

An Evaluation of the Bexar and Hidalgo County  
Public Defender Offices:

Final Report

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Prepared For: The Texas Task Force on Indigent Defense under Contract 05-014 with the Texas  
Office of Court Administration

Submitted: May 15, 2009

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## Executive Summary

In early 2005, The Spangenberg Group (TSG)<sup>1</sup> contracted with the Texas Task Force on Indigent Defense (Task Force) to assist in the implementation and evaluation of two new public defender offices in Bexar and Hidalgo Counties. This report is the last, and final, of three reports to be issued under the contract. The first report, for which the site work was completed in October 2005, provided an overview of the underlying problems of each system prior to the establishment of the public defender offices.<sup>2</sup> The second report provided an evaluation of each public defender office after one year of operation. This final report summarizes the findings of the first two reports and combines the final set of data collection to measure the offices' success and to make recommendations for continued improvement. This executive summary offers a brief overview of the TSG's conclusions and recommendations for each office.

TSG researchers found that after nearly three years of operations both public defender offices have made significant improvements to their respective indigent defense systems. TSG believes the offices will continue to improve the systems over time. Not only has the quality of indigent defense services improved in each county, data indicate that more people are being represented, appeals in Bexar County take less time, and in-custody misdemeanor defendants in Hidalgo County spend less time in jail pretrial. Creating a more efficient indigent defense system translates into cost-savings over time. The following sections review key recommendations from TSG to ensure each office continues to succeed.

### *Bexar County Appellate Public Defender Office (APDO)*

Overall, the APDO is running smoothly and has effectively worked to address the issues that were of concern prior to its formation, while saving the county significant funds. The office has decreased the amount of time that clients spend waiting in jail while appeals are pending, a factor of great importance to the clients themselves as well as to

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<sup>1</sup> In February of 2009, TSG joined George Mason University to create The Spangenberg Project. Although this report is primarily a product of TSG, George Mason researchers assisted with its production.

<sup>2</sup> See The Spangenberg Group, *Initial Interim Report to the Texas Task Force on Indigent Defense: An Analysis of the Newly Established Bexar and Hidalgo Public Defender Offices* (May 11, 2006). <http://www.courts.state.tx.us/tfid/pdf/FinalRevisedVersionInitialInterimReport.pdf>.

jail administrators. The quality of briefs has also improved, and there is greater consistency across time, something the Fourth Circuit Court values. Within the office, the Chief Appellate Defender has a staff that enjoys the work they do. It seems they suffer from a heavy caseload, however, and attorneys take work home in order to address their caseload in a timely manner.

In an effort to continue to improve the APDO operations, TSG offers five key recommendations for continued success:

- The APDO should monitor the practice of filing *Anders* briefs. While the rate of filing *Anders* briefs has increased in the three years of operation, the APDO policy appears to interpret *Anders v. California* correctly; therefore, the increased number of briefings alone is not cause for immediate concern. The Chief Appellate Defender should monitor compliance with the office policy regarding *Anders* briefings.
- The APDO should revisit its workload standards originally created by the Chief Defender. TSG continues to be concerned that the APDO workload standards are not in line with the NAC Standards. A practical workload standard provides an objective method to measuring workload overtime. This will help the APDO manage budget and staffing needs over time. For this reason, TSG recommends that the APDO consider a workload and time keeping study.
- The APDO has an immediate need for additional support staff. The APDO relies heavily on law student interns. While these students offer the APDO substantial benefits, the APDO should not rely on these students as if they are permanent staff members. These students should not be figured into the day-to-day work of the office given the variable nature of students' ability to take on work assignments.
- There continues to be pay disparity between the APDO and the Bexar County District Attorney Office's Appellate Section. The Chief Appellate Defender should continue to seek salary increases and pay parity from the County.

***Hidalgo County Public Defender Office (HPDO)***

As an institutional provider of indigent defense services the HPDO has been able to institute practices to expedite the process of resolving misdemeanor cases, reduce jail overcrowding, and assist defendants in being released from custody earlier than before. TSG researchers believe that indigent misdemeanor defendants now receive better representation than they had prior to the establishment of the Hidalgo PDO. However, TSG is concerned that the HPDO is not being utilized to its full potential. Hidalgo County, the HPDO, and the Texas Task Force must advocate for increased use of the HPDO to truly realize its full potential. TSG provides six specific recommendations below to assist the HPDO in enhancing its operations:

- The county should increase the percentage of cases the HPDO receives from the “wheel.” The Chief Public Defender should work with the Office of Indigent Defense to track the percentage of appointments the office receives and ensure the appropriate numbers of appointments are assigned to his office.
- The county should carefully consider the Budget Office’s proposal for the HPDO office to begin receiving felony appointments.
- If the Hidalgo PDO is able to receive additional misdemeanor appointments or felony appointments the office should consider conducting a Caseload Analysis and Time Keeping Study to ensure efficient processing of cases and optimal caseload for attorneys within the office.
- Hidalgo PDO should continue to improve its case management system and data tracking abilities. TSG suggests that the HPDO track data elements only (i.e., event dates) and avoid tracking fields that involve manual entry (i.e., days to events). Such human analysis creates unnecessary additional work and increases the potential for calculation errors. Data are imperative in understanding the benefits of the HPDO and the best practices in case processing. This should be a priority for the Chief Public Defender.
- It is vital the Hidalgo PDO continue training staff on immigration issues to ensure the best representation of its clients.

- The HPDO should continue to file bail reduction motions and seek out other ways to alleviate the delays that occur within case processing as a result of the police and district attorneys. This may require the Chief Public Defender to reach out to police and prosecutors to explore alternative solutions to these systemic problems.

## Introduction

The Spangenberg Group (TSG)<sup>3</sup> is a research and consulting firm that specializes in improving indigent defense systems. Since 1985, TSG has conducted research in all 50 states and has been under contract with the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants to provide support and technical assistance to individuals and organizations working to improve their jurisdictions' indigent defense systems. TSG has performed work in Texas for many years, including site analysis and research for the *Fair Defense Report*. The *Fair Defense Report* was written in conjunction with Texas Appleseed and was the result of extensive research, conducted during 2000-2001, of indigent defense practices in Texas. The findings from the report were helpful in encouraging a reform movement that culminated in the passage of the Fair Defense Act in 2001.

In early 2005, TSG contracted with the Texas Task Force on Indigent Defense (Task Force) to assist in the implementation and evaluation of two new public defender offices in Bexar and Hidalgo Counties. This report is the third, and final, of three reports issued by TSG to Task Force to assist in the implementation and evaluation of two new public defender offices in Bexar and Hidalgo Counties. The first report, *Initial Interim Report to the Texas Task Force on Indigent Defense: An Analysis of the Newly Established Bexar and Hidalgo Public Defender Offices*, provided an overview of the startup of the offices and a baseline evaluation of the systems in place in each county

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<sup>3</sup> In February of 2009, TSG joined George Mason University to create The Spangenberg Project. Although this report is primarily a product of TSG, George Mason researchers assisted with its production.

prior to the establishment of the public defender offices.<sup>4</sup> The second report, *Second Interim Report: An Evaluation of the Bexar and Hidalgo County Public Defender Offices After One Year of Operation*, summarized the performance evaluation findings of each public defender office after one year of operation. The final report uses both qualitative and quantitative data gathered across the contract period to examine the operations of both offices.

This report is organized into two separate chapters: 1) An Evaluation of Bexar County Public Defender; and, 2) An Evaluation of Hidalgo County Public Defender Office. Each chapter summarizes the underlying issues that were the impetus for the creation of Bexar and Hidalgo County Public Defender Offices. The chapter then describes the methods employed by TSG researchers in detail. Additional technical materials relating to the program evaluation protocols are provided at the end of this report in the Appendix. Findings for each office are explained in a number of subsections, specific to each office's operations. Finally, TSG offers conclusions and recommendations for the continued success of each office.

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<sup>4</sup> A link to the report is available at <http://www.courts.state.tx.us/tfid/pdf/FinalRevisedVersionInitialInterimReport.pdf>.



*An Evaluation of  
Bexar County Appellate Public Defender Office*

## *Bexar County Appellate Public Defender Office*

This report has been prepared to highlight results from the final phase of the Bexar County Appellate Public Defender Office (APDO) Evaluation conducted in 2007-2009. The report is broken down into three sections: Background, Findings, and Recommendations. Each section of the report contains key findings from the evaluation.

### ***1. Background***

The Texas Task Force on Indigent Defense awards discretionary grants to develop new public defender programs in courts throughout the state. In fiscal year 2005, Bexar County received a multi-year grant to establish a new public defender office. The County was awarded \$370,076 (80 percent of the first year's budget) to establish an appellate public defender's office in San Antonio. In 2005, the Spangenberg Group (TSG)<sup>5</sup> contracted with the Task Force to conduct a review of the soon-to-be established office in Bexar. The contract cited three specific tasks:

- Develop performance measures for the office,
- Provide an evaluation of the office's progress in meeting those measures, and
- Provide technical assistance to each program.

TSG proposed a three-part methodology to complete these tasks. First, an initial visit was scheduled in September 2005 to examine the appellate system in place in Bexar County prior to the establishment of the Appellate PD office. This visit provided TSG researchers with baseline data needed for future analyses and comparisons and enabled TSG to develop the evaluation protocol. During this visit, TSG conducted interviews with office staff and collected data from the county. TSG wishes to thank Bexar County Chief Appellate Defender Angela Moore for scheduling meetings, providing data and information about the APDO, and answering numerous questions throughout the evaluation process. An initial report was submitted to summarize the preliminary findings based upon the initial site visit and interviews.

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<sup>5</sup> In February of 2009, TSG joined George Mason University to create The Spangenberg Project. Although this report is primarily a product of TSG, George Mason researchers assisted with its production.

Second, TSG began constructing performance measure for the new office. There are two broad categories to examine when evaluating public defender offices. First, an examination considers the program qualifications in place in the jurisdiction being evaluated, including those relating to issues of eligibility for public defense, availability of counsel, attorney qualifications, and conflict of interest. Second, a performance evaluation of the office includes the quality of the legal work in the office, whether investigations are conducted, experts are sought, and motions are made. In order to determine the sufficiency of a public defender's office, information must be sought from that office as well as the courts, auditor offices, jails, and any other stakeholders. As the performance measures were finalized, TSG researchers returned to Bexar in March 2006 to evaluate the office's functioning and progress since its formation. TSG met with the Chief Public Defender and her staff, several judges and court coordinators as well as individuals from the Criminal Justice Planning and Coordination Department, the Auditor's Office, the County Commissioners Court, and the private defense bar. A second report detailed the outcome of the evaluation and outlined recommendations for the office's continued success.

Finally, to assess the Bexar County Appellate PD's response to the recommendations in the second report, TSG conducted an additional set of interviews via telephone in the summer of 2008 and collected supplementary data. This report summarizes the findings of the first two reports and combines the final set of data collection to measure the office's success and to make recommendations for continued improvement.

Overall, TSG researchers have found that, over its three years of operation, the APDO has successfully sped up the appellate process while providing high quality defense for indigent appellants and saving the county significant funds. In addition to improving the quality of appellate case processing in Bexar County, the APDO has largely removed trial judges from the voucher process, and garnered the respect and approval of many stakeholders who were initially skeptical of the office. The remainder of this report provides an overview of appellate case processing in Bexar County before October 2006, details the creation of the APDO, and describes the findings of this

evaluation. Finally, we offer several recommendations that will encourage the continued success of the APDO.

### **Bexar County Appeals Processing Before APDO**

Prior to the development of the Bexar County Appellate Public Defender Office, the system in place for appellate indigent defense was criticized for a number of shortcomings. First, there was no centralized system for appointing counsel or for overseeing the appellate process. Because of this, the caseload fell on a small group of qualified attorneys. The cases were too heavily concentrated within these individuals, and they did not have the necessary resources to handle the cases in a timely manner. There was not a system in place for managing the number of open cases an attorney had at one time, so attorneys were forced to ask for two to three extensions on every brief they filed because of overload, thus causing significant delay in the system.

Second, the attorneys who worked on appellate cases were appointed directly by trial court judges who reviewed attorney vouchers for payment. This created an issue of concern to local officials.

Finally, Bexar County is the largest of 32 counties that goes before the Fourth Court of Appeals. Prior to the establishment of the office, the Fourth Court of Appeals raised concerns about the quality of appellate briefs being filed.

To address these issues and to improve the system, the County Commissioners Court collaborated with the local district court judges and applied for a discretionary grant from the Task Force to establish an appellate public defender office. The Bexar County Appellate Public Defender Office (APDO) was established to address the concerns with the then existing system and to improve the quality and timeliness of appellate briefs while managing costs more effectively. The APDO represents all indigent defendants in Bexar County on appeal, with the exception of cases with a conflict, including both misdemeanor and felony level cases.

### **The Bexar County Appellate Public Defender Office**

The APDO is funded by a multi-year grant from the Task Force with the grant providing 80 percent of funds the first year and the county matching the other 20 percent.

The county has increasing fiscal responsibility each year until it becomes responsible for 100 percent of the office's budget in 2010.

The APDO began operation in the fall of 2005 and consists of the Chief Appellate Defender, four Staff Attorneys, including one senior member, one paralegal, and two office assistants, and is charged with indigent criminal and juvenile delinquency direct appeals at the Fourth Circuit Court of Appeals in Bexar County. The APDO handles between 85 and 90 percent of these appeals with the rest serviced by a small group of attorneys who qualify under the county plan. Trial court judges make appointments to the office, with the Chief Appellate Defender assigning cases to individual attorneys based on their current caseloads.

The office has improved the quality of appellate case processing in Bexar County, largely removed trial judges from the voucher process, and garnered the respect and approval of many stakeholders who were initially skeptical of the office. The following sections outline the findings of the Bexar County APDO Evaluation in detail.

## **2. Findings**

The APDO evaluation protocol focuses on examining the APDO's practices, policies, and progress in improving the problems associated with indigent appellate defense prior to the fall of 2005, as well as the goals outlined in the performance measures and recommendations in the second interim report. The findings are presented in the following four sections:

- Office Administration
- Case Processing
- Expenditures and Savings
- External Oversight.

## Office Administration

This section outlines the administrative operations of the APDO. It comprises five subsections, each offering a summary of the findings from the past two reports, details of current practice, and recommendations for the future operations of the APDO.

### *Office Policies*

The Chief Public Defender developed a detailed personnel manual that includes both procedural and performance standards; this was appended to the first interim report. The manual explains policies regarding minimum work standards, the filing of *Anders*.<sup>6</sup> briefs, the preparation of appellate briefs including the timeliness of briefs and the use of reply briefs, relationships with the local legal community, client contact, contact with trial counsel, procedures for handling conflict of interest cases, and the scope of representation. TSG is impressed by the overall administration of the office and the Chief Appellate Defender's receptivity to its concerns and suggestions.

### *Staffing*

The Chief Appellate Defender has staffed a qualified and relatively experienced office. The APDO is comprised of five attorneys, including the Chief Appellate Defender. Several of the attorneys have experience in the District Attorney's Office, and others have a history of private practice. The current attorneys have been promoted and a new, entry-level attorney began working at the office. The APDO has the help of one paralegal and two office assistants. A second office assistant has been hired since the second report, and has helped to make the workload more manageable. The office has worked with the local law school to create yearlong law clerk positions, but currently has a volunteer intern working for just one semester. The office has also contracted with several local civil law firms to write briefs for the office *pro bono*. This practice has dropped off recently, however, as there are fewer volunteers.

The policy and procedures manual outlines performance measures that reflect the goals and mission of the APDO: to provide effective and timely assistance of counsel

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<sup>6</sup> *Anders v. California*, 386 US 738 (1967).

while zealously representing its clients. The manual lists several factors that measure professional ability and dedication, including “knowledge of substantive and procedural law; effective research; recognition of legal issues; writing skills, including accuracy, brevity, clarity, development of issues and arguments, and effective use of authorities; oral argument skill; compliance with court rules and orders; effective allocation and use of time; assistance to other personnel; and client communication.”<sup>7</sup>

Adherence to these standards is determined by monitoring the caseload and workload of the office staff as a whole and individually, and a review of each brief submitted to the Fourth Court of Appeals. Employee evaluations occur both formally and informally, the latter as needed. Staff evaluations were conducted in March 2008, and according to the Chief Appellate Defender, the staff attorneys have performed above expectations and in line with the performance measures. Evaluations were not conducted in March 2009 due to changes in the office oversight, but the Chief Appellate Defender has notified the compensation chief that it has been over a year, and the new head is set to conduct evaluations shortly and address the lapse.

The Chief Appellate Defender is responsible for oversight of the APDO’s operations, including the assignment of cases, management of caseloads, staff, and other administrative issues. Since the office is comprised of experienced attorneys, a less formal system of supervision appears to work well for the office, with the support of both the Chief Appellate Defender and the staff attorneys and administrative staff. The Chief Appellate Defender has delegated roles to the Senior Staff Attorney, including assistance in the supervision of the other attorneys in administrative matters and the preparation of the budget.

### *Salaries*

Prior to the opening of the APDO, local officials expressed concern that some private attorneys may have been “padding” their vouchers in appellate matters, particularly as the rate of compensation dropped. The creation of the APDO, comprised entirely of salaried attorneys, has effectively eliminated this concern.

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<sup>7</sup> Bexar County Appellate Public Defender Policy and Procedures Manual.

There is a great deal of variation in staff attorney salaries within the APDO. Assistant Appellate Public Defenders earn between \$58,000 and \$72,000 annually, with the Senior Assistant and Chief Appellate Defender each earning more, respectively. Each attorney received a 5 percent increase for the fiscal year. Considering the wide range of salaries in the office, it is important that each attorney be compensated according to his or her skill level and in a fair manner.

Given the ABA standards of salary and resource parity between a public defender office and a district attorney’s office, it is imperative that the Chief Appellate Defender continue to advocate for her staff. While attorneys at both offices received raises, there was not parity from the beginning, and those at the district attorney’s office received 13% raises while at the public defender office they received only 5%. Table X shows the difference in salary for individuals with varying levels of experience at the APDO compared to the district attorney’s office. It is important that the office continue to seek parity.

<b>Table 1. Salary Comparisons for APDO and DA’s Office Appellate Division Staff with Equivalent Experience Levels</b>		
<b>District Attorney’s Office</b>	<b>Difference</b>	<b>APDO</b>
Chief	\$22,000	Chief
Over 25 years	\$35,376	25 years
Over 10 years	\$14,952	15 years
10 years	\$16,548	10 years
Office Assistant II	\$6,084	Office Assistant IV

*Training*

The Bexar County APDO was established with an experienced group of attorneys. While the office offers no formal in-house training, each of the attorneys came in with appellate experience, and the office held a joint training session with the Criminal Defense Lawyers Association.

Each attorney has participated in several continuing legal education (CLE) courses, provided by either the office or scholarship through the Texas Criminal Defense Lawyers Association. The Bexar County Indigent Defense Plan requires that attorneys who accept appellate appointments complete at least ten hours a year of CLE in criminal law or procedure, and the grant from the Task Force notes that staff training and



orientation should be evaluated. It appears that staff attorneys at the APDO are receiving necessary and appropriate training

Each staff member has received a copy of the policy and procedures manual as well as information on inter-office and county procedures. There are regular weekly staff meetings of the attorneys to discuss current cases and issues.

