interest, as a lawyer is forced to choose among the interests of various clients, depriving at least some, if not all clients, of competent and diligent defense services.") (citations omitted). Those who provide public defense services, no less than those who represent persons with financial means, are duty bound not to accept a representation when doing so would impinge upon their ability to provide competent and effective representation. *See* ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-441, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation* (2006). The National Association for Public Defense has concluded that public defenders "can no longer operate in a system without meaningful workload standards" and has "encourage[d] public defense providers in every jurisdiction to develop, adopt, and institutionalize meaningful, evidence-based workload standards in their jurisdictions." Nat'l Ass'n for Public Defense, *Statement on the Necessity of Meaningful Workload Standards for Public Defense Delivery Systems*¸ Mar. 19, 2015, https://www.publicdefenders.us/positionpapersstatements.

[18] *See ABA Eight Guidelines of Public Defense Related to Excessive Workloads*; Formal Ethics Opinion 06-441.

[19] The ABA's Standing Committee on Legal Aid and Indigent Defense (ABA SCLAID)

partnered with national data analysis firms to complete workload studies for seven jurisdictions. *See, e.g.,* Moss Adams and ABA SCLAID, The New Mexico Project (2022). These workload studies are available through the ABA SCLAID website, www.indigentdefense.org.

[20] Notably, in 2023, new National Public Defense Workload Standards (NPDWS) were published by The RAND CORPORATION, ABA SCLAID, The National Center for State Courts, and Stephen F. Hanlon. The NPDWS are grounded in a rigorous study of 17 prior jurisdiction-specific workload studies conducted between 2005 and 2022 and use the Model Rules and ABA Criminal Justice Section standards as the reference for reasonably effective assistance of counsel. The NPDWS then used the Delphi Method to obtain a reliable professional consensus of criminal defense experts, both public and private, from across the nation. These new national standards are intended to replace the 1973 NAC Standards. *See* National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, *Chapter 13, The Defense* (1973). The NPDWS reflect the changes in defense practice that have occurred in the fifty years since the creation of the NAC Standards, including the significant role of digital evidence from body-worn cameras to smart phone data and forensics in modern defense practice, as well as the expanded role of defense attorneys.

[21] *See* Formal Opinion 06-441; *ABA Eight Guidelines of Public Defense Related to Excessive Workloads* (August 2009). Failure to take steps to reduce an excessive caseload can result in bar discipline. *See, e.g.,* In re: Karl William Hinkebein, No. SC96089 (Mo. Sup. Ct. Sept. 12, 2017) (suspending the public defender's license indefinitely but staying that suspension and placing him on probation for one year). Courts should not order public defenders to take a case, if doing so would result in an excessive caseload. *See* State ex rel. Missouri Public Defender Commission v. Waters, 370 S.W.3d 592 (Mo. 2012) (holding that a trial judge exceeded his authority in appointing a public defender after the public defender office had declared unavailability due to an excessive caseload); *c.f.* Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228 (Sup. J. Ct. Mass. 2004) (rejecting a judge's appointment of public defenders despite an assertion by the Public Defense Provider that the public defenders had reached caseload limits).

[22] Data collection is essential to proper oversight at every level. A state's duty to fully fund the public defense function, as outlined in Principle 2, includes a duty to fully fund data collection. Florida has adopted a statute mandating the collection of extensive data throughout the criminal justice system. *See* Florida Statutes, Title 47, § 900.05 – Criminal Justice Data Collection. The Texas Indigent Defense Commission collects data on public defense from each county and publishes the data on a portal. *See* Indigent Defense Data for Texas, TIDC (visited Mar. 21, 2023).

[23] Such data should include the number and types of cases assigned to each Public Defense Provider. As noted in Principle 3, caseloads and workloads much be regularly monitored and controlled to ensure ability to comply with ethical and practice standards.

[24] Such data should include eligibility determinations and decisions, initial appearance outcomes including pretrial detention and conditions of release, motions filed, use of services such as translators, investigators, social workers, and experts, and case outcomes. Effective data collection may require the hiring of specific staff to focus on the collection, verification and presentation of data. The ABA has endorsed similar data collection responsibilities for prosecutors. 2021A504. An effective way to collect such data is through regular timekeeping.

[25] Case data is most often collected using timekeeping and/or standardized case opening and closing forms. The ABA has recognized the Los Angeles Independent Juvenile Defender Program, which requires attorneys to complete case intake and resolution forms, for its effective case data collection system. ABA SCLAID, *Exemplary Defense: A Study of Three Groundbreaking Projects in Public Defense* 44-45, Oct. 2018.

[26] The ABA has endorsed collecting demographic data on all judges and government lawyers to promote and track progress toward improving diversity in the legal profession and increasing trust in the justice system. 2021A605.

[27] 2021A504 (urging prosecutor offices to similarly collect and publish outcomes by demographic data); *see, e.g.*, Ramsey County Attorney's Office Public Data Portal (visited Mar. 21, 2023)(showing case outcomes by race and gender). Such data should be collected from clients voluntarily and in accordance with best practices. These best practices are evolving; accordingly, data collection and reporting practices should be regularly reviewed and updated. See, e.g., *A Vision for Equitable Data: Recommendations from the White House Equitable Data Working Group* (Apr. 2022). Absent such data, Public Defense Providers cannot identify, assess, and seek to address disparate impact. See, e.g., *Guidelines for data collection on race and ethnicity*, Utah Dept. of Health and Human Services, Office of Health Equity (Oct. 2022).

[28] *See id.* Sensitive data should be made public in an aggregated format that protects the privacy of individuals. *See* 2021A605 (discussing best practices of aggregating data for privacy). Individual client data should be carefully guarded. *See, e.g., ABA Model Rules of Professional Conduct*, Rule 1.6 (providing that a lawyer many not, generally, "reveal information relating to the representation of a client unless the client gives informed consent" and that a lawyer "shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client").

[29] *ABA Criminal Justice Standards: Providing Defense Services*, §5-7.1 ("Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship."); Eligibility consideration should consider the prevailing fee for the charge(s) faced by the person in the jurisdiction. *See* Brennan Center for Justice, *Eligible for Justice: Guidelines for Appointing Defense Counsel, at 13* (2008) ("In determining whether someone can afford counsel, jurisdictions should take into account the actual cost of obtaining counsel."),

https://www.brennancenter.org/publication/eligible-justice-guidelines-appointing-defense-counsel. Jurisdictions should also consider how the type and nature of the charged offense would affect the cost of an effective defense.

[30] Persons refers to any person arrested or detained or seeking the assistance of indigent defense counsel.

[31] *ABA Criminal Justice Standards: Providing Defense Services*, §5-7.3 ("Determination of eligibility should be made by defenders, contractors for services, assigned counsel, a neutral screening agency or by the court."); *ABA Model Rules of Professional Conduct*, Rule 1.6. Eligibility screening should not be conducted by the presiding judge. *See also* Brennan Center for Justice, *Eligible for Justice: Guidelines for Appointing Defense Counsel, at 11* (2008). Eligibility information should be disclosed only to the extent required by applicable Rules of Professional Conduct or other law.

[32] A person should never be discouraged from or punished for applying for public defense services. *See* National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel*, at 85-87 (2009) (observing how defendants can be pressured to waive counsel rather seek public defense because "a defendant who wants . . . counsel must wait several days for counsel to be appointed and possibly several more days for appointed counsel . . . to make contact.").

[33] Public defense user fees should be eliminated. *See ABA Ten Guidelines on Court Fines and Fees*, Commentary to Guideline 1 (2018) (recommending the elimination of user fees "because the justice system serves the entire public and should be entirely and sufficiently funded by general government revenue.").

[34] Pleas of guilty to criminal charges at first appearance or arraignment are disfavored. *See ABA Criminal Justice Standards: Defense Function*, Standard 4-6.1(b), (2015) ("In every criminal matter, defense counsel . . . should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed . . .. Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest.")

[35] To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where clients confer with defense counsel. *See, e.g.,* Williams v. Birkett, 697 F. Supp. 2d 716 (U.S. Dist. Ct., E.D. Mich. 2010) ("To ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions between counsel and accused.")

[36] *See ABA Criminal Justice Standards: Defense Function*, Standard 5-8.2(a) (2017) ("The accused's failure to request counsel or an announced intention to plead guilty should not

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

[37] *See ABA Ten Guidelines on Court Fines and* Fees, Guideline 8 ("Waiver of counsel must not be permitted unless the waiver is knowing, voluntary, and intelligent. In addition, the individual first has been offered a meaningful opportunity to confer with counsel capable of explaining the implications of pleading guilty, including collateral consequences."). *See also* Faretta v. California, 422 U.S. 806 (1975) ("Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'") (citations omitted); Padilla v. Kentucky, 559 U.S. 356 (2010) (holding that counsel must advise their client on the potential immigration consequences of a criminal conviction).

[38] If the defense lawyer lacks the requisite experience or training for the case, the lawyer cannot provide effective and competent representation and is obligated to refuse appointment. *See ABA Model Rules of Professional Conduct,* Commentary to Rule 1.1 ("In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question."); *ABA Eight Guidelines of Public Defense Related to Excessive Workloads.*

[39] As with other aspects of an effective Public Defense System, and as described in Principle 2, Public Defense Providers should be adequately funded to provide such training.

[40] The ABA has endorsed similar requirements for attorneys providing civil legal aid services, Standards for the Provision of Civil Legal Aid 4.4, as well as for law students. 2022M300 ("A law school shall provide education to law students on bias, cross-cultural competency and racism[.]").