Recognizing that the APDO has a capable staff of attorneys, the office should continue to provide training and mentorship, although formal in-house training is not necessary given each attorney's previous appellate experience. The Chief Appellate Defender should distribute the policy and procedures manual and other training material to each new employee, including secretarial staff.

#### *Office Equipment & Resources*

In the summer of 2007, the APDO lost \$10,000 worth of videoconferencing equipment to theft. At the time of the interviews in 2008, several staff members expressed concern over the safety and security of the office. Since then, the office has replaced the videoconference equipment and has secured the building so that access is limited to employees with keys after hours. During the workday, the office continues to remain open to the public.

One attorney complained about the quality of the county's information technology department in charge of fixing computer or network issues – that it is not always helpful and can take an excessive amount of time. Several staff members also noted that additional computers would be useful; the Chief Appellate Defender has been receptive and the office now has two laptop computers for the interns and other outside assistance.

The staff attorneys have unlimited access to Lexis for legal research and maintain a shared network drive where they can access one another's briefs through a keyword search.

Several employees are working to customize Defender Data to better suit it to the office's needs. At this point, they are fine-tuning the details of integrating the intake packet into the program. An office assistant is also working on an office manual that will describe the process of entering data into Defender Data as well as provide job descriptions for each position in the office.

## **Case Processing and Workload**

The APDO worked with the Court of Appeals to develop a procedure for the determination of the right to appeal following a guilty plea. The Court appoints the APDO for every indigent appellant and the APDO reviews the case. If there is not a right to appeal because the client pled guilty, the APDO writes a form letter to the client and the court asking the case to be dismissed (TBD). These cases take about twenty minutes to review and the workload is split among the attorneys. There is an efficient system for reviewing these cases, as the records are now put on CDs, thus making the work faster. The office receives about ten cases to be dismissed per month.

As of the second interim report, the APDO was planning to take on Child Protective Services appeals, but that has not yet happened. There are two attorneys who handle mental health misdemeanors at trial court, but they are funded differently from the rest of the staff and, thus, do not affect the overall caseload.

Obtaining records continues to be a problem, particularly with the regional program. While some court clerks and reporters are resistant to gathering materials for appellate cases (as they do not have experience beyond trial court and do not know what it entails) staff at the APDO has developed rapport with them, thus making it easier. Gathering information is also difficult due to regional differences in practice. While some counties have computerized systems, others rely on handwritten case files. Incomplete records present a problem, as they are not realized immediately. It is also difficult to identify who is in charge of appeals in each of the counties.

### *Initial Interview*

The APDO policy manual lays out in detail the requirements for client contact. It notes that all clients must be visited at least once by the attorney providing representation for the case, where possible. In addition, staff attorneys must inform all clients of the status of their cases at each step in the appellate process, explain any delays in the case, and provide general information regarding policies and procedures of appeals and an anticipated timeframe for the appeal, which may be done via mail. Also by mail,

attorneys are expected to provide a client with each substantive document filed by both the prosecution and the defense.

Attorneys at the APDO seem to be doing an effective job of meeting with their clients for the initial interview. It is often difficult, however, for attorneys at the APDO to meet with their clients in person, as the clients may be in custody in prisons across the state. This is of particular concern with the regional program, although the program is ending. Inmates also have limited access to phones, so attorneys typically correspond through letters – with the exception of the staff attorney in charge of juvenile cases, as juveniles have phone privileges. The attorneys usually try to meet with the clients in jail, though other issues, including one TB outbreak, can inhibit the practice. The office has replaced the stolen video conferencing equipment, thus making long-distance communication less time-consuming and more personal, and staff attorneys are beginning to use it again.

TSG researchers recommend that the attorneys at the APDO meet with every client possible, and that the first meeting be in person to discuss the facts of the case. It is also recommended that when possible, technology, such as the video conference equipment, not be used in place of the initial in-person as it is important for the attorney and client to develop rapport.

### *Conflict*

There is a strict policy in the APDO manual not to represent co-defendants on appeal. On occasion the office will be assigned co-defendants; however, there is an effective computerized system for checking conflicts. The Chief Appellate Defender has noted that she has no issues with giving conflict cases to private counsel. It seems the APDO is effectively handling any conflict cases that arise.

### *Anders Policies*

The APDO office manual has an extensive policy on the filing of *Anders* briefs. The policy requires that the briefs be filed sparingly, and the decision to file a brief be discussed with other staff attorneys. There is a very strict standard to determine which cases have “no arguable merit.” Further, the client must be notified of the attorney’s

decision to file an *Anders* brief, and the client must be given the opportunity to withdraw his request for appointment of counsel or the appeal.

In 2007, the APDO was filing *Anders* briefs at a rate of 22 percent, with an increase to 28 percent in 2008. In 2009 to date, the office is filing *Anders* briefs at a rate of 14 percent. The present decline helps to alleviate a concern of TSG, which cautions attorneys at the APDO to carefully decide the merits of each case before them. It is important that attorneys are following the written policy on *Anders* briefs and discussing the possible issues with other staff members.

### *Regional Pilot Program*

As of the summer of 2008, the Regional Pilot Project had been up and running for a year, with 30 of the 32 eligible counties participating. The goal of the project was to expand the APDO services to all of the counties within the Fourth Circuit Court of Appeals. Initially, there was skepticism about the program, but only two counties opted-out as they noted they did not have any appeals.

In establishing the regional program, the Chief Appellate Defender spoke with each of five administrative judges as well as the Commissioners Court in each county. Appellate attorneys in each of the counties were initially opposed, but since the judges wanted more competent counsel to take the appeals, they welcomed the APDO's offer.

Since that time, the regional program has suffered. Once the free trial period ended, very few counties hired the office to handle appeals. Several counties signed interlocal agreements, but the trial courts are rarely appointing the APDO in lieu of their own local counsel. The program did allow the regional attorney to carry numerous cases for Bexar County at no cost to the county, and enabled staff members to interact with attorneys across the region; however, it seems unlikely the program will continue as it is underutilized by other counties. This is unfortunate as the APDO attorneys have more experience than other attorneys being appointed to such cases.

### *Brief Preparation*

The APDO policy manual addresses the quality and timeliness of briefs, as reflected in the performance measures. Attorneys must adhere to this high standard of

professional ability and dedication while producing high quality briefs, “filed in a timely manner, and in full compliance with applicable court rules.”

As of the second report, every brief submitted to the Fourth Court of Appeals was reviewed by each attorney in the office to provide suggestions and editing. As recommended by TSG researchers, currently only one additional attorney reviews briefs submitted by the APDO for stylistic and grammar purposes. Briefs with more complicated issues are discussed at staff meetings with two attorneys conducting the final review.

As of the summer of 2008, attorneys at the APDO were filing for extensions in a significant number of briefs due to the high volume of cases. Attorneys estimated they filed for extension in at least half of all cases, although only one extension per case. The policy manual states that “at least 75 percent of all briefs filed by the APDO should be filed within the time limit set by statute or court rule without extension.” As noted in the second report, the Fourth Circuit of Appeals has not had to send letters to the office notifying the staff that a brief was overdue, a practice that regularly occurred when the system was assigned counsel only.

According to the Chief Judge of the Fourth Circuit of Appeals and an associate judge, the APDO has made a significant difference in reducing the time spent processing appeals. Although attorneys at the APDO are asking for extensions, appeals are moving through the system faster than they did previously with private counsel handling them. The quality of the briefs is also better, with greater consistency in the writing. One of the issues in Bexar County prior to the establishment of the APDO was the delay involved in appellate cases. As of the second interim report, the office had not received notice of overdue briefs from the Fourth Circuit of Appeals. This continues to be the case, with one exception that was later revoked. A case was dismissed by the court due to the lack of a response in the case file. The Chief Appellate Defender successfully argued that the defendant’s case should not be dismissed as the trial court was at fault for not filing the certification. The Court reinstated the appeal and ordered the trial court to complete its duties.

*Caseload*

This section evaluates data provided from the APDO, the Bexar County Auditor’s Office, and the Fourth Circuit of Appeals. Table 2 presents the types of appeals the APDO has handled in its three years of operation. The majority of the APDO’s cases are felony appeals (more than 85% each year). The office has had four capital appeals, three in FY2006 and one in FY2007. The number of misdemeanor appeals has increased over the past three years, from 9 cases (3.6% of the total appointments) in FY 2006 to 20 appointments (7.5% of the total appointments) in FY2008.

	<b>FY2006</b>		<b>FY2007</b>		<b>FY2008</b>	
	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>
Capital	3	1.2%	1	.3%	0	0%
Felony	222	88.1%	248	86.4%	237	88.4%
Misdemeanor	9	3.6%	12	4.2%	20	7.5%
Juvenile	18	7.1%	26	9.1%	11	4.1%
<b>Total</b>	<b>252</b>	<b>100%</b>	<b>287</b>	<b>100%</b>	<b>268</b>	<b>100%</b>

As described earlier in this section, TSG is concerned with the increase in the rate of *Anders* briefings filed in the office. In FY 2007, the APDO filed 26 *Anders* briefings. In FY2008, this number increased quite dramatically to 46 filings (see Table 3). As a percent of the total briefings filed, *Anders* briefings increased from 22% in FY2007 to 28% in FY2008. Although the early numbers from 2009 suggest that these rates are decreasing, TSG urges the APDO to ensure that all attorneys are familiar with the office’s written policy on *Anders* briefs and recommends that the office continue to monitor the number of *Anders* briefs submitted to ensure compliance with *Anders v. California*. The column marked “reply briefings” designates briefs filed by APDO following the submission of the brief by the prosecutor.

	FY2007		FY2008	
	PD Briefings	Reply Briefings	PD Briefings	Reply Briefings
<i>Non-Anders</i>	90	14	119	20
<i>Anders</i>	26	0	46	0
<b>Total</b>	<b>116</b>	<b>14</b>	<b>165</b>	<b>20</b>

The total number of dispositions is calculated using the fiscal year when the opinion was issued and is presented in Table 4. The APDO's dispositions per year have increased each year of operation. This, of course, would be expected, as many appeals assigned to APDO in its first year of operation, FY2006, would not be disposed of until the following years.

	FY2006		FY2007		FY2008	
	N	%	N	%	N	%
<i>Non-Anders</i>	110	100%	110	80.3%	115	76.7%
<i>Anders</i>	0	0%	27	19.7%	35	23.3%
<b>Total</b>	<b>110</b>	<b>100%</b>	<b>137</b>	<b>100%</b>	<b>150</b>	<b>100%</b>

Appellate cases are complex and time consuming. Table 5 describes the length of time, in the average number of days, it takes to process a case. Cases in which an *Anders* brief is filed often take longer from appointment to docket than non-*Anders* cases; however, the number of days from when the case is placed on the docket until the record is complete and from when the record is complete until the briefing is filed is typically shorter than non-*Anders* cases. *Anders* cases typically take much longer from an appointment to opinion than non-*Anders* cases (252 days vs. 174 days in FY2007 and 282 days vs. 206 days in non-*Anders* cases).

	<b>FY2007</b>		<b>FY2008</b>	
	<i>Non-Anders</i>	<i>Anders</i>	<i>Non-Anders</i>	<i>Anders</i>
Appointment to Docket	17	24	21	67
Docket to Record Complete	83	44	84	41
Record Complete to Briefing	77	52	88	43
Defender Briefing to State Briefing	70	-	70	-
State Brief to Opinion	122	-	135	-
Appointment to Opinion	174	252	206	282

The APDO is currently utilizing Defender Data software to assist in managing its cases and to track important data points, some of which are presented above. As this system was not in place in the founding year of the APDO, comparing some data points across all three years of operation is difficult. Nonetheless, even the most basic comparison of data from the previous two reports and this final one confirm what a number of key stakeholders told TSG researchers: that the APDO is more efficient, and appeals handled by APDO require less time to process, than cases were taking when assigned private counsel was handling appeals years ago.

### **Expenditures and Savings**

Not only are appeals handled more expeditiously by the APDO, but the office also has saved the county \$200,572 from the start of FY2007 (October 1, 2007) through August 31, 2008.<sup>8</sup> Table 6 outlines these savings, which are based on the number of felonies filed and the cost of attorneys as well as the jail costs incurred. The APDO filed 158 briefs during this time, 25 of which were *Anders* briefs and one of which was a capital case. The office filed 85 “To Be Dismissed” cases and dismissed 9 cases.

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<sup>8</sup> These calculations were made using the average case cost for assigned private counsel FY06 and FY07. This data was provided by TTFID as reported by Bexar County. The number of cases was provided by APDO.



<b>Table 6. Savings with the APDO compared to private attorneys FY07</b>		
<b>Estimated Costs for Assigned Private Counsel</b>		
<b>Number</b>	<b>Cost per case</b>	<b>Total Cost</b>
150 Felonies	\$3450	\$517,500
8 Misdemeanors	\$2,000	\$8,000
93 Dismissed 85 "To Be Dismissed" 9 Dismissed	\$1,000	\$93,000
1 capital murder (200 hrs)	\$150/hr	\$30,000
<b>Total Cost for County without APDO</b>		<b>\$648,500</b>
<b>Actual Cost of APDO</b>		<b>\$447,928</b>
<b>APDO Cost Savings for County (Cost without APDO-Actual APDO Cost)</b>		<b><u>\$200,572</u></b>

As Table 6 shows, the total, additional cost to the county if the APDO did not exist would be \$200,572 based on the number of cases filed and the cost per case. Moreover, the APDO also saves money spent on incarceration, as defendants now spend fewer days in jail since the APDO's creation. Prior to the APDO, the average number of days a client spent in jail while an appeal was pending was 180. With the APDO, the average number of days a client waits in jail during appeal is 55. These efficiencies add up to a savings of \$531,250 in jail expenses from the 85 "To Be Dismissed" cases processed from October 1, 2007- August 31, 2008, as shown in Table 7. Combined with the savings detailed in Table 6 above, the APDO has saved Bexar County approximately \$731,824 from October 1, 2007- August 31, 2008 alone.

<b>Table 7. Savings from Reduced Time In-Custody for TBD Cases<sup>9</sup></b>				
<b>Average Number of Days Spent in Custody while Appeal Pending</b>	<b>Estimated Cost per Day In-Custody</b>	<b>Cost per Case</b>	<b>Number of Cases</b>	<b>Total Cost</b>
180 Days <b>before</b> APDO	\$50	\$9,000	85	\$765,000
55 Days <b>with</b> APDO	\$50	\$2,750	85	\$233,750
<b>Savings from Reduced Time In-Custody</b>				<b><u>\$531,250</u></b>
<b><u>Total Cost Savings</u></b> (APDO savings & savings from reduced time in-custody)				<b><u>\$731,824</u></b>

Against these savings, the budget for the APDO for FY2008 is \$485,719, up only slightly from \$446,890 in FY2007. The office is currently over budget by nearly \$12,000. The majority of expenditures are personnel related, followed by supplies and travel. It is important that the office maintain a balanced budget, with enough money set aside for travel to meet with clients and staff salaries. For FY2008, \$424,304 was budgeted for personnel salaries and expenses. The hourly rate for appeals changed in FY2005, which makes comparison to other years more difficult. For FY2008, the cost per hour for the APDO is \$52 per attorney, including overhead and staff.

### **External Oversight**

There are three organizations that share some part of oversight over the APDO: the Bexar County Commissioners Court, and Bexar County Public Defender Oversight Board, and, formerly, the Criminal Justice Planning and Coordination Department. Criminal Justice Planning and Coordination was not directly involved in the day-to-day operations of the APDO, and has now been disbanded and replaced by Personnel Resource Management. This change happened recently and without warning, but staff members are gradually assimilating to the new culture, predominantly focused on budget and human resources

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<sup>9</sup> Data provided by the APDO.

The Oversight Board consists of seven members including judges and defense attorneys. The Board is charged with providing advice and counsel to the court pertaining to the operation of the APDO. The APDO currently has a list of issues that need to be resolved by the Oversight Board, including assistance to trial attorneys, the use of pro bono civil firms, supervision of interns, and a problem regarding orders of appointment.

The Chief Appellate Defender creates the office budget, and formerly had oversight by Criminal Justice Planning and Coordination and final approval by the Commissioner's Court.

It is important that the APDO have many resources to call upon to assist with the development of the office. The Chief Appellate Defender must remain independent and retain the ability to advocate on behalf of the office. The oversight committees seem to have adopted an appropriate role, giving guidance only on budget and spatial concerns when asked and not involving themselves in the handling of cases. It is important that the APDO and its oversight committees, particularly the Board, remain in close contact to resolve issues such as those mentioned above, without becoming too entangled in the others' work.

### ***3. Conclusions and Recommendations***

Overall, the APDO is running smoothly and has effectively worked to address the issues that were of concern prior to its formation, while saving the county significant funds. The office has decreased the amount of time that clients spend waiting in jail while appeals are pending, a factor of great importance to the clients themselves as well as to jail administrators. The quality of briefs has also improved, and there is greater consistency across time, something the Fourth Circuit Court values. Within the office, the Chief Appellate Defender has a staff that enjoys the work they do.

In an effort to continue to improve the APDO operations, TSG offers five key recommendations for continued success:

- The APDO should continue to reach out to County administrators and key stakeholders to ensure the APDO office is able to continue to improve appellate processing in Bexar County.
- The APDO should monitor the practice of filing *Anders* briefs. While the rate of filing *Anders* briefs has increased in the three years of operation, the APDO policy appears to interpret *Anders v. California* correctly; therefore, the increased number of briefings alone is not cause for immediate concern. The Chief Appellate Defender should monitor compliance with the office policy regarding *Anders* briefings.
- The APDO should revisit its workload standards originally created by the Chief Defender. TSG continues to be concerned that the APDO workload standards are not in line with the NAC Standards. A practical workload standard provides an objective method to measuring workload overtime. This will help the APDO manage budget and staffing needs over time. For this reason, TSG recommends that the APDO consider a workload and time keeping study.
- The APDO has an immediate need for additional support staff. The APDO relies heavily on law student interns. While these students offer the APDO substantial benefits, the APDO should not rely on these students as if they are permanent staff members. These students should not be figured into the day-to-day work of the office given the variable nature of students' ability to take on work assignments.
- There continues to be pay disparity between the APDO and the Bexar County District Attorney Office's Appellate Section. The Chief Appellate Defender should continue to seek salary increases and pay parity from the County.

*An Evaluation of the  
Hidalgo County Public Defender's Office*

## *Hidalgo County Public Defender's Office*

### **1. Background**

The Texas Task Force on Indigent Defense (Task Force) awards grants “to encourage courts and counties to examine their indigent defense processes to improve the local system by developing innovative programs.”<sup>10</sup> In 2005, Hidalgo County was awarded \$395,490 from the Task Force to establish a misdemeanor public defender office to represent indigent defendants. That same year, The Spangenberg Group (TSG),<sup>11</sup> a research and consulting firm that specializes in improving indigent defense systems, contracted with the Task Force to conduct a review and evaluation of the soon to-be-established public defender office in Hidalgo County. The contract cited three specific tasks:

- (1) Develop performance measures for the office.
- (2) Provide an evaluation of the office's progress in meeting those measures.
- (3) Provide technical assistance to the program.

TSG utilized a three-part methodology to complete these tasks. First, an initial visit was scheduled to examine the indigent defense system in Hidalgo County before the Public Defender Office (HPDO) began operations. This visit provided TSG researchers with baseline data needed for future analyses and comparisons. A second site visit was scheduled soon after the HPDO began operations. During this visit, TSG conducted interviews to determine how the office was functioning and collected secondary data from the county. An initial report was submitted to summarize the findings from the two site visits.

Second, TSG began constructing performance measures for the new office. Generally, evaluation protocols for misdemeanor public defender offices seek to examine

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<sup>10</sup> Office of Court Administration, Task Force on Indigent Defense.  
<http://www.courts.state.tx.us/tfid/tfidhome.asp>

<sup>11</sup> In February of 2009, TSG joined George Mason University to create The Spangenberg Project. Although this report is primarily a product of TSG, George Mason researchers assisted with its production.

the functioning of the office (see the evaluation protocol provided at Appendix X). The evaluation protocol developed for misdemeanor public defender offices comprises questions covering many issues, including oversight, supervision, training, caseload, workload, case conflicts, personnel policies and resources, salary parity with the District Attorney's Office, investigation, expert and other services, motions and hearings, equipment and resources, case dispositions, attorney-client contact, case processing, and data reporting and tracking. As the performance measures were finalized, TSG returned to Hidalgo to evaluate the HPDO's functioning and progress since it began operations. A second report was submitted to detail the outcome of the evaluation and make recommendations for the HPDO's continued success.

Finally, to assess HPDO's response to the recommendations in the second report, TSG conducted an additional set of interviews via telephone in June 2008 and collected further data to supplement these interviews. This report summarizes the findings of the first two reports and combines the final data to measure the HPDO's success and make recommendations for continued improvement. This report calls upon information gathered in the site visits conducted in October 2005, March 2006, and October 2006. Interviews were conducted with the HPDO staff, judges, court staff, and members of the Criminal Justice Planning and Coordination Department, the Commissioners' Court, the Public Defender Oversight Committee, and the Auditor's Office. The above information is supplemented by caseload and financial data obtained from the county Auditor Offices, the court systems, and the HPDO itself when possible. Technical assistance was provided on an ongoing basis when the Task Force or Hidalgo County made requests to TSG.

As an institutional provider of indigent defense services the HPDO has been able to institute practices to expedite the processing of resolving misdemeanor cases, reduce jail overcrowding, and assist defendants in being released from custody earlier than before. TSG researchers believe that indigent misdemeanor defendants now receive better representation than they had prior to the establishment of the Hidalgo PDO.

### *The Hidalgo County Public Defender's Office*

Prior to October 2005, Hidalgo County processed misdemeanor cases through a court-appointed counsel program. Such a program appoints private bar attorneys to cases and pays either an hourly or flat-rate fee to the attorney for services rendered. This system was criticized for a number of shortcomings, including how attorneys were assigned to cases, the length of time defendants spent in jail throughout case processing, and the high cost when compared to a public defender office.

First, the method of appointing an attorney to a misdemeanor case was an issue. Qualified attorneys were appointed to and selected off a “wheel,” or a rotating list of qualified attorneys for the County. The Fair Defense Act of 2002 requires that attorneys be appointed in a fair, neutral, and non-discriminatory manner. Under the local indigent defense plan, judges are to appoint an attorney from among the top five names on the appointment wheel to a particular case. Some attorneys regularly wait in the court to be appointed by a judge. In practice, the top attorney on the appointment list does not often get assigned to a case. The system of appointing attorneys not at the top of the appointment list is thought to have distorted the distribution of appointments and possibly provided defendants with lower quality representation.<sup>12</sup>

During TSG’s initial site work, two functions were identified as likely causing delays in case processing. First, there was a delay by the police and sheriff’s office in completing and providing reports to the District Attorney in a timely manner. In cases where a defendant was arrested over the weekend (to include Fridays), the DA would not receive the reports until the following Tuesday or Wednesday, causing a bottleneck in the system. There would then be a delay of up to 10 days from the time the DA received the reports from the police until the complaint was signed. It was noted that a defendant could wait in jail for up to 10-15 days before an initial court appearance. A second bottleneck occurred as the defendant waited to be brought before the assigned judge for the entry of a guilty plea (which appeared to occur in the majority of cases). It was proposed that a new public defender office would help alleviate some of these systemic issues.

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<sup>12</sup> The Spangenberg Group. Initial Interim Report to the Texas Task Force on Indigent Defense: An Analysis of the Newly Established Bexar and Hidalgo Public Defender Offices. May 11, 2006.



Finally, a new public defender office was thought to be able to save Hidalgo County funds by decreasing the costs per case and the amount of time defendants spend in jail, saving the costs associated with incarceration. At the time of the initial site visits, case costs and costs associated with jail housing were gathered. In October 2005, there were 1,106 defendants in the Hidalgo County Jail, with 258 (30%) being held pretrial for misdemeanor offenses. Interviewees reported that on any given day, approximately 30-40% of the inmates were pre-trial misdemeanor defendants.

These issues provided the impetus for the creation of the HPDO. The HPDO, which began operation on October 21, 2005, seeks to improve the quality of court-appointed counsel and help reduce jail overcrowding by decreasing the amount of time defendants spend in custody pre-disposition. Funds for the new Public Defender's Office were provided from the Texas Task Force on Indigent Defense's FY2005 Discretionary Grant Award in the amount of \$395,490. Hidalgo County agreed to assume a larger proportion of the office's expenses each year throughout the four-year term. Currently, Hidalgo County is supporting 80 percent of the office's budget, and is set to fully assume financial responsibility for the office in FY2010. Upon start-up the HPDO was to represent 25% of all in-custody misdemeanor indigent defendants.

## **2. Findings**

Overall, the HPDO has improved indigent defense in Hidalgo County. Indicators suggest that while the HPDO is not receiving the number of appointments it should, the office continues to save Hidalgo County money by decreasing the amount of time defendants spend in custody awaiting processing, thus saving costs of detainment and keeping the cost per case down. This report examines the HPDO's practices, policies, and progress in improving the problems associated with indigent defense prior to October 2005, as well as the goals outlined in the performance measures and recommendations in TSG's second project report. The findings are presented in the following four sections:

- Office Administration
- Case Processing and Workload
- Expenditures and Savings
- Conclusions and Recommendations.

### *Office Administration*

This section details the administrative operation of the HPDO. It comprises six sub-sections, each offering a summary of the findings from the past two reports, detailing current practices, and incorporating recommendations for the future operations of the HPDO.

### *Office Policies*

In the first interim report, TSG researchers noted the importance of developing and implementing a range of policies that help structure any public defender office. Specific recommendations included guidelines for the assignment of cases, visiting clients, taking on outside legal work, as well as general human resources policies. The HPDO has developed and executed such policies that were noted as necessary. The office has an extensive policy and procedures manual that covers these policies in detail. The manual has been updated often, with the most recent edition dated July 2008. The manual is provided to each new staff member upon hire.

### *Staffing*

Since its formation and throughout the TSG evaluation period, the HPDO has continued to grow. The office is currently staffed with the Chief Public Defender, one first assistant, four assistant public defenders, one investigator, and one administrative assistant. Jaime Gonzalez, a former Assistant District Attorney in Hidalgo County, is the founding and current Chief Public Defender. The HPDO is a fairly young office in terms of criminal law experience, though the mentorship within the office helps to introduce new attorneys to both office procedures and legal practice. At the time of the second interim report, the position for first assistant staff attorney was open; this position has since been filled. Because the new attorney's background was primarily in civil practice, the attorney has trained through courtroom observation and studying criminal law while attending formal training sessions and CLEs. The first assistant now serves as the "rover" attorney, thus reducing the workload of the Chief Public Defender.

In December 2007, a new position, jail intake officer, was created and filled. This individual generally conducts the first interview and gets clients bonded out of jail as well as assisting with administrative duties around the office. The introduction of this position at the HPDO may have contributed to the reduction of the number of in jail at any given time from 15-25 to 5-10, an important factor given the initial plan for the HPDO to reduce jail time for indigent defendants in the county.

As of the second interim report, there was no formal system for staff evaluations. Following the advice of TSG researchers, individuals on the HPDO staff now undergo an initial evaluation following their first six months in the position and again at one year. Thereafter each staff member is evaluated annually. Several staff members noted they also underwent informal evaluations at different time intervals. It is important that the Chief Public Defender and first assistant continue to evaluate the performance of the staff on a regular basis.

### *Salaries*

Since the second interim report, the HPDO has increased staff salaries by a substantial amount. The Chief Public Defender believes there is parity for the starting salary of trial public defenders and misdemeanor assistant district attorneys. After one year, defenders earn between \$50,000 and \$52,000 annually; however, after a year of practice in the DA's office, ADAs will earn more than second-year assistant public defenders. Also, because attorneys at the Hidalgo PDO only handle misdemeanor cases, they do not receive the same pay increases that attorneys at the DA's office do when they move to the felony division. A third year prosecutor usually earns between \$54,000 and \$55,000 annually.

The investigator in the misdemeanor unit at the DA's office earns significantly more than the investigator at the HPDO. The secretaries in the DA's office earn several thousand dollars a year less than the secretary at the HPDO office, although the workload at the HPDO is greater as the secretary works for all of the attorneys.

During its first years in operation, the HPDO lost several attorneys to private criminal practice, where they are able to earn substantially more money. Indeed, assistant public defenders in Hidalgo County will hit a salary ceiling unless they are permitted to

take on felony cases. To attract and retain strong attorneys, the HPDO should be permitted to accept felony cases. This will increase not only pay, but also opportunities for professional growth. Several attorneys mentioned a desire to take on felony cases. There is substantial pressure from the criminal defense bar, however, which does not want the HPDO to accept felonies as it would take work away from private attorneys. The Chief Public Defender noted one instance in which a judge brought up the possibility of the public defenders taking felony cases and the bar threatened to support an opponent running against that judge.

The office policy and procedures manual outlines the guidelines for the practice of attorneys taking outside cases. Staff attorneys at the HPDO continue to accept outside work, ensuring there are no conflicts of interest with clients or referrals. Attorneys noted they had between two and ten outside civil cases. TSG researchers believe this practice could be stopped if the HPDO was better utilized and the attorneys were permitted to accept felony cases. Presently, the allowance to take on outside cases is seen as an incentive to keep employees in the office. Attorneys at the DA's office are also permitted to take on private cases.

### *Training*

The policy and procedures manual for the HPDO outlines extensive mentoring and training initiatives for new attorneys "to provide guidance and instruction".<sup>13</sup> Since the writing of the second interim report, the HPDO has filled the opening for first assistant, the individual who new attorneys shadow when beginning at the office. The HPDO does not have any formal in-house training, but the mentor assists new attorneys for several weeks throughout their early cases, and also introduces them to court personnel including judges and attorneys at the DA's Office. During their first trials, new attorneys serve as second chair to their mentor. The extent of the mentorship and shadowing depends upon the new attorney's level of experience, and can include an introduction to office policies through instruction on how to negotiate pleas and draft motions, for those attorneys coming straight out of law school.

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<sup>13</sup> Hidalgo County Public Defender's Office. Policy and Procedures Manual. Last revised, July 1, 2008.

The manual does not require training for experienced staff, though the Hidalgo County Plan does require attorneys to complete an average of 10 annual continuing legal education courses related to criminal law. The HPDO covers all expenses related to CLE seminars. Staff members who attend a CLE course share any new information and materials with the rest of the office upon their return, though several attorneys noted this often happens after a significant amount of time has passed. The materials, however, are placed in the library and available for anyone to review. Staff attorneys at the office have attended CLE seminars related to immigration matters, field sobriety testing, and mental health training. All staff attorneys at the HPDO have completed the necessary number of CLE courses.

In both the initial and the second interim reports, TSG researchers raised concern over the lack of training related to the immigration consequences of a criminal conviction, particularly due to the location of the HPDO and the nature of a great deal of its cases. It is estimated that 50 percent of the clients assigned to the HPDO have an immigration and naturalization service hold on them for illegal entry into the United States. Those clients are not eligible for release on bond, and following disposition of their cases, are transferred out of the Hidalgo County jail to federal custody.

The Chief Public Defender has since attended a training session on the Immigration Consequences of State Criminal Convictions in September 2008. Materials from the training, including PowerPoint slides, were shared with the staff attorneys. The HPDO also plans to co-sponsor a CLE with the ACLU on the Immigration Consequences of State Criminal Convictions in June 2009 at the University of Texas, Pan-American.

This training notwithstanding, one Hidalgo public defender acknowledged that if clients asks him questions about immigration, he tells them to speak with an immigration attorney. It is important that the HPDO continue to train on immigration matters and that all staff members participate due to the office's location and the frequency with which they deal with clients facing immigration issues. TSG recommends that HPDO ensure there are adequate resources for such training to be included in the operating budget as training on this matter is essential in providing quality defense to HPDO clients.

As outlined in the policy and procedures manual, the HPDO investigator is to receive "training and certification under the guidelines of the National Association of

Investigative Specialists.” The staff investigator has undergone training and is currently pursuing a degree in criminal justice.

### *Office Equipment and Resources*

Since the HPDO opened in October 2005, the office equipment is still relatively new, though several staff members noted concerns over the speed of their computers. Staff members also have had concerns over the amount of available office space. Although the office has expanded since the second interim report, staff members still feel “cramped,” and there is not room for further expansion in the current location. The staff investigator also voiced concern over the lack of private conference space, though the Chief Public Defender notes that the office now has a private conference room/library that can accommodate six-to-eight people. As of summer 2008, the office had plans to move into the courthouse, which would allow for more space. At this writing, the Chief Public Defender hopes to move into bigger space within the next year.

Several attorneys also noted that the availability of video conferencing would be useful, although currently the attorneys are able to use the system in the Office of Indigent Defense when necessary. While it is recommended that the initial client interview be conducted in person, when it is not possible it would be useful for the office to have its own videoconferencing system.

The HPDO staff members appear to have adequate legal research resources. The attorneys have access to a library, including “case law... practitioner manuals, legal articles and motion practice files.”<sup>14</sup> The HPDO also has access to LexisNexis and Westlaw, with office training provided for the latter.

### *Office Oversight*

As part of the contract establishing the public defender office, a public defender oversight board was established. The Chief Public Defender reports to the oversight board, which consists of five members including three judges, a private defense attorney, and a county commissioner. Oversight is informal and the Chief Public Defender contacts the chair of the board with any concerns. Any administrative role of the board in

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<sup>14</sup> Hidalgo County Public Defender’s Office. Policy and Procedures Manual. Last revised, July 1, 2008.

supervising the Chief Public Defender, including fiscal authority, must be decided by the Commissioners' Court.

The Chief Public Defender regularly consults with several individuals at the Indigent Defense Office and presents budget and planning reports to the Oversight Board twice annually. This is a change from the previous reports and is a sign of the heightened level of confidence in the office. There do not appear to be any instances of the Oversight Board overstepping its boundaries or interfering with the legal practice of the HPDO, and the level of trust between the two has grown, allowing each to concentrate on its own duties.

## ***2. Case Processing and Workload***

The Texas criminal code mandates that arrestees appear before a magistrate within 48 hours of arrest.<sup>15</sup> Arrestees can request counsel at this Article 15.17 hearing. Such a request is to be forwarded to the appointing agency, the Office of Indigent Defense, within 24 hours from the request. Article 1.051(c) requires the appointing authority to make a determination of indigence and appoint counsel within three working days of receiving the request. This section details case processing in Hidalgo County generally, and in the HPDO office specifically.

### *Indigent Qualification & Case Assignment*

Staff members at the Office of Indigent Defense Services (IDS) determine defendants' eligibility for public defense, with judges making the final decision. There is currently no system to verify indigence, though the Task Force has outlined strict qualification guidelines. The specific procedure and financial standards are available in the Hidalgo County Local Rules to Implement the Texas Fair Defense Act. The eligibility guidelines for appointment of counsel are administered fairly, and eligible defendants have not been denied counsel. Case assignments to the HPDO are electronically transmitted and received each day. Upon receipt of a case, the support staff assembles all court documentation as well as any other information regarding the client available from

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<sup>15</sup> Texas Code Criminal Procedure Article 15.17(a).

intranet data, at which point the case is given to the Chief Public Defender for assignment.

Each day, either the jail intake officer or one of the attorneys visits the jail to meet with pretrial defendants to whom the office has been assigned. These defendants have typically not had formal charges filed yet. The intake officer or the attorney discusses the available options with the client, and also collects case details. These interviews are intended to help the defendants make bond and to determine if they have a border patrol hold or if they are on probation.

A number of the HPDO's clients live in Mexico and cross into the United States to work. If they have crossed the border illegally, law enforcement notifies the Department of Homeland Security following the arrest, and the defendants are placed on a border patrol hold, which prevents them from being bonded out of jail. A number of defendants who are in the United States illegally are able to contact their employer before the Department of Homeland Security is notified of their immigration status. These individuals are then able to bond out before they are placed on a border patrol hold. When this happens, the HPDO continues to work on the case, and it proceeds as any other out-of-custody case would. Most defendants who remain out-of-custody go on to contest the charges against them.

Following the initial interview, the intake officer or attorney will call the in-custody defendant's family members to see if someone can help pay bond. In cases where the defendant has a border patrol hold and is unable to bond out, the family members will be notified of the individual's location. At this point in the process, the Hidalgo PDO does not know which attorney will represent the clients as cases are not assigned to a particular courtroom until formal charges have been filed.

Each attorney at the HPDO is responsible for a particular courtroom, with the exception of County Court Four, which has two staff attorneys due to the high volume of cases. The second attorney at County Court Four is the "rover" who picks up assignments as needed in order to help with the other attorneys' caseloads. The attorneys are generally responsible for all of the cases assigned to the public defender in their court, which is said to be every fourth case from the wheel, or a total of 25 percent of all cases. In addition, some judges make assignments directly from the bench, which can raise the HPDO's



appointments beyond the 25 percent level. Given the current economic climate, however, the number of cases appointed from the bench is quickly decreasing. The Chief Public Defender noted that there are often more private attorneys seeking appointments than defendants in the courtroom. Attorneys often wait for judges to assign them cases “on the fly,” as these cases can supplement the decreased workload and income many attorneys in Hidalgo County are now experiencing.

### *Initial Interview*

At the time of the second interim report, it was unclear whether attorneys were discussing the facts of the case at the first meeting with the client. Since that time, it has become policy; “if you have the arrest affidavit, you are in a better position to ask questions relevant to the case. If you don’t you’ll have to try and get as much from the client as you can.”<sup>16</sup> At the initial interview, whether in the jail with the investigator or at the courthouse with the attorney, it is important that the facts of the case are discussed in order to better serve the clients.

The HPDO’s investigator reported that it can be difficult to gather all of the necessary information during the initial meeting with the client. Clients may be reluctant to confide in their lawyers at first, and since police reports have not yet been filed, the client must provide the majority of the information.