[41] For instance, all counsel should be trained to effectively raise objections under Batson v. Kentucky, 476 U.S. 79 (1986).

[42] *See, e.g.,* 2020A116G (urging that all legal and medical professionals "receive periodic training regarding implicit biases."); The ABA's Diversity, Equity and Inclusion Center has a number of resources and trainings available.

[43] In some jurisdictions, to facilitate prompt initial appearance, a specially trained duty lawyer or bail lawyer may represent an individual from arrest through initial appearance. Before or at initial appearance, defense counsel should be assigned. Procedures should be in place to ensure continuous representation and proper transition from initial appearance counsel to defense counsel.

[44] For instance, some public defense offices have established distinct units of attorneys with specialized skills to advise non-U.S. citizen clients on immigration matters relevant to their cases. *See* Carlos J. Martinez, George C. Palaidis & Sarah Wood Borak, *You Are the Last Lawyer They Will Ever See Before Exile: Padilla v. Kentucky and One Indigent Defender Office's Account of Creating a Systematic Approach to Providing Immigration Advice in Times of Tight Budgets and High Caseloads*, 39 Fordham Urb. L.J. 121 (2012).

[45] *See* James M. Anderson, Maya Buenaventura & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 Harv. L. Rev. 819 (Jan. 2019) (assessing the benefits of a client-centered defense model in reducing the length of sentences).

[46] *See* Nat'l Ass'n for Public Defense, *Policy Statement on Public Defense Staffing*, May 2020, https://www.publicdefenders.us/positionpapersstatements.

[47] Under no circumstances should defense counsel be required to bear the cost of experts and other professionals. *See Wash. R. Professional Conduct* 1.8 ("A lawyer shall not . . . make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm . . . to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law firm personnel.").

[48] In Florida, for example, state funds, sometimes referred to as "due process funds for the defense," are available for various defense services, such as investigators, experts, and other specialized public defense needs in addition to contingency funding. The funds also cover prosecution services. *See Florida Statutes* § 29.006, § 29.015, and § 29.018 (2018).

[49] In Padilla v. Kentucky, 559 U.S. 356 (2010), the U.S. Supreme Court held that, in order to provide effective assistance of counsel, an attorney must provide advice on the potential immigration consequences of a client's criminal charge. Following Padilla, several courts have held that advice on other potential civil consequences of a criminal case is also required. *See, e.g.*, Bauder v. Department of Corrections, 619 F.3d 1272, 1275

(11th Cir. 2010) (holding that the requirement of advice on non-criminal consequences extended beyond immigration to include civil commitment). Understanding a client's non-criminal legal issues, may be critical to understanding relevant arguments regarding sentencing, including the appropriateness of diversion or other programs available through the criminal case.

[50] *See* 2012AM107C (urging defender organizations and criminal defense lawyers to create "linkages and collaborations with civil practitioners, civil legal services organizations, social service program providers and other non-lawyer professionals who can serve, or assist in serving, clients in criminal cases with civil legal and non-legal problems related to their criminal cases, including the hiring of such professionals as experts, or where infrastructure allows, as staff.") https://www.americanbar.org/groups/legal_aid_indigent_defendants/indigent_defense_systems_improvement/standards-and-policies/policies-and-guidelines/. For over 40 years, scholars have recognized the importance of having social workers in defender offices. *See, e.g.,* Charles Silberman, *Criminal Violence, Criminal Justice* (New York: Random House, 1978).

REPORT

Background of the ABA's Public Defense Standards

After the U.S. Supreme Court's decision in *Gideon v. Wainwright*, 371 U.S. 335 (1963), guaranteeing the Sixth Amendment right to appointed counsel for persons charged with a felony, the American Bar Association quickly recognized the need for national standards for public defense services. In 1967, the ABA promulgated the *Standards for Criminal Justice, Providing Defense Service*, now in its third edition. Other entities soon followed suit. In 1973, President Nixon's National Advisory Commission on Criminal Justice Standards and Goals published *The Report of the Task Force on the Courts*, which included a chapter on defense standards. From 1974 to 1976, the National Legal Aid and Defender Association (NLADA) convened a 35-member National Study Commission on Defense Services, with support from the Law Enforcement Assistance Administration, which produced a report outlining several recommendations for the provision of indigent defense services. The ABA meanwhile continued to adopt additional standards governing the provision of defense services, such as the *ABA Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* in 1985 and the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* in 1989. All these policies were passed with the aim of ensuring high-quality, effective, and independent criminal defense counsel for persons who cannot afford an attorney.