The policy and procedures manual also includes information to help attorneys determine and assist special needs clients, including those with mental illness or mental retardation. For the former, attorneys contact Tropical Texas Behavioral Health, which assists with medication and assessment.

### *Conflict*

As outlined in the policy and procedures manual for the office, “a conflict check is to be conducted on each case early in the appointment process.” The manual covers instances where there might be conflicts, including cases in which the public defender already represents, or has in the past represented, the victim, a co-defendant, or an

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<sup>16</sup> Hidalgo County Public Defender’s Office. Policy and Procedures Manual. Last revised, July 1, 2008.

adverse witness in the case. As of the second interim report, the office did not have the software necessary to check for conflicts.

While the office now uses the Defender Data system to check for conflicts as cases are entered into the system, one attorney noted there can be mistakes due to human error upon entry. Further, interviews with the Chief Public Defender in June 2008 indicated that conflicts are not always caught immediately as their recognition hinges on the information in the police report. Instead of relying only on that report, staff attorneys ask clients about co-defendants or other potential conflicts to ensure conflicts are identified as soon as possible. This practice, however, needs to be done in conjunction with the check conducted through Defender Data, as it is important that all conflicts be caught – and in a timely manner – to make efficient use of attorney time and resources. TSG recommends HPDO continue to improve identification of conflicts by enhancing the case management system the office utilizes and providing additional training to HPDO staff on using the system to identify conflicts and entering data into this system.

### *Motions*

The HPDO policy and procedures manual provides guidelines for filing motions throughout a case. Several attorneys noted they file motions to compel discovery at every case so that the records are complete. They also have experience submitting motions for transcription, suppression, witness statements, continuance, and discovery, among others.

There are a number of systemic issues relating to motions and outside offices, as the investigator estimates that between 65 and 80 percent of the time police officers do not show up for motions to suppress; when they do, officers often do not remember the details of what happened, as there can be a number of arrests in a single shift. This problem is outside of the control of the HPDO and does not appear to stem from poor relationships with the police agencies in Hidalgo County.

The HPDO files a motion for bond reduction or a motion for personal recognizance bond in every in-custody case to which it is assigned. The Chief Public Defender noted that this is one way his office can expedite the processing of cases and the release of its clients from custody. It seems that this also informs judges of the

processing delays, described earlier in this report, that plague the system. The Chief Public Defender stated that his office follows this practice in an effort to push the police and prosecutors to process cases more efficiently. These efforts also assist the County in reducing the costs spent on pretrial detention and reducing bond costs to its clients. TSG recommends this practice continue.

### *Investigation*

The policy and procedures manual notes that “without the hard work of the investigator, it would be impossible for the attorneys to do their job effectively.”<sup>17</sup> As outlined, “it is the responsibility of the attorney to initiate an investigation through a written request.” The HPDO has a full-time investigator on staff whose duties include the initial client interview and talking with families and witnesses. The investigator also spends some time working on bond reduction paperwork and completes administrative duties such as timekeeping and budgeting. The investigative caseload is dominated by DWI and family assault cases, and the investigator notes her caseload “is not very high” and she “could do a lot more.”<sup>18</sup> She sees the problem as clients not wanting to contest their cases. The majority of defendants are instead focused on getting out of jail. Clients, thus, have a tendency of pleading to time served, so a number of cases do not need any investigative work.

At the time of the interviews in June 2008, the staff investigator faced issues with privacy and space due to the set-up of the office. She noted that clients can feel intimidated as they must walk past the entire staff, and she was concerned with privacy as the conference room was situated between the office and the restroom and break-room. As the office plans to relocate to the courthouse, the Chief Public Defender should explore the possibility of a separate, private area for the investigator to use when interviewing clients and their families.

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<sup>17</sup> Hidalgo County Public Defender’s Office. Policy and Procedures Manual. Last revised, July 1, 2008.

<sup>18</sup> Personal Communication. June 11, 2008.

### *Discovery*

The HPDO faces problems with discovery, as the attorneys need to file motions to access any type of information. While Hidalgo County has open files discovery, the District Attorney's office appears resistant at times due to the financial burden and the extra work required for them. Not only does the DA's office require Hidalgo public defenders to bring their own paper to print computerized files, but the DA's office also does not permit the photocopying of files. Instead, attorneys must hand copy information from the file, which can take extra time. It is recommended that the attorneys have laptop computers to make this task easier and faster. Only one attorney noted he currently uses his laptop for this purpose, while another uses it in court to streamline the inputting of data. TSG recommends the Chief Public Defender discuss the printing and photocopying policies with the DA's office and the county, if necessary, as obtaining information contained in the discovery files is paramount in providing a quality defense.

Another problem stems from the timing of reporting. The attorneys at the HPDO often do not review the ADA's case file until they are in court at arraignment. The defenders usually receive notice of the case files' availability the day before, but a DA must be present in the office with the public defenders when they review the file. Since there is not always a prosecutor available, the defender must often wait until arraignment the next day. Thus, while discovery is technically available, in practice public defenders often do not get access to the files with sufficient time to plan for a court appearance.

### *Experts*

The HPDO has \$10,000 budgeted for contract services, including the use of experts. The policy and procedures manual outlines the types of cases for which an expert would be appropriate, including cases with defendants with mental health issues and for DWI charges, the latter being a significant proportion of the office's work.

As of the second interim report, the HPDO had not used any experts and had not yet contracted with outside counsel to appeal any cases. At that time, TSG researchers indicated their concern over the failure to utilize experts in cases. Since that time, TSG researchers continue to be somewhat concerned that the office has not needed an expert for any of its cases throughout its three and a half years of operation. The Chief Public

Defender noted that each time there was an opportunity to use a medical professional the case was dismissed prior to jury selection. Indeed, as of the second interim report, the misdemeanor trial rate in Hidalgo County was less than one percent; most cases are resolved prior to trial. Presently, the trial rate has increased, and attorneys believe about 10% of their cases go forward through trial. It is important that staff attorneys are aware of the possibility of using outside experts in their cases, and should undergo training as to the benefits of using an expert in particular types of cases.

### *Workload*

There are several factors that affect the workload of staff attorneys at the HPDO. The culture of the criminal justice system in Hidalgo County is largely influenced by its proximity to the Mexican border. Because of this, there are a large number of misdemeanor jail cases where the defendants remain in custody until they plead out at the initial appearance or arraignment. This tendency affects workload, as attorneys spend less time on cases than they would in jurisdictions in which defendants do not plead at the first court appearance. In this section, TSG researchers analyze secondary data,<sup>19</sup> including appointments, dispositions, and time-to-event data. While the majority of the report so far has explored qualitative data as indicators of the HPDO's practice, this section utilizes primarily quantitative data gathered from a variety of sources. The section proceeds with three sub-sections:

- Case Management System
- Appointments
- Dispositions.

The first section describes the HPDO's case management system and the data collected within that system. These data are used in the analyses that follow in the Appointments and Disposition sections.

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<sup>19</sup> Data used in this report were provided by the Hidalgo County Auditor's Office, the Office of Indigent Services, the Hidalgo County Clerk, and the Hidalgo County Public Defender Office.

### *Case Management System*

The HPDO uses case management software designed and installed by Defender Data to track its cases. The system tracks many different elements, including case identifying information, dates of significant events, and general descriptive information. Among the case identifiers tracked by the HPDO are the case number, a client identification number, an attorney identification number, the case type (i.e., Misdemeanor A, Misdemeanor B), and a disposition description. Some of the dates tracked include case opening and closing, initial interview, and disposition. Finally, the HPDO records descriptive information pertaining to each case, such as the court hearing the case, the bond amount, and the arresting agency.

The HPDO also records the number of days between events, such as the number of days in custody between a client's arrest and his/her release from jail. TSG suggests that the HPDO track data elements only (i.e., event dates) and avoid tracking fields that involve manual calculation and entry (i.e., days to events). The latter fields create unnecessary additional work and increase the potential for calculation errors. TSG also recommends that the system be modified to include the date of the defendant's release, and at which stage of the proceedings the release occurred, such that the impact of the office's representation on systemic costs can be better measured.

Hidalgo County also maintains a database which the courts, law enforcement, the DA's office, and the Office of Indigent Defense Services all have access through the Able Term interface. The HPDO can access Able Term to look up data, but is unable to enter any information. Some of the data supplied to TSG researchers by the HPDO indicated that inconsistencies may exist between the HPDO's records in Defender Data and the court records in Able Term. In cases where a bonded person does not show up for an appearance a failure to appear charge is brought against the defendant. The defendant may have been represented by counsel before the failure to appear charge. When the defendant is eventually brought in on a warrant, the courts' system does not recognize that the defendant is being represented by the original attorney. Instead, a new attorney is assigned, although the HPDO does not automatically receive notice of this reassignment. If the HPDO represented the client originally, it still sees the case as pending, even if the case is disposed. Currently, HPDO must periodically sort through its pending cases to

ensure that all cases are actually pending. When the HPDO first realized the existence of these situations, they disposed of an unusually large number of cases in October 2007 as “transfers” to account for this difference. TSG’s analysis of this data excludes these bulk dispositions.

It is important that case information be verified across the input into Defender Data and the information the county holds through Able Term. TSG recommends that the HPDO speak with the county to clarify how cases are entered, including charging decisions and appointment of counsel. Staff attorneys should also check their open cases against the county information in Able Term, and look into any discrepancies.

### *Appointments*

The HPDO has seen an overall decrease in its caseload over the past three fiscal years (see Table 1). In its first year of operation, the Hidalgo PDO was appointed in 25% of misdemeanor cases in which the defendant was indigent. In the second year of operation, the office’s appointments dropped to 1,451, or 21% of the total indigent appointments. Finally, last year, FY2008, the office received its lowest number of appointments to date, only 1,407 appointments, or 17%, of the total indigent appointments in the county. In line with these findings, the Chief Public Defender expressed concern about the underutilization of the office, and staff attorneys noted that their caseloads were “very manageable.”<sup>20</sup>

Although the total number of misdemeanor filings has also decreased in Hidalgo County over the past three years, the HPDO’s percent of appointment should remain fairly stable considering the method of appointment. TSG’s findings suggest that the appointment process is not being adhered to. For example, the office should receive one-quarter of the appointments from the wheel appointment process and a small number of appointments from the bench. Unfortunately, it appears that the office is receiving less than one in seven appointments from the “wheel.” It is important to note that this analysis removes the number of cases transferred from the HPDO due to the conflicts of interest or other transfers to private attorneys. Since the method and systems used in data collection have changed as the HPDO has been in operation, detailed analysis of

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<sup>20</sup> Personal Communication. June 9, 2008.

transferred appointments is not possible (see section on Case Management above). However, it appears that approximately 13% of appointments are transferred from the HPDO each fiscal year. In practice, this means that the HPDO is likely receiving approximately 17% of the total misdemeanor appointments in Hidalgo County in FY2008. This number remains significantly below the number of appointments the HPDO should be receiving. TSG recommends that the County increase the percent of appointments HPDO receives from the wheel. In deciding the percentage of cases to assign to HPDO, the number of transfers should be taken into account as well.

<b>Table 1. HPDO Appointments</b>			
	FY2006	FY2007	FY2008
Total HPDO Appointments*	2,319	1,584	1,407
Transferred Cases*	112*	133*	
Actual HPDO Workload	2,207	1,451	1,407
Total Assigned Attorney Appointments**	6,466	5,499	6,808
Total Number of Misdemeanor Appointments	8,673	6,950	8,215
Percentage of Appointments for HPDO	25%	21%	17%
Total Number of Misdemeanor Filings***	14,264	13,032	12,593
Percentage of Misdemeanor Cases Appointing/Assigning Indigent Defense Counsel	61%	53%	65%
Percent of Misdemeanor Cases Appointed Indigent Defense Counsel in Large Counties in Texas ****	35.8%	37.6%	42.4%

\*Approximately 245 cases were administratively transferred due to discrepancies discussed above, and should not be considered as workload for the office, as HPDO attorneys have never provided representation in these matters. The remainder of the tables in this section, those transfers are included, as they do represent the court's utilization of the office.

\*\*Data provided from the Auditor's Office.

\*\*\*Data provided by the County Clerk.

\*\*\*\*Task Force 2008 Annual Report. Page 8.

It is interesting that the HPDO is not receiving as many appointments as intended considering that Hidalgo County sees a relatively large number of cases in which defendants are indigent. As Table 1 indicates, over the past three years, approximately over half of all defendants charged with a misdemeanor had an attorney appointed to their case. The Task Force collects data on the percent of cases in which attorneys are appointed throughout the counties of Texas. Hidalgo County has a population of



approximately 710,500 persons,<sup>21</sup> which places the county in the “large county” category of the Task Force. Other large counties had a rate of appointment of 42% in FY2008<sup>22</sup>. The higher rate of appointment may be due to the geographic location of Hidalgo County and the large percentage of cases in which defendants in which defendants have immigration issues.

Although the percent of in-custody appointments to the HPDO has remained relatively stable, it was the intent of the office to represent more in-custody cases.

HPDO Appointments by Custody Type	FY2006		FY2007		FY2008	
	N	%	N	%	N	%
In-custody (“jail”) cases	884	38%	506	32%	485	34%
Out-of custody (“non-jail”) cases	1,435	62%	1,078	68%	922	66%
Total *	2,319	100%	1,584	100%	1,407	100%

\*Totals may not equal the total HPDO appointments in Table 1 due to included transferred cases.

Interestingly, while the number of in-custody cases has increased as a percentage of the total HPDO appointments, the seriousness of the charges has remained fairly constant (see Table 3). In the HPDO’s first year of operation (FY2006), about sixty percent (62%) of appointments were class B misdemeanors and thirty-three percent (34%) were class A misdemeanors. The remaining four percent (4%) were other classifications of misdemeanors or were missing a classification. These percentages have remained quite stable, as in FY2008 the HPDO’s class A misdemeanors accounted for nearly thirty-seven percent (35%) of their total appointments and class B misdemeanors accounted for approximately sixty-three percent (64%) of their total appointments. Anecdotal reports suggest that while the type of cases the HPDO is receiving appears to have remained stable, the HPDO is actually receiving more complex cases. To fully understand the workload required in these cases, a time keeping study should be considered.

<sup>21</sup> U.S. Census 2007 Population Estimates. <http://www.census.gov/popest/estimates.html>

<sup>22</sup> Texas Task Force on Indigent Defense. Annual Report FY2008.

Appointments by Case Type	FY2006		FY2007		FY2008		Total	
	N	%	N	%	N	%	N	%
Misdemeanor A	793	34%	573	36%	492	35%	1,144	25%
Misdemeanor B	1438	62%	1003	63%	901	64%	3,342	74%
Misdemeanor "Other" or Unknown	88	4%	8	1%	14	1%	30	<1%
<b>Total</b>	<b>2319</b>	<b>100%</b>	<b>1584</b>	<b>100%</b>	<b>1407</b>	<b>100%</b>	<b>4,516</b>	<b>100%</b>

\*Totals may not equal the total HPDO appointments in Table 1 due to included transferred cases.

Appointments are made in one of three ways. First, a case may be appointed via the "wheel." As previously discussed, the HPDO should be receiving 25% of cases from the wheel, which in turn should represent the majority of the cases handled by the office. In fact, approximately seventy percent (70%) of the HPDO's cases are appointed in this manner (see Table 4). The remaining cases are appointed from the bench or via a bench substitution. These bench appointments should account for a fairly small number of cases; however, it appears that bench appointments have accounted for between 22-32% of the total appointments within the office across its years of operation.

Appointments by Assignment Type	FY2006		FY2007		FY2008		Total	
	N	%	N	%	N	%	N	%
Wheel	1664	72%	1,045	62.4%	1,000	70.3%	3,709	70%
Bench	575	25%	472	32.9%	323	22.2%	1,370	26%
Bench Substitution	80	3%	66	4.7%	80	7.4%	226	4%
<b>Total *</b>	<b>2,319</b>	<b>100%</b>	<b>1,583</b>	<b>100%</b>	<b>1,403</b>	<b>100%</b>	<b>5,305</b>	<b>100%</b>

\*Totals may not equal the total HPDO appointments in Table 1 due to included transferred cases.

As Table 5 presents, appointments also vary by the county court from which they originate. Cases originating in County Court 4 have comprised the bulk, ranging from 32% - 39% of all appointments of the HPDO caseload over the three years of the office's operation. Data on the total number of filings for each county court is not available. As such, it is not possible to discern whether County Court 4 is appointing more cases to

HPDO or if County Court 4 receives more filings and thus appoints the same percentage of total appointments to HPDO as do other county courts. This should be explored in the future. Since the second interim report, the Hidalgo PDO has begun accepting cases from County Court 6. With the exception of the addition of County Court 6, the caseload distribution by appointing court has not changed dramatically over the three years of operation. However, the total number of cases appointed by each of the four remaining courts to the HPDO has declined since its first year of operation.

Assignment by County Court	FY2006		FY2007		FY2008	
	N	%	N	%	N	%
County Court #1	433	19%	243	15%	183	13%
County Court #2	451	19%	254	16%	182	13%
County Court #4	815	35%	614	39%	457	32%
County Court #5	482	21%	216	14%	206	15%
County Court #6	9	<1%	134	8%	209	15%
Unfiled	50	2%	10	1%	0	0%
Missing	79	3%	113	7%	169	12%
Total	2,319	100%	1,584	100%	1,407	100%

In addition to the Chief Public Defender, the HPDO is staffed with a first assistant public defender and four assistant public defenders. The first assistant public defender and each of the four assistant public defenders are assigned to a specific county courtroom. Because each judge appoints cases to the HPDO at different rates, the caseload distribution among the staff public defenders varies. In addition, while staff attorneys are primarily responsible for the courts that they cover, all attorneys pick up case assignments from the other county courts as necessary.

When TSG researchers spoke to the Chief Public Defender in June 2008, he was serving as the unfilled “rover” position and picked up assignments as needed. As the rover, the Chief Public Defender estimated that he spent over 70 percent of his day on case-related work and the remaining 30 percent of his day working on general administrative duties. With the office now at full staff capacity, there has been a decrease in the Chief Public Defender’s workload. The First Assistant has taken over duties as the

court rover, thus allowing the Chief Public Defender to concentrate on administrative duties.

As noted previously in this section, the HPDO is concerned that the office is underutilized. Staff attorneys are concerned as well that they are not getting the correct amount of appointments from the “wheel.” In the second report,<sup>23</sup> TSG explored individual attorney caseload data to determine if one or more attorneys were taking on too much work, thus skewing the caseloads of other attorneys, and to ensure that the attorneys were not exceeding the 400 misdemeanor cases per year limit established by the National Advisory Committee on Criminal Justice Standards.<sup>24</sup> TSG found that in FY2006 attorney caseload varied dramatically due to the court to which the attorney was primarily assigned (refer to Case Processing section of this report for an overview) and two attorneys were close to exceeding the maximum advisable caseload. While this was concerning to TSG at the time, it appears that with the overall decrease in appointments across the past two years, the Hidalgo PDO’s individual attorney caseloads are lower (See Appendix).