As policies became more numerous and detailed, the ABA saw the need to adopt a succinct policy that laid out the fundamental criteria for an effective public defense delivery system. Thus, the ABA House of Delegates adopted the original *Ten Principles of a Public Defense Delivery System* (the "Principles"), dated February 2002, "[T]o provide experts and non-experts alike with a quick and easy way to assess a public defense delivery system and communicate its needs to policy makers."[1] The Principles recognized the need for stronger standards in a variety of areas, including public defense independence, high caseloads, and unduly low salaries and reimbursement rates. The Principles have since been recognized as important national public defense standards by national media and public defense advocacy groups. Courts, legislatures, and state

and local public defense agencies have looked to the Principles in developing decisions, laws, and policies. In 2010, Attorney General Eric Holder called the Principles "the building blocks of a well-functioning public defender system."[2]

The Need for Revised Principles

In the 21 years since the Principles were adopted, significant changes in the delivery of public defense services have occurred, such as the emergence of voluminous digital discovery. Moreover, new information and, critically, more data, have allowed public defense experts to better understand how to provide high-quality indigent defense representation effectively and efficiently. In 2018, the Standing Committee on Legal Aid and Indigent Defense (SCLAID) formed the Ten Principles Revision Committee, comprised of a diverse group of public defense leaders, academics, and experts. The Working Group set out to update the Principles based on their own experiences and the collective knowledge on public defense best practices that had been developed since 2002, while also ensuring that the Principles' core focus remained intact.

These new developments in public defense have been reflected in SCLAID's own work. SCLAID's *Eight Guidelines of Public Defense Related to Excessive Workloads* became ABA policy in 2009[3]. Then, between 2014 and 2022, SCLAID released comprehensive studies of public defender workloads in seven states: Missouri, Louisiana, Rhode Island, Colorado, Indiana, New Mexico, and Oregon. This work culminated in 2023 with the release of the *National Public Defense Workload Standards*, a meta-study published in conjunction with the RAND Corporation, the National Center for State Courts, and nationally recognized indigent defense expert Stephen F Hanlon. Studies such as these, which rely on hard data and the Delphi method[4] to analyze public defender workloads, were simply not available when the original Principles were adopted in 2002.[5] The Working Group also considered developments in public defense standards related to cultural competency, technology, and ancillary services.

In 2023, the Working Group solicited commentary on a draft of the revised Principles from four leading public defense advocacy groups:

NLADA, the National Association of Criminal Defense Lawyers, the National Association for Public Defense, and the Sixth Amendment Center. Their input helped ensure that these revised Principles truly reflect the core best practices for public defense delivery in the modern age.

Key Revisions in the New Principles

All the Principles have been revised to provide more detail and clarity to policymakers. Some of the 2002 Principles were consolidated to make room for additional principles, but all topics addressed in the 2002 Principles are directly addressed in this revision. The following changes are particularly notable:

- A new principle (Principle 4) was added to reflect the importance of data collection and transparency to ensure public defense systems are receiving adequate resources and are following these Principles.

- The principle on training and supervision (Principle 7) reflects a deeper understanding of the need for systematic evaluation of defense lawyers, as well as the need for specialized training and cultural competency.

- A new principle (Principle 9) was added to reflect the importance of non-lawyer professionals, such as investigators, social workers, and experts, to the public defense function.

- The principle on public defense workloads (Principle 3) has been substantially revised to reflect the new information gleaned from the *National Public Defense Workload Standards* study and SCLAID's several state-based studies. Language has also been added on the duties of defenders who face unmanageable workloads.

- A new principle (Principle 10) was added to reinforce the important place public defense providers have in the legal system,

especially in relation to any law or policy changes that are likely to affect their clients.

Use of the Principles

As with the 2002 version of the Principles, these revised Principles are meant to provide policymakers and other stakeholders with easy-to-follow guidelines for assessing their jurisdiction's compliance with the core best practices for a public defense delivery system. They are not meant to serve as a comprehensive guide for public defense practices in every situation. However, each Principle is accompanied by extensive commentary to explain or illustrate the Principle, and to identify issues that might arise in its application. All jurisdictions should strive to bring their public defense systems into compliance with these Principles.

Conclusion

The *Ten Principles of a Public Defense Delivery System* provide policymakers, public defense administrators, and other important stakeholders a critically important roadmap for providing effective indigent defense as required by the Sixth Amendment. In revising the Principles, the ABA ensures that this roadmap reflects the realities and best practices of public defense as of 2023, while maintaining its commitment to independent, well-managed, and well-resourced indigent defense systems.

Respectfully submitted,

Hon. Bryant Yang, Chair
Standing Committee on Legal Aid and Indigent Defense

August 2023

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[1] 02M107.
[2] https://www.justice.gov/opa/speech/attorney-general-eric-holder-addresses-department-justice-national-symposium-indigent
[3] 09M119.

[4] The Delphi method is a process for arriving at a group consensus by surveying a panel of experts. Experts respond to questionnaires, the results are aggregated and shared with the group, and the process continues until a consensus is reached.
[5] 02M107.