In order for the HPDO to be cost effective, its staff public defenders must carry larger caseloads. As noted, staff attorneys at the HPDO should be limited to the NAC recommendation of 400 cases per year, a number the Chief Public Defender originally believed the office would exceed. When fully staffed, the HPDO should ideally dispose of over 2,000 cases per year, compared to the 2008 total of under 1,000.

TSG strongly urges the county courts to increase the percentage of cases assigned to the Hidalgo PDO, and to ensure that the appointments made by the five county courts are more uniformly distributed between staff attorneys within the HPDO. By example, in 2008 assignments ranged from 183 appointments in the County Court #1 to 457 appointments in the County Court #4. As noted previously, it was not possible to determine the number of total number of appointments (to both the HPDO and assigned counsel) by county court. This information should be gathered and explored to ensure the county courts are not appointing the HPDO in a disparate percentage of their total indigent defense appointments.

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<sup>23</sup> The Spangenberg Group. Second Interim Report: An Evaluation of the Bexar and Hidalgo County Public Defender Offices After One Year of Operation. March 2, 2007.

<sup>24</sup> National Advisory Committee on Criminal Justice Standards (1973).

The HPDO may want to explore alternative methods of case assignment within the office to alleviate the disparity among attorneys' caseloads. Additionally, if the Hidalgo PDO begins to accept felony cases, as proposed by the Budget Office, the office would likely experience an increase in appointments, increasing the benefits and cost savings to the county. As the HPDO does not have formal workload standards at this time, the office will want to establish such a standard as the number of appointments increases and if the office begins to accept felony appointments. Workload standards can help the Chief Public Defender develop a budget, provide the county with budget predictability over time, and allow the Chief Public Defender to easily monitor staff attorneys' workload to assist in determining where additional staff is needed, or where cases should be redistributed.

### *Dispositions*

Table 6 presents the number and type of dispositions for FY2007 and FY2008. As the data tracking systems in the HPDO changed from FY2006 to FY2007, the type of information and the actual method of entering the data are different. Therefore, comparisons across all three years of HPDO's operation are not possible for this particular analysis. Data presented in previous reports for FY2006 are provided in the Appendix. As Table 6 presents, it appears that the percentage of cases in each disposition type has remained fairly stable over the office's three years of operation. The most common disposition type is guilty. This finding is consistent with anecdotal reports that most defendants plead guilty in order to decrease the amount of time spent in-custody awaiting case processing and is consistent with our experience in other jurisdictions.

	FY2007		FY2008		Total	
	N	N	N	%	N	%
Probation	398	29.9%	233	23.1%	631	27.0%
Guilty	452	34%	374	37.1%	826	35.3%
Dismissed	421	31.7%	347	34.5%	768	32.8%
Pending	58	4.4%	4	0.4%	62	2.7%
Missing	3	0.2%	49	4.9%	52	2.2%
<b>TOTAL</b>	<b>1332</b>	<b>10%</b>	<b>1007</b>	<b>100%</b>	<b>2339</b>	<b>100%</b>

The Task Force collects data on the dispositions of misdemeanor cases in Hidalgo County. These data,<sup>25</sup> as reported in the FY2008 Annual Report, state that Hidalgo County had a misdemeanor dismissal rate of 23.9% in FY2006, up from 23.6% in FY2005. In FY2007, 32% of misdemeanors were dismissed. Considering that the HPDO began operations in FY 2006, there is a correlation between the office's activities and the rising rate of dismissals in the county. Indeed, a significantly higher percentage of misdemeanor cases were dismissed in FY 2008 than in the year before the HPDO office opened.

The HPDO's clients obviously want to spend as little time in jail as possible, and many, thus, engage in plea bargaining with the prosecution. The Indigent Defense Office no longer monitors the length of time clients spend in jail. In an effort to collect such data, the HPDO enters the number of days between various events in the processing of cases into the case management system. These analyses were conducted using data from that system, unless otherwise noted.

As one of the goals of the HPDO is to decrease time spent in-custody pretrial, the analysis of time-to-release in cases is an important indicator of the office's success. As Table 7 indicates, while the average number of days it took the DA to file complaints in in-custody cases appointed to the HPDO took, on average, from 8.9 days in 2006 to 14.6 days in 2008, the number of days between complaint to release has remained steady, and the number of days from complaint to disposition was reduced by nearly three days. Although we reported on the number of days spent in pre-trial detention in our earlier

<sup>25</sup> Task Force on Indigent Defense. Annual Report FY2008. (This data includes all dispositions in Hidalgo County)

reports, similar data was not available for this analysis. Again, TSG recommends entering the arrest, release and first hearing dates in order to more effectively measure these calculations.

<b>Table 7. HPDO Time to Event Analysis</b>			
Average Days Between Events	Hidalgo Public Defender Office In-Custody Cases		
	FY2006*	FY2007**	FY2008**
Number of Cases (N)	511	488	406
Arrest to Complaint	8.9	11.9	14.6
Arrest to Release	15.4	19.4	21.4
Arrest to Disposition	16.3	17.2	19.4
Complaint to Release***	6.5	7.5	6.8
Complaint to Disposition***	7.4	5.3	4.8

\*Source: Hidalgo County Jail and Office of Indigent Defense, as reported in our earlier study.

\*\*Source: PDO's Defender Data Case Management System.

\*\*\*These numbers are not tracked in the PDO system; they are calculated by subtracting days to complaint from the respective average days to event.

#### **4. Expenditures and Savings**

As noted in the second interim report, indigent defense costs rose by 27 percent from FY 2005 to FY 2006 (the first year the public defender was in operation), only slightly more than the 24 percent increase in costs from FY 2004 to FY 2005 (see Table 9). In other words, the establishment of the public defender office did not significantly increase annual indigent defense expenditures for misdemeanor cases, and expenditures continued to rise at a similar pace to the year prior. While the costs associated with assigned counsel decreased slightly in both FY2006 and FY2007 (a decrease would be expected as assigned counsel should be receiving fewer appointments), there was also only a 14% increase in the costs of the HPDO operations from FY2006 to FY2007. The total costs of indigent defense did not increase substantially that year. In FY2008 the costs of both assigned counsel and the HPDO increased significantly. Assigned counsel costs increased by 41%, however, while HPDO costs increased by only 22%. This dramatic increase in assigned counsel costs is likely due to the decreased number of cases

in which the HPDO has been appointed that would have been assigned to private counsel. Had the appropriate number of cases been assigned to the HPDO it is unlikely the county would have seen a cost increase higher than what was experienced by the office in FY2008, given the HDPO attorneys are paid a set salary rather than a per-case or hourly rate.

**Table 8. Indigent Defense Costs in Hidalgo County**

	Assigned Counsel Payments	Percent Change in Assigned Counsel Costs	HPDO Expenditures	Percent Change in HDPO Costs	Total Indigent Defense Costs	Percent Change in Total Costs
FY 2004	\$1,130,948		N/A	NA	\$1,130,948	
FY 2005	\$1,406,103	24%	N/A	-	\$1,406,103	24%
FY 2006	\$1,367,483	- 3%	\$412,690*		\$1,780,173	27%
FY2007	\$1,338,291	-2%	\$470,434	14%	\$1,808,725	2%
FY2008	\$1,888,967	41%	\$574,874	22%	\$2,463,841	27%

\*Public Defender Expenditures do not include those expenditures that we have determined are normal office start-up costs, such as furniture and computers.

As Table 10 indicates, the HPDO cost-per-case was significantly lower than the assigned counsel cost-per-case in its first year of operation. While costs per case have increased in FY2007 and FY2008 when compared to assigned counsel, this is likely due to two issues. First, the HPDO is handling an increased percentage of in-custody cases. Assigned counsel is thought to take more out-of-custody cases that take less time to litigate; however, these attorneys are able to collect the per-case rate to maximize the payment from the county. Second, and more importantly, the HPDO is not being appointed in the expected number of cases and therefore has fewer dispositions per year in FY2007 and FY2008. If the number of dispositions were to increase to 2,000 cases per year (a full caseload for the office as it is currently staffed), cost per case would decrease to \$287, a cost much closer to the cost per case of assigned counsel. As noted throughout this report, the county must increase the number of cases appointed to the HPDO in order to maximize the cost savings of the HPDO.



	<b>Assigned Counsel Payments</b>	<b>Number of Dispositions</b>	<b>Cost per Case</b>	<b>HPDO Expenditures</b>	<b>Number of Dispositions **</b>	<b>Cost per Case</b>
FY 2004	\$1,130,948	5143	\$244	N/A		
FY 2005	\$1,406,103	7001	\$238	N/A		
FY 2006	\$1,367,483	5794	\$236	\$412,690*	1,897	\$218
FY2007	\$1,338,291	5499	\$243	\$470,434	1,361	\$346
FY2008	\$1,888,967	6808	\$277	\$574,874	1,272	\$452

\*Public Defender Expenditures do not include those expenditures that we have determined are normal office start-up costs, such as furniture and computers.

\*\* Disposition data provided by Hidalgo County Auditor’s Office.

### **5. Recommendations**

As an institutional provider of indigent defense services the HPDO has been able to institute practices to expedite the processing of resolving misdemeanor cases, reduce jail overcrowding, and assist defendants in being released from custody earlier than before. TSG researchers believe that indigent misdemeanor defendants now receive better representation than they had prior to the establishment of the Hidalgo PDO. However, TSG is concerned that the HPDO is not being utilized to its full potential. Hidalgo County, the HPDO, and the Texas Task Force must advocate for increased use of the HPDO to truly realize its full potential. TSG provides six specific recommendations below to assist the HPDO in enhancing its operations:

- The county should increase the percentage of cases the HPDO receives from the “wheel.” The Chief Public Defender should work with the Office of Indigent Defense to track the percentage of appointments the office receives and ensure the appropriate numbers of appointments are assigned to his office.
- The county should carefully consider the Budget Office’s proposal for the HPDO office to begin receiving felony appointments.
- If the Hidalgo PDO is able to receive additional misdemeanor appointments or felony appointments the office should consider conducting a Caseload Analysis

and Time Keeping Study to ensure efficient processing of cases and optimal caseload for attorneys within the office.

- Hidalgo PDO should continue to improve its case management system and data tracking abilities. TSG suggests that the HPDO track data elements only (i.e., event dates) and avoid tracking fields that involve manual entry (i.e., days to events). Such human analysis creates unnecessary additional work and increases the potential for calculation errors. Data are imperative in understanding the benefits of the HPDO and the best practices in case processing. This should be a priority for the Chief Public Defender.
- It is vital the Hidalgo PDO continue training staff on immigration issues to ensure the best representation of its clients.
- The HPDO should continue to file bail reduction motions and seek out other ways to alleviate the delays that occur within case processing as a result of the police and district attorneys. This may require the Chief Public Defender to reach out to police and prosecutors to explore alternative solutions to these systemic problems.

# **APPENDIX A**

## **EVALUATING PUBLIC DEFENDERS OFFICES**

### **METHODS & PROTOCOLS**

## **EVALUATING APPELLATE PUBLIC DEFENDER OFFICES**

## HOW TO EVALUATE APPELLATE PUBLIC DEFENDER OFFICES

The following summaries correlate with the questions in the evaluation protocol for appellate public defender offices and provide best practices for each topic. The summaries are not comprehensive, but provide direction in evaluating appellate public defender offices. Evaluators should closely examine national standards, including those by the American Bar Association, the National Legal Aid and Defender Association, and the National Advisory Commission on Criminal Justice Standards and Goals, when examining the effectiveness of a public defender office.

Inter-dispersed throughout this section is information that can be used by new public defender offices to create detailed written performance standards for all staff. Every public defender office should have written performance standards that include information such as the duties of supervisors, caseload and workload limits, and requirements regarding client contact.

### A. Independence of the Chief Public Defender and Office

According to the ABA's Ten Principles of a Public Defense Delivery System, Principle 1, "[t]he public defense function, including the selection, funding, and payment of defense counsel, is independent." The principles suggest "to safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems." The board's involvement should be limited to advocating on behalf of the public defender office in the criminal justice system. This includes broad criminal justice policy considerations or problems, and working to get the office needed resources. The board should not in any way interfere with the handling of cases or internal office legal policy regarding the cases:

(b) An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board. Provisions for size and manner of selection of boards of trustees should assure their independence. Boards of trustees should not include prosecutors or judges. The primary function of boards of trustees is to support and protect the independence of the defense services program. Boards of trustees should have the power to establish general policy for the operation of defender, assigned-counsel and contract-for-service programs consistent with these standards and in keeping with the standards of professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction.<sup>1</sup>

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<sup>1</sup> ABA's Criminal Justice Standards: Providing Defense Services, Standard 5-1.3 Professional independence.

An independent oversight board should be responsible for selecting the chief appellate defender on the basis of merit, and the board should consist of both lawyers and non-lawyers. Termination of the chief appellate defender should only be for cause. *See* ABA Criminal Justice Standards, Providing Defense Services, Standard 5-4.1.

The chief public defender and the office should not only be independent from any public defender oversight board, but the judiciary as well. According to the ABA's Criminal Justice Standards: Providing Defense Services, Standard 5-1.3 Professional independence:

(a) The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs.

## **B. Supervision**

Every public defender program should have a clear written policy regarding supervision. Supervisors' duties should include: explaining job duties and responsibilities to all new employees and periodically reviewing staff attorneys' performance to determine whether staff are able to identify all potential appellate issues, including those raised by trial counsel or issues that may not appear in the record; conduct appropriate legal research; write and edit motions and briefs; prepare and present oral argument; and identify and seek subsequent appeals in the event of an adverse decision. Supervisors should conduct periodic staff attorney evaluations based on objective standards. Evaluations should be performed at least twice a year in order to determine the strengths and weaknesses of each staff attorney, and to set goals to improve performance.

Supervisors should seek out new attorneys to be certain the attorneys are progressing at an appropriate pace. The supervisor should also be responsible for assuring that the caseload of the staff attorneys is manageable and appropriate for the attorney's level of experience. It is important to note that supervisors are responsible for being aware of each public defender's caseload at any given time, relative to the attorney's level of experience. According to a new ABA Ethics Opinion regarding attorney caseloads, if an attorney's caseload is so high that it becomes unethical, his/her supervisor may be ethically responsible for the attorney that he/she is supervising. (See Caseload, Section D, below.) Supervisors should not handle a full caseload. It is a good idea to also have an experienced attorney serve as a mentor, who will be available to the new attorney when the supervisor is not, or in addition to the supervisor.

## **C. Training**

Training for entry level appellate defenders should not be limited to "on the job" training, and the office should have an established training program that commences prior to

representation. There should also be ongoing continuing legal education programs for all staff attorneys.

ABA Criminal Justice Standards, Providing Defense Services, Standard 5-1.5 Training and professional development states:

The legal representation plan should provide for the effective training, professional development and continuing education of all counsel and staff involved in providing defense services. Continuing education programs should be available, and public funds should be provided to enable all counsel and staff to attend such programs.

In addition, the chief appellate defender should make him/herself available to the local bar, particularly those attorneys who provide trial representation, to educate trial counsel on issues that might be raised at trial, or new/developing legal trends. Assistance should be provided to trial counsel with regards to the proper preservation of issues at trial that may be raised on appeal. (See Section F below, Other Workload Factors.)

#### **D. Caseload**

The development of caseload and workload standards is very important to the success of newly established public defender offices. Caseload and workload are two different things. *Caseload* is a maximum case count per attorney, without giving weight to the complexity of the case. *Workload*, discussed in section “E” below, takes into account other factors that may cause one type of case to be more time-consuming than another. With regards to appeals, this would include the severity of the underlying charge, the length of the transcript and size of the record, etc. For example, Attorney A has two open death penalty appeals; Attorney B has two open juvenile appeals. While their caseloads are the same – two open cases each – their workloads are quite different: filing a death penalty appeal requires much more investigation, transcripts are longer, the record is more voluminous, case law is more complicated, etc.

The only national source that has attempted to quantify a maximum annual public defender caseload is the National Advisory Commission (NAC), which published its standards in 1973. In that report, Standard 13.12 on Courts states, “the caseload of a public defender attorney should not exceed the following: ... appeals per attorney per year: not more than 25.” Several states have adopted the NAC caseload limit for appellate indigent defense representation.<sup>2</sup>

In the absence of guidelines created for a particular jurisdiction, NAC standards are an effective tool to help public defenders plan and discuss resource needs with policymakers and budget committees. However, NAC standards are limited to describing resource needs strictly according to the raw number of cases for which an attorney is responsible. They do not take into consideration administrative or supervisory work, waiting or travel time, or professional development activities. Furthermore, they do

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<sup>2</sup> For example: Arizona, Georgia, Indiana, Vermont and Washington. New York City has also adopted the NAC standards.

not differentiate the amount of time required to work on various types of cases within a case category. For example, all felonies, whether straightforward burglary charges or complicated child sex abuse charges, are given equal weight by NAC standards.<sup>3</sup>

This is where workload comes into play: when considering the administrative or supervisory work, waiting or travel time, etc., mentioned above. Workload is discussed below in greater detail in section “E”.

Supervisors should monitor staff attorney caseload; however, it is also the responsibility of the staff attorneys to notify a supervisor when they are approaching the maximum number of cases set by office policy. Also, in May 2006 the ABA Standing Committee on Ethics and Professional Responsibility promulgated Ethics Opinion 06-441, which places the responsibility for workload and discipline on each individual attorney, each attorney’s supervisor, and if necessary the Chief Public Defender.<sup>4</sup> These ethical requirements are far more stringent than the standards for effective assistance of counsel established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). According to that decision, to prove ineffective assistance of counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness and, if so, whether there is a reasonable probability that the result of the proceeding would have been different but for counsel’s substandard performance.

In smaller public defender offices, attorneys may work part-time. In these situations, there should be a written policy in each public defender office that defines what part-time means, and what types of cases the attorney is permitted to handle in their private practice. This should be monitored frequently to make sure the public defender is spending the required amount of time on his or her public defender work.<sup>5</sup> Public defender work should always be an attorney’s first priority.

## **E. Workload**

We recommended that the Chief Appellate Defender not only develop individual attorney caseload limits, but develop workload standards as well. The capacity and workload of appellate defender offices is affected more by court rules, system structures, and legislative mandates than any other area of criminal practice.<sup>6</sup> It is therefore imperative that workload standards be put in place to help manage the office and ensure the least amount of extensions possible.

According to the ABA’s Ten Principles of a Public Defense Delivery System, Principle 5, “Defense counsel’s workload is controlled to permit the rendering of quality representation.”

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<sup>3</sup> Bureau of Justice Assistance, *Keeping Defender Workloads Manageable*, 8 (2001), at <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

<sup>4</sup> ABA Ethics Opinion 06-441, “Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation.”

<sup>5</sup> It should be noted that the ABA’s Criminal Justice Standards, Providing Defense Services, Standard 5-4.2 suggest that all public defender staff counsel be full-time and prohibited from engaging in the private practice of law. However, this is an old standard, and it is now generally accepted that some public defenders must work part-time.

<sup>6</sup> For instance appellate defenders must wait for court reporters and the trial court to finalize the record and must adhere to court rules and court dates developed without consultation.



It further states that counsel is obligated to decline appointments that make workload so large as to interfere with their ability to provide quality representation and ethical obligations. “National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney’s nonrepresentational duties) is a more accurate measurement.”

In addition to the ABA’s Ten Principles of a Public Defense Deliver System, Standard 5-5.3 of the ABA’s Criminal Justice, Providing Defense Services states:

(a) Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

(b) Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments. Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.

Workload standards are often reached through the use of case-weighting studies, which allow a jurisdiction to determine how much work is required in certain types of cases. This allows a jurisdiction to translate caseload (the number of cases a lawyer handles) into workload (the amount of effort, measured in units of time, for the lawyer to complete work on the caseload).<sup>7</sup>

## **F. Other Workload Factors**

There are a number of additional factors not typically used to determine workload, that may affect the amount of time it takes an attorney to complete a case. These additional factors may include preparation of oral arguments, contact with trial counsel, and any additional responsibilities given to the office that fall outside of the typical purview of an appellate defender office.

With regards to oral arguments, there should be written standards for determining when oral argument is requested or waived, and if granted attorneys should be adequately prepared for arguments. Supervisors and senior staff counsel should assist an attorney with his/her preparations for oral argument.

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<sup>7</sup> Bureau of Justice Assistance, Keeping Defender Workloads Manageable, 9 (2001), at <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

There should be clearly articulated procedures for contact with trial counsel. This includes notifying trial counsel that the appellate defender office has been assigned to the appeal and if ineffective assistance of counsel is being raised. In addition, the appellate defender should work with trial counsel to:

- a. Identify issues which might be raised at trial which reflect new or developing legal trends;
- b. Properly preserve at trial issues which might be raised on appeal;
- c. Acquaint the trial bar with recent decision which have an impact on the trial cases; and
- d. Share the appellate defender research facilities if such materials are not available elsewhere and the appellate defender has adequate materials and office space.<sup>8</sup>

In instances where the appellate defender office is asked to take on additional responsibilities by the appellate court, the chief defender should work with the justices to streamline any procedures to minimize attorney time. Also, “the appellate defender and his or her staff shall establish regular lines of communication with judges on the appellate court and with appellate court staff to determine whether the office is providing representation in a manner acceptable and appropriate to the court.”<sup>9</sup> The appellate defender office should also have the authority to seek discretionary review in any state appellate court, where deemed appropriate by the appellate defender and permitted by law.

With regards to the relationship between the appellate defender and the district attorney, “the appellate defender should establish a cordial, and professional, relationship with the appellate court prosecutor so that mutual problems can be solved administratively or with a concerted effort.”<sup>10</sup> A good relationship with the district attorney’s office will also make it easier to discuss the possibility of settling the case when appropriate.

## **G. Case Conflicts**

Each public defender office should have written uniform policies regarding conflicts of interest. A conflict occurs most frequently when a public defender office has been assigned co-defendants in a case; however, a conflict of interest may also exist when the public defender office is assigned a defendant who was a witness in a case the office handled previously, a defendant may be related to someone who works in the office, or if a public defender came from or goes to the district attorney’s office.

The determination about whether something is a conflict should not be left solely to the staff attorney. A written policy should require that at least a supervisor review staff counsel’s suggestion about whether something is a conflict. This written policy should also take into consideration the rules/procedures in the office’s particular jurisdiction.

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<sup>8</sup> NLADA Standards and Evaluation for Appellate Defender Offices, Standard K. Training.

<sup>9</sup> *Id.* at Standard II. Criteria for Assuring the Efficiency of the Legal Representation, H. Feedback.

<sup>10</sup> *Id.*

There are a number of ways that public defender programs deal with co-defendants; however, typically the public defender should represent the first co-defendant that is appointed to the office, and the court should be notified that any additional co-defendants must be reassigned outside of the office. It is also important to be aware that conflicts may not be discovered until a considerable amount of time has been put into a case. Therefore, it is also critical to have some type of computer case-tracking system available at the time of appointment in order to determine whether a conflict of interest can be detected as early as possible.

## **H. Personnel Policies**

Every public defender office should have a personnel manual that has written attorney performance qualifications and standards. The manual should not only cover general human resources policies, such as health benefits, sick and vacation benefits, etc., but should include annual refresher training requirements, office policies regarding representation of co-defendants, *Anders* brief policies, caseload and workload limits, etc.

The office should make every effort to hire highly qualified experienced counsel, and previous criminal trial or appellate experience alone is not sufficient. Personnel should only be fired for cause, and there should be a procedure to appeal any termination decisions. The hiring of public defender staff should be the sole discretion of the chief appellate defender, and while recommendations may be made by judges or the oversight board, the ultimate decision should be that of the chief appellate defender. Performance reviews of all staff counsel should be conducted annually.

## **I. Personnel Resources**

The NLADA Standards for Appellate Defender Offices, G. Staffing suggest that:

Prior to the creation of any appellate unit, or as soon thereafter as possible, a clearly-articulated caseload standard staffing ratio and caseload weighting system should be developed – and publicly stated – with written plans for alternative methods of providing representation in the event those standards are exceeded.

The ABA also has standards for support services, although not specific to appellate practice. The ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-1.4, Supporting services, states:

The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process.

There are no national standards on the appropriate ratio of support staff to attorneys for appellate defender offices. Indiana has developed numerical attorney to support staff ratios, which indicate that to be fully staffed an appellate defender office should have one law clerk for every two appellate attorneys. However, due to the fact that appellate practice varies greatly from state-to-state, this ratio may not be appropriate in every state. Chief appellate defenders should be responsible for adjusting the number of support staff as they see necessary depending on the workload of the office, such that attorney administrative work is minimized, and the office should be provided with sufficient funds to do so.

With regards to compensation, the NLADA Guidelines for Legal Defense Systems in the United States, 3.2 Defender System Salaries, indicates that:

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

The ABA Ten Principles of a Public Defense Delivery System, Principle 8 (Feb. 2002) also discusses the issue of pay parity. It states that in a properly functioning system:

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. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.

Specifically, with regards to appellate public defender offices, the NLADA Standards for Appellate Defender Offices, C. Selection of Legal Staff states, "the salaries of the staff of the state public defender shall be equal to or higher than the salaries of persons doing comparable work in the prosecutor's office."

Appellate public defender offices should take advantage of law students/interns when available. However, because the training and supervision of law students/interns may take time away from the attorneys' cases, or attorneys may not have the appropriate amount of time to mentor students, a chief appellate defender should determine prior to the implementation of such an arrangement whether the time needed to train and supervise outweighs the benefits of having a law student/intern. The NLADA Guidelines for Legal Defenses Systems in the United States, Standard 4.4 Use of Law Students, states:

[L]aw schools throughout the nation should be encouraged to establish closely supervised clinical criminal law courses in cooperation with local defender offices.... Law student programs should not be viewed as a long-term answer to the problem of adequately meeting the needs of defendants in the criminal justice system.

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

Every appellate defender office should have adequate bilingual staff/interpreters. If not, there should be a mechanism for providing an interpreter at every meeting the attorney has with his/her client.

#### **J. Parity with the District Attorney's Office**

A number of national standards call for, at minimum, pay parity between public defender and prosecutor or other court system offices. The ABA Ten Principles of a Public Defense Delivery System, Principle 8 (Feb. 2002) states that in a properly functioning system:

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. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.

The NLADA Guidelines for Legal Defense Systems in the United States, and the National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts also discuss pay parity.<sup>11</sup>

#### **K. Equipment and Law Library Resources/Availability**

The ABA Criminal Justice Standards, Providing Defense Services, Standard 5-4.3 Facilities; library, states:

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

Specifically, each appellate defender program should have an in-house library with at least the following:

- United States Supreme Court decisions
- All published state appellate court decisions

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<sup>11</sup> For instance, “[t]he budget of a public defender for operational expenses other than the costs of personnel should be substantially equivalent to, and certainly not less than, that provided for other components of the justice system with whom the public defender must interact, such as the courts, prosecution, the private bar, and the police.” National Advisory Commission on Criminal Justice Standards and Goals, Standards for the Defense, Standard 13.14 Supporting Personnel and Facilities (1973).

- Federal Reporter
- State Statutes
- State Digests
- Current Criminal Law Reporter
- Current ABA Standards for Criminal Justice
- Other standard treatises on:
  - Substantive criminal law
  - Criminal procedure
  - Evidence

The NLADA Standards and Evaluation Design for Appellate Defender Offices provides a much more extensive list of library materials that each appellate defender office should have.<sup>12</sup>

In addition to the above referenced library materials, the appellate defender office should also have a computerized system for storing all briefs completed by the office, with a keyword search function. Briefs should also be indexed by issues raised on appeal. In addition, appellate defender offices should have access to Lexis, Westlaw or a similar database, and provide training as needed.

#### **L. Brief Preparation**

Briefs should comply with local court rules. Every brief filed by the appellate defender’s office should be reviewed by at least one other staff member other than the author. According to the NLADA Standards and Evaluation Design for Appellate Defender Offices, L. Brief Preparation:

8. Each appellate defender should adopt procedures for reviewing and screening the briefs that are filed by that office, which should include the careful review of the brief and record by at least one member of the staff other than the person who wrote the brief prior to the completion of the final draft of the brief, in offices of more than five attorneys, supervisory staff shall be designated for this purpose.

The NLADA standards also explain that briefs must conform to the court rules of that jurisdiction, make appropriate use of legal authority, and be of the highest professional quality, utilize federal case authority from other jurisdictions in support of positions for which no local authority exists or when local authority is contrary to the weight of recent decisions from other jurisdictions, include non case reference materials, have a consistent method of citation, etc.

In addition to brief preparation, appellate defenders should be responsible for filing appropriate appellate motions. “The appellate defender shall have a clearly-articulated policy regarding the filing of motions in the appellate court which should include providing the client

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<sup>12</sup> See NLADA Standards and Evaluation Design for Appellate Defender Offices, Standard II. Criteria for Assessing the Efficacy of the Legal Representation, G. Facilities, 2. Library.

with the most complete and effective representation in the appellate court through the appropriate motion practice.”<sup>13</sup>

### **M. *Anders* Policies<sup>14</sup>**

The office should have a written policy on the use of *Anders* briefs, which should be shared with the appellate court. There should be an internal review process if an attorney wishes to file an *Anders* brief.

ABA Criminal Justice Standards: Criminal Appeals, Standard 21-3.2. Counsel on appeal states:

(b) Counsel for a defendant-appellant should not seek to withdraw from a case because of counsel's determination that the appeal lacks merit.

(i) Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment of conviction and sentence, including any that might require initial presentation in a postconviction proceeding. Counsel should advise on the probable outcome of a challenge to the conviction or sentence. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.

(ii) If the client chooses to proceed with an appeal against the advice of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court. When counsel cannot continue without misleading the court, counsel may request permission to withdraw.

The NLADA Standards lay out an extensive procedure for *Anders* cases, which includes an internal review of an attorney's decision to file an *Anders* brief, a prohibition against *Anders* briefs in appeals from a death sentence or sentence of life imprisonment, communication with the client prior to the filing of an *Anders* brief, allowing the client to withdraw his request for the appointment of counsel or the appeal, etc.<sup>15</sup>

Specifically with regards to client contact, the NLADA Standards state:

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<sup>13</sup> NLADA Standards and Evaluation for Appellate Defender Offices, Standard D. Scope of Representation.

<sup>14</sup> “*Anders* briefs” refer to the United States Supreme Court case *Anders v. California*, 386 U.S. 738 (1967), which held that despite appellate counsel's belief that an appeal is frivolous and there is no arguable claim for appeal, a no-merit letter will not suffice and appellate counsel must prepare a brief to assist the court in understanding the facts and the legal issues in the case. The brief must include a statement of the facts with citations to the transcript, discuss the legal issues with citations of appropriate authority, and argue all possible issues for appeal.

<sup>15</sup> *Id.* at Standard O. Procedure for *Anders* Cases.

6. The attorney shall communicate [the decision to file an *Anders* brief] to the client prior to the filing of such brief, and shall give the client the opportunity to withdraw his request for the appointment of counsel or to withdraw the appeal.

7. The attorney shall send a copy of the *Anders* brief to the defendant with instructions for responding thereto, and may assist the defendant in responding to the *Anders* brief or in contacting another agency or lawyer for such assistance.<sup>16</sup>

## **N. Attorney/Client Contact**

Attorneys should meet with their clients in-person at least once during the appellate process. This meeting should be conducted in a private interview room. A video-teleconferencing system should not be used as a substitution for the initial in-person meeting. In addition, contact should be provided through mail correspondence as needed: to inform a client of the status of the case, general information regarding the appellate process and anticipated timeframe, and any substantive documents filed by both the prosecution and defense.<sup>17</sup>

In addition, according to the NLADA Standards and Evaluation Design for Appellate Defender Offices:

The appellate defender shall have a clearly-articulated policy of discussing the merits, strategy, and ramifications of the proposed appeal with each client prior to the perfection and completion thereof. Such policies shall include discussing any possible adverse consequences or strategic problems when pursuing such appeal, even when there is an arguable issue to appeal. It is the obligation of the appellate counsel to provide the client with his/her best professional judgment as to whether the appeal should be pursued in view of...strategic considerations.<sup>18</sup>

## **O. Data Reporting**

For case counting and assignment purposes, the appellate public defender office should establish a clear definition of a case, in consultation with the courts and prosecutor's office. Appellate cases should be counted consistently across the state as well. There are no national standards for how appellate defenders should count cases because appellate practice varies greatly among jurisdictions. However, an appropriate way to count cases would be to count all activities involved in a direct appeal as one case, and each action in a new court for the same defendant would be counted as a separate case – such as a subsequent appeal to the Court of Criminal Appeals or in the federal system. An appellate public defender may choose to count a situation where the case is remanded by the appellate court to the trial court for further action and the appellate defender is involved in the trial court as a separate case. Post-conviction habeas corpus actions require a lot of additional work and should be counted as separate case

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<sup>16</sup> *Id.*

<sup>17</sup> See NLADA Standards and Evaluation for Appellate Defender Offices, Standard I., Client Contact.

<sup>18</sup> *Id.* at Standard D., Scope of Representation.



even if the appellate defender represented the defendant on direct appeal. The best way for an appellate defender office to determine how to count and track cases is to create a case-weight system based on the amount of time certain actions in an appeal take. From this, a definition of a case and what steps are included in this definition can be created.

Every case that the appellate public defender office receives should be entered into the case management system. In the “Data Elements to Track” section we provided a list of data elements that should be tracked for each case. This will allow for the counting of all cases including those where the office withdraws due to a conflict of interest, and thus will assist the chief appellate defender in determining case assignments or additional staffing needs. The more complete the case management system is in terms of capturing relevant data, the greater variety of reports the office may run, and thus the office will be better at advocating for additional money or illustrating its efficiency and cost-effectiveness. Sample reports may be created that illustrate the following: number of cases handled by the office, attorney workload, number of days between events, cost-per-case, etc. The Chief Appellate Defender should then be responsible for reporting all data to the county, OCA, comptroller and/or the Task Force.

The following are some examples of how data should be reported to the county, appellate courts and the Task Force:

- Number of appointments by type of appeal (e.g., death sentence, felony drug case, juvenile delinquency, misdemeanor, etc.)
- Number of appeals filed
- Number by type of disposition for each case (e.g., transfer due to conflict, withdrawal due to overload, appeal granted by court, appeal settled by agreement with DA, etc.)
- The average time from:
  - Appointment to completed record received
  - Completed record received to filing of opening brief (include number of extensions sought and granted)
  - Time from filing of opening brief to filing of state’s brief
  - Time from filing of state’s brief to filing of reply brief, if filed
  - Time from appointment/opening brief/final brief filed (either state’s brief or reply brief) to appellate court’s decision
  - Average hours spent on attorney/client contact

## **P. Data Elements to Track**

Every public defender system should have a case-tracking system in place that is able to store the necessary data needed to evaluate the public defender office from a quantitative standpoint. For many small offices in the initial stages of development, this may be achieved by a simple Microsoft Access or Excel database. As public defender offices begin to grow, a more advanced case-tracking system may be necessary.

According to the NLADA *Guidelines for Legal Defense Systems in the United States*, 3.4 Nonpersonnel Needs in Defender Offices:

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

Included in the evaluation protocol is a list of relevant data elements that should be tracked by every appellate public defender office. These elements can then be used to measure workload. The numbers should be run periodically to determine whether the public defender office is providing services in a timely cost-efficient manner, and to determine where improvements, if any, need to be made.

## HOW TO EVALUATE APPELLATE PUBLIC DEFENDER OFFICES

The following summaries correlate with the questions in the evaluation protocol for appellate public defender offices and provide best practices for each topic. The summaries are not comprehensive, but provide direction in evaluating appellate public defender offices. Evaluators should closely examine national standards, including those by the American Bar Association, the National Legal Aid and Defender Association, and the National Advisory Commission on Criminal Justice Standards and Goals, when examining the effectiveness of a public defender office.

Inter-dispersed throughout this section is information that can be used by new public defender offices to create detailed written performance standards for all staff. Every public defender office should have written performance standards that include information such as the duties of supervisors, caseload and workload limits, and requirements regarding client contact.

### A. Independence of the Chief Public Defender and Office

According to the ABA's Ten Principles of a Public Defense Delivery System, Principle 1, "[t]he public defense function, including the selection, funding, and payment of defense counsel, is independent." The principles suggest "to safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems." The board's involvement should be limited to advocating on behalf of the public defender office in the criminal justice system. This includes broad criminal justice policy considerations or problems, and working to get the office needed resources. The board should not in any way interfere with the handling of cases or internal office legal policy regarding the cases:

(b) An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board. Provisions for size and manner of selection of boards of trustees should assure their independence. Boards of trustees should not include prosecutors or judges. The primary function of boards of trustees is to support and protect the independence of the defense services program. Boards of trustees should have the power to establish general policy for the operation of defender, assigned-counsel and contract-for-service programs consistent with these standards and in keeping with the standards of professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction.<sup>19</sup>

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<sup>19</sup> ABA's Criminal Justice Standards: Providing Defense Services, Standard 5-1.3 Professional independence.

An independent oversight board should be responsible for selecting the chief appellate defender on the basis of merit, and the board should consist of both lawyers and non-lawyers. Termination of the chief appellate defender should only be for cause. *See* ABA Criminal Justice Standards, Providing Defense Services, Standard 5-4.1.

The chief public defender and the office should not only be independent from any public defender oversight board, but the judiciary as well. According to the ABA's Criminal Justice Standards: Providing Defense Services, Standard 5-1.3 Professional independence:

(a) The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs.

## **B. Supervision**

Every public defender program should have a clear written policy regarding supervision. Supervisors' duties should include: explaining job duties and responsibilities to all new employees and periodically reviewing staff attorneys' performance to determine whether staff are able to identify all potential appellate issues, including those raised by trial counsel or issues that may not appear in the record; conduct appropriate legal research; write and edit motions and briefs; prepare and present oral argument; and identify and seek subsequent appeals in the event of an adverse decision. Supervisors should conduct periodic staff attorney evaluations based on objective standards. Evaluations should be performed at least twice a year in order to determine the strengths and weaknesses of each staff attorney, and to set goals to improve performance.

Supervisors should seek out new attorneys to be certain the attorneys are progressing at an appropriate pace. The supervisor should also be responsible for assuring that the caseload of the staff attorneys is manageable and appropriate for the attorney's level of experience. It is important to note that supervisors are responsible for being aware of each public defender's caseload at any given time, relative to the attorney's level of experience. According to a new ABA Ethics Opinion regarding attorney caseloads, if an attorney's caseload is so high that it becomes unethical, his/her supervisor may be ethically responsible for the attorney that he/she is supervising. (See Caseload, Section D, below.) Supervisors should not handle a full caseload. It is a good idea to also have an experienced attorney serve as a mentor, who will be available to the new attorney when the supervisor is not, or in addition to the supervisor.

## **C. Training**

Training for entry level appellate defenders should not be limited to "on the job" training, and the office should have an established training program that commences prior to

representation. There should also be ongoing continuing legal education programs for all staff attorneys.

ABA Criminal Justice Standards, Providing Defense Services, Standard 5-1.5 Training and professional development states:

The legal representation plan should provide for the effective training, professional development and continuing education of all counsel and staff involved in providing defense services. Continuing education programs should be available, and public funds should be provided to enable all counsel and staff to attend such programs.

In addition, the chief appellate defender should make him/herself available to the local bar, particularly those attorneys who provide trial representation, to educate trial counsel on issues that might be raised at trial, or new/developing legal trends. Assistance should be provided to trial counsel with regards to the proper preservation of issues at trial that may be raised on appeal. (See Section F below, Other Workload Factors.)

#### **D. Caseload**

The development of caseload and workload standards is very important to the success of newly established public defender offices. Caseload and workload are two different things. *Caseload* is a maximum case count per attorney, without giving weight to the complexity of the case. *Workload*, discussed in section “E” below, takes into account other factors that may cause one type of case to be more time-consuming than another. With regards to appeals, this would include the severity of the underlying charge, the length of the transcript and size of the record, etc. For example, Attorney A has two open death penalty appeals; Attorney B has two open juvenile appeals. While their caseloads are the same – two open cases each – their workloads are quite different: filing a death penalty appeal requires much more investigation, transcripts are longer, the record is more voluminous, case law is more complicated, etc.

The only national source that has attempted to quantify a maximum annual public defender caseload is the National Advisory Commission (NAC), which published its standards in 1973. In that report, Standard 13.12 on Courts states, “the caseload of a public defender attorney should not exceed the following: ... appeals per attorney per year: not more than 25.” Several states have adopted the NAC caseload limit for appellate indigent defense representation.<sup>20</sup>

In the absence of guidelines created for a particular jurisdiction, NAC standards are an effective tool to help public defenders plan and discuss resource needs with policymakers and budget committees. However, NAC standards are limited to describing resource needs strictly according to the raw number of cases for which an attorney is responsible. They do not take into consideration administrative or supervisory work, waiting or travel time, or professional development activities. Furthermore, they do

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<sup>20</sup> For example: Arizona, Georgia, Indiana, Vermont and Washington. New York City has also adopted the NAC standards.

not differentiate the amount of time required to work on various types of cases within a case category. For example, all felonies, whether straightforward burglary charges or complicated child sex abuse charges, are given equal weight by NAC standards.<sup>21</sup>

This is where workload comes into play: when considering the administrative or supervisory work, waiting or travel time, etc., mentioned above. Workload is discussed below in greater detail in section “E”.

Supervisors should monitor staff attorney caseload; however, it is also the responsibility of the staff attorneys to notify a supervisor when they are approaching the maximum number of cases set by office policy. Also, in May 2006 the ABA Standing Committee on Ethics and Professional Responsibility promulgated Ethics Opinion 06-441, which places the responsibility for workload and discipline on each individual attorney, each attorney’s supervisor, and if necessary the Chief Public Defender.<sup>22</sup> These ethical requirements are far more stringent than the standards for effective assistance of counsel established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). According to that decision, to prove ineffective assistance of counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness and, if so, whether there is a reasonable probability that the result of the proceeding would have been different but for counsel’s substandard performance.

In smaller public defender offices, attorneys may work part-time. In these situations, there should be a written policy in each public defender office that defines what part-time means, and what types of cases the attorney is permitted to handle in their private practice. This should be monitored frequently to make sure the public defender is spending the required amount of time on his or her public defender work.<sup>23</sup> Public defender work should always be an attorney’s first priority.

## **E. Workload**

We recommended that the Chief Appellate Defender not only develop individual attorney caseload limits, but develop workload standards as well. The capacity and workload of appellate defender offices is affected more by court rules, system structures, and legislative mandates than any other area of criminal practice.<sup>24</sup> It is therefore imperative that workload standards be put in place to help manage the office and ensure the least amount of extensions possible.

According to the ABA’s Ten Principles of a Public Defense Delivery System, Principle 5, “Defense counsel’s workload is controlled to permit the rendering of quality representation.”

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<sup>21</sup> Bureau of Justice Assistance, *Keeping Defender Workloads Manageable*, 8 (2001), at <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

<sup>22</sup> ABA Ethics Opinion 06-441, “Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation.”

<sup>23</sup> It should be noted that the ABA’s Criminal Justice Standards, Providing Defense Services, Standard 5-4.2 suggest that all public defender staff counsel be full-time and prohibited from engaging in the private practice of law. However, this is an old standard, and it is now generally accepted that some public defenders must work part-time.

<sup>24</sup> For instance appellate defenders must wait for court reporters and the trial court to finalize the record and must adhere to court rules and court dates developed without consultation.

It further states that counsel is obligated to decline appointments that make workload so large as to interfere with their ability to provide quality representation and ethical obligations. “National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney’s nonrepresentational duties) is a more accurate measurement.”

In addition to the ABA’s Ten Principles of a Public Defense Deliver System, Standard 5-5.3 of the ABA’s Criminal Justice, Providing Defense Services states:

(a) Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

(b) Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments. Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.

Workload standards are often reached through the use of case-weighting studies, which allow a jurisdiction to determine how much work is required in certain types of cases. This allows a jurisdiction to translate caseload (the number of cases a lawyer handles) into workload (the amount of effort, measured in units of time, for the lawyer to complete work on the caseload).<sup>25</sup>

## **F. Other Workload Factors**

There are a number of additional factors not typically used to determine workload, that may affect the amount of time it takes an attorney to complete a case. These additional factors may include preparation of oral arguments, contact with trial counsel, and any additional responsibilities given to the office that fall outside of the typical purview of an appellate defender office.

With regards to oral arguments, there should be written standards for determining when oral argument is requested or waived, and if granted attorneys should be adequately prepared for arguments. Supervisors and senior staff counsel should assist an attorney with his/her preparations for oral argument.

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<sup>25</sup> Bureau of Justice Assistance, Keeping Defender Workloads Manageable, 9 (2001), at <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

There should be clearly articulated procedures for contact with trial counsel. This includes notifying trial counsel that the appellate defender office has been assigned to the appeal and if ineffective assistance of counsel is being raised. In addition, the appellate defender should work with trial counsel to:

- a. Identify issues which might be raised at trial which reflect new or developing legal trends;
- b. Properly preserve at trial issues which might be raised on appeal;
- c. Acquaint the trial bar with recent decision which have an impact on the trial cases; and
- d. Share the appellate defender research facilities if such materials are not available elsewhere and the appellate defender has adequate materials and office space.<sup>26</sup>

In instances where the appellate defender office is asked to take on additional responsibilities by the appellate court, the chief defender should work with the justices to streamline any procedures to minimize attorney time. Also, “the appellate defender and his or her staff shall establish regular lines of communication with judges on the appellate court and with appellate court staff to determine whether the office is providing representation in a manner acceptable and appropriate to the court.”<sup>27</sup> The appellate defender office should also have the authority to seek discretionary review in any state appellate court, where deemed appropriate by the appellate defender and permitted by law.

With regards to the relationship between the appellate defender and the district attorney, “the appellate defender should establish a cordial, and professional, relationship with the appellate court prosecutor so that mutual problems can be solved administratively or with a concerted effort.”<sup>28</sup> A good relationship with the district attorney’s office will also make it easier to discuss the possibility of settling the case when appropriate.

## **G. Case Conflicts**

Each public defender office should have written uniform policies regarding conflicts of interest. A conflict occurs most frequently when a public defender office has been assigned co-defendants in a case; however, a conflict of interest may also exist when the public defender office is assigned a defendant who was a witness in a case the office handled previously, a defendant may be related to someone who works in the office, or if a public defender came from or goes to the district attorney’s office.

The determination about whether something is a conflict should not be left solely to the staff attorney. A written policy should require that at least a supervisor review staff counsel’s suggestion about whether something is a conflict. This written policy should also take into consideration the rules/procedures in the office’s particular jurisdiction.

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<sup>26</sup> NLADA Standards and Evaluation for Appellate Defender Offices, Standard K. Training.

<sup>27</sup> *Id.* at Standard II. Criteria for Assuring the Efficiency of the Legal Representation, H. Feedback.

<sup>28</sup> *Id.*



There are a number of ways that public defender programs deal with co-defendants; however, typically the public defender should represent the first co-defendant that is appointed to the office, and the court should be notified that any additional co-defendants must be reassigned outside of the office. It is also important to be aware that conflicts may not be discovered until a considerable amount of time has been put into a case. Therefore, it is also critical to have some type of computer case-tracking system available at the time of appointment in order to determine whether a conflict of interest can be detected as early as possible.

## **H. Personnel Policies**

Every public defender office should have a personnel manual that has written attorney performance qualifications and standards. The manual should not only cover general human resources policies, such as health benefits, sick and vacation benefits, etc., but should include annual refresher training requirements, office policies regarding representation of co-defendants, *Anders* brief policies, caseload and workload limits, etc.

The office should make every effort to hire highly qualified experienced counsel, and previous criminal trial or appellate experience alone is not sufficient. Personnel should only be fired for cause, and there should be a procedure to appeal any termination decisions. The hiring of public defender staff should be the sole discretion of the chief appellate defender, and while recommendations may be made by judges or the oversight board, the ultimate decision should be that of the chief appellate defender. Performance reviews of all staff counsel should be conducted annually.

## **I. Personnel Resources**

The NLADA Standards for Appellate Defender Offices, G. Staffing suggest that:

Prior to the creation of any appellate unit, or as soon thereafter as possible, a clearly-articulated caseload standard staffing ratio and caseload weighting system should be developed – and publicly stated – with written plans for alternative methods of providing representation in the event those standards are exceeded.

The ABA also has standards for support services, although not specific to appellate practice. The ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-1.4, Supporting services, states:

The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process.

There are no national standards on the appropriate ratio of support staff to attorneys for appellate defender offices. Indiana has developed numerical attorney to support staff ratios, which indicate that to be fully staffed an appellate defender office should have one law clerk for every two appellate attorneys. However, due to the fact that appellate practice varies greatly from state-to-state, this ratio may not be appropriate in every state. Chief appellate defenders should be responsible for adjusting the number of support staff as they see necessary depending on the workload of the office, such that attorney administrative work is minimized, and the office should be provided with sufficient funds to do so.

With regards to compensation, the NLADA Guidelines for Legal Defense Systems in the United States, 3.2 Defender System Salaries, indicates that:

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

The ABA Ten Principles of a Public Defense Delivery System, Principle 8 (Feb. 2002) also discusses the issue of pay parity. It states that in a properly functioning system:

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. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.

Specifically, with regards to appellate public defender offices, the NLADA Standards for Appellate Defender Offices, C. Selection of Legal Staff states, "the salaries of the staff of the state public defender shall be equal to or higher than the salaries of persons doing comparable work in the prosecutor's office."

Appellate public defender offices should take advantage of law students/interns when available. However, because the training and supervision of law students/interns may take time away from the attorneys' cases, or attorneys may not have the appropriate amount of time to mentor students, a chief appellate defender should determine prior to the implementation of such an arrangement whether the time needed to train and supervise outweighs the benefits of having a law student/intern. The NLADA Guidelines for Legal Defenses Systems in the United States, Standard 4.4 Use of Law Students, states:

[L]aw schools throughout the nation should be encouraged to establish closely supervised clinical criminal law courses in cooperation with local defender offices.... Law student programs should not be viewed as a long-term answer to the problem of adequately meeting the needs of defendants in the criminal justice system.

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

Every appellate defender office should have adequate bilingual staff/interpreters. If not, there should be a mechanism for providing an interpreter at every meeting the attorney has with his/her client.

#### **J. Parity with the District Attorney's Office**

A number of national standards call for, at minimum, pay parity between public defender and prosecutor or other court system offices. The ABA Ten Principles of a Public Defense Delivery System, Principle 8 (Feb. 2002) states that in a properly functioning system:

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. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.

The NLADA Guidelines for Legal Defense Systems in the United States, and the National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts also discuss pay parity.<sup>29</sup>

#### **K. Equipment and Law Library Resources/Availability**

The ABA Criminal Justice Standards, Providing Defense Services, Standard 5-4.3 Facilities; library, states:

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

Specifically, each appellate defender program should have an in-house library with at least the following:

- United States Supreme Court decisions
- All published state appellate court decisions

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<sup>29</sup> For instance, “[t]he budget of a public defender for operational expenses other than the costs of personnel should be substantially equivalent to, and certainly not less than, that provided for other components of the justice system with whom the public defender must interact, such as the courts, prosecution, the private bar, and the police.” National Advisory Commission on Criminal Justice Standards and Goals, Standards for the Defense, Standard 13.14 Supporting Personnel and Facilities (1973).

- Federal Reporter
- State Statutes
- State Digests
- Current Criminal Law Reporter
- Current ABA Standards for Criminal Justice
- Other standard treatises on:
  - Substantive criminal law
  - Criminal procedure
  - Evidence

The NLADA Standards and Evaluation Design for Appellate Defender Offices provides a much more extensive list of library materials that each appellate defender office should have.<sup>30</sup>

In addition to the above referenced library materials, the appellate defender office should also have a computerized system for storing all briefs completed by the office, with a keyword search function. Briefs should also be indexed by issues raised on appeal. In addition, appellate defender offices should have access to Lexis, Westlaw or a similar database, and provide training as needed.

#### **L. Brief Preparation**

Briefs should comply with local court rules. Every brief filed by the appellate defender’s office should be reviewed by at least one other staff member other than the author. According to the NLADA Standards and Evaluation Design for Appellate Defender Offices, L. Brief Preparation:

8. Each appellate defender should adopt procedures for reviewing and screening the briefs that are filed by that office, which should include the careful review of the brief and record by at least one member of the staff other than the person who wrote the brief prior to the completion of the final draft of the brief, in offices of more than five attorneys, supervisory staff shall be designated for this purpose.

The NLADA standards also explain that briefs must conform to the court rules of that jurisdiction, make appropriate use of legal authority, and be of the highest professional quality, utilize federal case authority from other jurisdictions in support of positions for which no local authority exists or when local authority is contrary to the weight of recent decisions from other jurisdictions, include non case reference materials, have a consistent method of citation, etc.

In addition to brief preparation, appellate defenders should be responsible for filing appropriate appellate motions. “The appellate defender shall have a clearly-articulated policy regarding the filing of motions in the appellate court which should include providing the client

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<sup>30</sup> See NLADA Standards and Evaluation Design for Appellate Defender Offices, Standard II. Criteria for Assessing the Efficacy of the Legal Representation, G. Facilities, 2. Library.

with the most complete and effective representation in the appellate court through the appropriate motion practice.”<sup>31</sup>

### **M. *Anders* Policies<sup>32</sup>**

The office should have a written policy on the use of *Anders* briefs, which should be shared with the appellate court. There should be an internal review process if an attorney wishes to file an *Anders* brief.

ABA Criminal Justice Standards: Criminal Appeals, Standard 21-3.2. Counsel on appeal states:

(b) Counsel for a defendant-appellant should not seek to withdraw from a case because of counsel's determination that the appeal lacks merit.

(i) Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment of conviction and sentence, including any that might require initial presentation in a postconviction proceeding. Counsel should advise on the probable outcome of a challenge to the conviction or sentence. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.

(ii) If the client chooses to proceed with an appeal against the advice of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court. When counsel cannot continue without misleading the court, counsel may request permission to withdraw.

The NLADA Standards lay out an extensive procedure for *Anders* cases, which includes an internal review of an attorney's decision to file an *Anders* brief, a prohibition against *Anders* briefs in appeals from a death sentence or sentence of life imprisonment, communication with the client prior to the filing of an *Anders* brief, allowing the client to withdraw his request for the appointment of counsel or the appeal, etc.<sup>33</sup>

Specifically with regards to client contact, the NLADA Standards state:

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<sup>31</sup> NLADA Standards and Evaluation for Appellate Defender Offices, Standard D. Scope of Representation.

<sup>32</sup> “*Anders* briefs” refer to the United States Supreme Court case *Anders v. California*, 386 U.S. 738 (1967), which held that despite appellate counsel's belief that an appeal is frivolous and there is no arguable claim for appeal, a no-merit letter will not suffice and appellate counsel must prepare a brief to assist the court in understanding the facts and the legal issues in the case. The brief must include a statement of the facts with citations to the transcript, discuss the legal issues with citations of appropriate authority, and argue all possible issues for appeal.

<sup>33</sup> *Id.* at Standard O. Procedure for *Anders* Cases.

6. The attorney shall communicate [the decision to file an *Anders* brief] to the client prior to the filing of such brief, and shall give the client the opportunity to withdraw his request for the appointment of counsel or to withdraw the appeal.

7. The attorney shall send a copy of the *Anders* brief to the defendant with instructions for responding thereto, and may assist the defendant in responding to the *Anders* brief or in contacting another agency or lawyer for such assistance.<sup>34</sup>

## **N. Attorney/Client Contact**

Attorneys should meet with their clients in-person at least once during the appellate process. This meeting should be conducted in a private interview room. A video-teleconferencing system should not be used as a substitution for the initial in-person meeting. In addition, contact should be provided through mail correspondence as needed: to inform a client of the status of the case, general information regarding the appellate process and anticipated timeframe, and any substantive documents filed by both the prosecution and defense.<sup>35</sup>

In addition, according to the NLADA Standards and Evaluation Design for Appellate Defender Offices:

The appellate defender shall have a clearly-articulated policy of discussing the merits, strategy, and ramifications of the proposed appeal with each client prior to the perfection and completion thereof. Such policies shall include discussing any possible adverse consequences or strategic problems when pursuing such appeal, even when there is an arguable issue to appeal. It is the obligation of the appellate counsel to provide the client with his/her best professional judgment as to whether the appeal should be pursued in view of...strategic considerations.<sup>36</sup>

## **O. Data Reporting**

For case counting and assignment purposes, the appellate public defender office should establish a clear definition of a case, in consultation with the courts and prosecutor's office. Appellate cases should be counted consistently across the state as well. There are no national standards for how appellate defenders should count cases because appellate practice varies greatly among jurisdictions. However, an appropriate way to count cases would be to count all activities involved in a direct appeal as one case, and each action in a new court for the same defendant would be counted as a separate case – such as a subsequent appeal to the Court of Criminal Appeals or in the federal system. An appellate public defender may choose to count a situation where the case is remanded by the appellate court to the trial court for further action and the appellate defender is involved in the trial court as a separate case. Post-conviction habeas corpus actions require a lot of additional work and should be counted as separate case

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<sup>34</sup> *Id.*

<sup>35</sup> See NLADA Standards and Evaluation for Appellate Defender Offices, Standard I., Client Contact.

<sup>36</sup> *Id.* at Standard D., Scope of Representation.

even if the appellate defender represented the defendant on direct appeal. The best way for an appellate defender office to determine how to count and track cases is to create a case-weight system based on the amount of time certain actions in an appeal take. From this, a definition of a case and what steps are included in this definition can be created.

Every case that the appellate public defender office receives should be entered into the case management system. In the “Data Elements to Track” section we provided a list of data elements that should be tracked for each case. This will allow for the counting of all cases including those where the office withdraws due to a conflict of interest, and thus will assist the chief appellate defender in determining case assignments or additional staffing needs. The more complete the case management system is in terms of capturing relevant data, the greater variety of reports the office may run, and thus the office will be better at advocating for additional money or illustrating its efficiency and cost-effectiveness. Sample reports may be created that illustrate the following: number of cases handled by the office, attorney workload, number of days between events, cost-per-case, etc. The Chief Appellate Defender should then be responsible for reporting all data to the county, OCA, comptroller and/or the Task Force.

The following are some examples of how data should be reported to the county, appellate courts and the Task Force:

- Number of appointments by type of appeal (e.g., death sentence, felony drug case, juvenile delinquency, misdemeanor, etc.)
- Number of appeals filed
- Number by type of disposition for each case (e.g., transfer due to conflict, withdrawal due to overload, appeal granted by court, appeal settled by agreement with DA, etc.)
- The average time from:
  - Appointment to completed record received
  - Completed record received to filing of opening brief (include number of extensions sought and granted)
  - Time from filing of opening brief to filing of state’s brief
  - Time from filing of state’s brief to filing of reply brief, if filed
  - Time from appointment/opening brief/final brief filed (either state’s brief or reply brief) to appellate court’s decision
  - Average hours spent on attorney/client contact

## **P. Data Elements to Track**

Every public defender system should have a case-tracking system in place that is able to store the necessary data needed to evaluate the public defender office from a quantitative standpoint. For many small offices in the initial stages of development, this may be achieved by a simple Microsoft Access or Excel database. As public defender offices begin to grow, a more advanced case-tracking system may be necessary.

According to the NLADA *Guidelines for Legal Defense Systems in the United States*, 3.4 Nonpersonnel Needs in Defender Offices:

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

Included in the evaluation protocol is a list of relevant data elements that should be tracked by every appellate public defender office. These elements can then be used to measure workload. The numbers should be run periodically to determine whether the public defender office is providing services in a timely cost-efficient manner, and to determine where improvements, if any, need to be made.



## EVALUATION PROTOCOL FOR APPELLATE PUBLIC DEFENDER OFFICES

### A. Independence of the Public Defender and Office

1. Is there a public defender oversight board? If so, is the makeup of the board sufficiently varied to include a variety of stakeholders?
2. What is the role of the oversight board?
3. Who calls and runs meetings? How often do meetings occur?
4. Does the oversight board improperly interfere with the handling of cases/legal issues?
5. Must the board approve budget requests?
6. Is the board able to advocate effectively on behalf of the public defender office?
7. Does the oversight board hire the chief public defender? If not, who does?
8. Can the board fire the chief public defender at will or must it be for cause?
9. What is the judiciary's role with regards to the chief public defender and the office?
10. Do judges provide advice regarding public defender office policy, such as caseload?
11. Do judges attempt to influence any legal aspects of the office's cases or legal policy in the office?

### B. Supervision

1. What are supervisors' roles and what are their responsibilities?
2. Is there an adequate ratio of supervisors to staff counsel?
3. Is there a policy that new attorneys receive additional supervision?
4. Are there policies for mentoring roles?
5. Are there timely and consistent staff evaluations? Is hiring and firing based on objective evaluations?
6. Are supervisors' caseloads limited?
7. Are there incentives for supervisor promotions? Is supervisor status the only promotion available to attorneys?

### C. Training

1. What kind of training is there for new personnel?
2. Are new lawyers provided training on appellate practice?
3. What about specific training on issues such as immigration or defending clients with mental health problems?
4. Is there a policy for routine refresher training?
5. What is the process for attorneys to attend outside trainings? Are their costs covered?

### D. Caseload

1. Are there standards for maximum caseload? Does the caseload limit mirror the National Advisory Commission limit of 25 appeals per attorney annually? If not, what is the caseload limit and why?
2. Is there a case-tracking system in place? If so, what type of case-tracking system is in place? Does the case-tracking system meet the needs of the office and is it set up in a way that will allow it to grow as the office grows?
3. Is there a county-wide case tracking system in place? Is the appellate court's case tracking system accessible by the appellate defender office?
4. Who is responsible for monitoring caseload?
5. How are cases allocated in the office? Who makes appointments? Are cases appointed directly from the bench? If so, are there mechanisms in place to avoid overload?
6. How are excessive caseload situations handled? Are there policies for staff attorneys to shut off the flow of new cases when they are overloaded?
7. Do public defenders handle private cases as well? If yes, with what restrictions?

**E. Workload**

1. Are there standards for maximum workload? In other words, is consideration given to factors that contribute to the amount of time attorneys must spend on a case when determining maximum caseload? For instance, is the length of the transcript, whether oral argument is granted, etc. considered?
2. Is there a case-weighting system?
3. What factors are considered when determining attorney workload?

**F. Other Workload Factors**

1. Is there a clear policy regarding the request for oral argument?
2. Are there policies regarding contact with trial counsel? Does the public defender office work with trial counsel to provide information or training on the proper preservation of issues at trial for an appeal, or identifying new legal trends that may be raised at trial?
3. In any appeal where ineffective assistance of counsel is raised, is trial counsel notified?
4. If the appellate public defender office is responsible for reviewing guilty plea cases for the possibility of appeal, what steps have been taken to streamline the process? How are cases assigned among attorneys? Are these cases weighed when determining an attorney's workload?
5. Does the public defender office have a good working relationship with the district attorneys?
6. How often does staff counsel find it necessary to supplement the record? Who in the office is responsible for this task?
7. Are there any other outside factors affecting attorney workload?

**G. Case Conflicts**

1. Are there uniform written policies against handling multiple co-defendants?
2. Are there uniform written policies regarding other conflict of interest cases?
3. If there are no written policies, what is the informal office policy?

4. Is there timely determination of conflicts?

#### **H. Personnel Policies**

1. Is there a personnel manual with written policies?
2. Who has the authority to hire and fire personnel?
3. What is the procedure for filling a vacant position?
4. Do performance reviews occur? Do they occur regularly for all staff?
5. What is the procedure for termination of an employee?
6. Are all employees full-time? If not, what is the policy regarding part-time work?
7. How do public defender staff salaries compare with similar staff in the district attorney's office?

#### **I. Personnel Resources**

1. What is the number of staff attorneys by level of experience?
2. With regards to support staff, what is the:
  - a. Ratio of secretaries to attorneys
  - b. Ratio of paralegal staff to attorneys
  - c. Ratio of social workers to attorneys
  - d. Ratio of sentencing specialists to attorneys?
3. Are law students/interns available? How are they used?
4. Is there adequate bilingual staff/interpreters? If not, is an interpreter available at attorney's first meeting with client?
5. How does public defender staffing compare with staffing in the district attorney's appellate department?
6. Who will type letters, motions, etc? What does the secretary do for the attorneys?
7. Who prepares and oversees the office's budget?

#### **J. Parity with the District Attorney's Office**

1. Is there salary parity between the Chief Appellate District Attorney and the Chief Appellate Public Defender?
2. Is there salary parity between appellate assistant district attorneys and appellate assistant public defenders? At all experience levels?
3. Is there comparable staff between the district attorney's appellate section and the appellate public defender's office? Including: attorneys, clerical, investigators, administration, supervisors?

#### **K. Equipment and Law Library Resources/Availability**

1. Photocopiers?
2. Fax machines?
3. Automated telephone system and voice mail?
4. E-mail?
5. Internet?

6. County-owned cars for investigators and/or social workers?
7. Does the office have a law library? Or is there a law library provided by a local bar association or the courts for use by public defender staff?
8. What are the normally circulated publications in the office?
9. CD-Rom availability?
10. Is WESTLAW/Lexis or other computerized legal research programs available?

**L. Brief Preparation**

1. Are all briefs reviewed by a supervisor before submission? Do briefs undergo peer review before submission?
2. Is there a policy regarding requests for extensions?
3. Are non-case reference materials, if appropriate, used?

**M. Anders Policies**

1. Is there a formal *Anders* policy in the office? Has this policy been communicated with the courts?
2. Is there secondary review of all cases where the primary attorney assigned to the case has decided to file an *Anders* brief?
3. When it has been determined that an *Anders* brief will be filed, is this decision communicated to the client before the brief is filed? Is a copy of the brief provided to the client?

**N. Attorney/Client Contact**

1. Is there an office policy requiring appellate counsel to meet with clients in-person? If so, when and where does initial contact take place? Is there private space to speak with clients in jail or prison? If contact is done by videophone, do clients have a private area in jail/prison to speak with counsel?
2. Jail Visits
  - a. How far must attorneys travel to visit in-custody clients? (jail and prison)
  - b. What are the attorney visitation hours, and how long do attorneys wait to gain access to clients?
  - c. How often do attorneys make in-custody visits?
  - d. Can attorneys communicate by telephone or videophone with in-custody clients?
  - e. Are there other adequate means for counsel to maintain confidential correspondence with clients?
3. How often do attorneys normally meet with a client during the life of a case?
4. Are there facilities available to attorneys at court to meet privately with clients/families/witnesses?
5. Do attorneys correspond regularly via mail with their clients? Do attorneys provide clients with a copy of the brief and any reply briefs? Is there an office policy regarding such?
6. Are collect calls from clients accepted?

## **O. Data Reporting**

1. What is the definition of a case in the public defender office? Is a case considered open if a brief has been filed and it is awaiting a decision or possibly reply brief or oral argument?
2. Does the public defender case-counting method and definition of a case align or conflict with the case-counting methods and definition of a case used by the district attorneys and courts?
3. Are cases tracked by appeal of a particular case type? Are cases tracked by attorney?
4. How are conflicts and other withdrawal cases counted?
5. Who is responsible for reporting the data to the county? What data is reported, and how often?
6. Who reports public defender data to the OCA, Comptroller, and/or Task Force?

## **P. Data Elements to Track**

1. Total case intake for the office
2. Total cases closed
3. Total briefs filed
4. Total *Anders* briefs filed
5. Total number of oral arguments requested
6. Total number of oral arguments granted
7. Total guilty plea cases reviewed for possible appeal
8. Total number of appeals assigned to private court-appointed counsel by type of appeal
9. Total amount paid out to court-appointed counsel, by type of appeal
10. For each case, both public defender and court-appointed counsel cases, the following dates should be tracked:
  - Sentence date
  - Notice of appeal filed
  - Receipt of record
  - Date defense brief submitted
  - Number, date, and length of extensions filed by defense
  - Date state brief submitted
  - Number, date, and length of extensions filed by State
  - Whether oral argument was requested and granted
  - Final disposition
11. How many attorneys were appointed over the life of each appeal? Reason for reappointment?
12. Record time spent on investigative work

## **EVALUATING MISDEMEANOR PUBLIC DEFENDER OFFICES**

## HOW TO EVALUATE A MISDEMEANOR PUBLIC DEFENDER OFFICE

The following summaries correlate with the questions in the evaluation protocol for misdemeanor public defender offices and provide best practices for each topic. The summaries are not comprehensive, but provide direction in evaluating misdemeanor public defender offices. Evaluators should closely examine national standards, including those by the American Bar Association, the National Legal Aid and Defender Association, and the National Advisory Commission on Criminal Justice Standards and Goals, when examining the effectiveness of a public defender office.

Inter-dispersed throughout this section is information that can be used by new public defender offices to create detailed written performance standards for all staff. Every public defender office should have written performance standards that include information such as the duties of supervisors, caseload and workload limits, and requirements regarding client contact.

### A. Oversight of the Public Defender and Office

According to the ABA's Ten Principles of a Public Defense Delivery System, Principle 1 states, "The public defense function, including the selection, funding, and payment of defense counsel, is independent." The principles suggest "to safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems." The board's involvement should be limited to advocating on behalf of the public defender office in the criminal justice system. This includes broad criminal justice policy considerations or problems, and working to get the office needed resources. The board should not in any way interfere with the handling of cases or internal office legal policy regarding the cases:

(b) An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board. Provisions for size and manner of selection of boards of trustees should assure their independence. Boards of trustees should not include prosecutors or judges. The primary function of boards of trustees is to support and protect the independence of the defense services program. Boards of trustees should have the power to establish general policy for the operation of defender, assigned-counsel and contract-for-service programs consistent with these standards and in keeping with the standards of professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction.<sup>37</sup>

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<sup>37</sup> ABA's Criminal Justice Standards: Providing Defense Services, Standard 5-1.3 Professional independence.

An independent oversight board should be responsible for selecting the chief public defender on the basis of merit, and the board should consist of both lawyers and non-lawyers. Termination of the chief public defender should only be for cause. *See* ABA Criminal Justice Standards, Providing Defense Services, Standard 5-4.1.

The Chief Public Defender and the Office should not only be independent from any public defender oversight board, but the judiciary as well. According to the ABA's Criminal Justice Standards: Providing Defense Services, Standard 5-1.3 Professional independence:

(a) The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs.

## **B. Supervision**

Every public defender program should have a clear written policy regarding supervision. Supervisors' duties should include: explaining job duties and responsibilities to all new employees, periodically observing new attorneys in court to evaluate trial skills, and occasionally reviewing case files to determine whether case preparation needs improvement. Supervisors should conduct periodic staff attorney evaluations, both verbally and in writing, based on objective standards. Evaluations should be performed at least twice a year in order to determine the strengths and weaknesses of each staff attorney, and to set goals to improve performance.

Supervisors should seek out new attorneys to be certain the attorneys are progressing at an appropriate pace. The supervisor should also be responsible for assuring that the caseload of the inexperienced lawyer is manageable and appropriate for the attorney's level of experience. It is important to note that supervisors are responsible for being aware of each public defender's caseload at any given time, relative to the attorney's level of experience. According to a new ABA Ethics Opinion regarding attorney caseloads, a supervisor may very well be ethically responsible, not only for him or herself, but also for the attorney(s) that he/she is supervising if an attorney's caseload is so high that it becomes unethical. (See Caseload, Section D, below.) Supervisors should not handle a full caseload. It is a good idea to also have an experienced attorney serve as a mentor, who will be available to the new attorney when the supervisor is not or in addition to the supervisor.

## **C. Training**

The ABA Standards, Criminal Justice, Providing Defense Services, Standard 5-1.5 states, with regards to training and professional development:



The legal representation plan should provide for the effective training, professional development and continuing education of all counsel and staff involved in providing defense services. Continuing education programs should be available, and public funds should be provided to enable all counsel and staff to attend such programs.

In order for public defender attorney and support staff to reach a high level of competence, both introductory and ongoing training is essential. This training should not be exclusive to staff attorneys – support staff and investigators should receive training as well. A public defender who is new to office procedure and/or the criminal justice system will require an orientation that may include intensive work with an experienced attorney for several weeks.

In addition to initial attorney/support staff training, the office should also have a standardized procedure to ensure that all public defenders are current in the law. Defender staff should be encouraged to take advantage of programs both in and outside of the office that are directed at trial and/or investigative techniques. Also, because criminal law is constantly changing, specific training should be provided to attorneys and investigators regarding immigration issues and other issues related to the collateral consequences of a criminal conviction (such as loss of public housing or food stamps). Office training materials should be reviewed periodically to make sure they are up-to-date. At the present time there are excellent training videos for trial public defenders.

It is very important that all new employees shadow experienced staff in the same court that they will be practicing in. The new employees, in turn, should be watched throughout case preparation and from time-to-time should second chair cases until the supervisor feels that they are capable of providing competent representation.

#### **D. Caseload**

The development of caseload and workload standards is very important to the success of any public defender office. Caseload and workload are two different things. *Caseload* is a maximum case count per attorney, without giving weight to the complexity of the case. *Workload*, discussed in section “E” below, takes into account other factors that may cause one type of case to be more time-consuming than another. For instance, Attorney A has six cases, three DWI’s and three domestic violence cases. Attorney B has six cases, all involve driving with a suspended license. While both attorneys have the same caseload – six cases – Attorney A has a greater workload, as DWI cases and domestic violence cases tend to take more time since they involve more investigation than other cases, there may be more witnesses involved, the potential sentence is higher, the case law is more complex, etc.

The only national source that has attempted to quantify a maximum annual public defender caseload is the National Advisory Commission (NAC), which published its standards in 1973. In that report, Standard 13.12 on Courts states, “the caseload of a public defender attorney should not exceed the following: ... misdemeanor (non-traffic) per attorney per year: not more

than 400.”<sup>38</sup> A number of states have adopted the NAC caseload limit for misdemeanor indigent defense representation, while others have lower caseload limits.<sup>39</sup>

In the absence of guidelines created for a particular jurisdiction, NAC standards are an effective tool to help public defenders plan and discuss resource needs with policymakers and budget committees. However, NAC standards are limited to describing resource needs strictly according to the raw number of cases for which an attorney is responsible. They do not take into consideration administrative or supervisory work, waiting or travel time, or professional development activities. Furthermore, they do not differentiate the amount of time required to work on various types of cases within a case category. For example, all felonies, whether straightforward burglary charges or complicated child sex abuse charges, are given equal weight by NAC standards.<sup>40</sup>

This is where workload comes into play: when considering the administrative or supervisory work, waiting or travel time, etc., mentioned above. Workload is discussed below in greater detail in section “E”.

It should be a supervisor’s responsibility should monitor staff attorney caseload. (See Section B, Supervision.) It is also the responsibility of the staff attorneys to notify a supervisor when they are approaching the maximum number of cases set by office policy. As discussed in greater detail below, supervisors and staff counsel, and possibly chief public defenders, are now ethically obligated to seek withdrawal from cases if an attorney becomes overloaded with cases.

In smaller public defender offices, attorneys may work part-time. In these situations, there should be a written policy in each public defender office that defines what part-time means, and what types of cases the attorney is permitted to handle in their private practice. This should be monitored frequently to make sure the public defender is spending the required amount of time on his or her public defender work and clients are receiving competent representation.<sup>41</sup>

## **E. Workload**

We recommended that the chief public defender not only develop individual attorney caseload limits, but develop workload standards as well. According to the ABA’s Ten Principles of a Public Defense Delivery System, Principle 5, “Defense counsel’s workload is controlled to permit the rendering of quality representation.” It further states that counsel is obligated to

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<sup>38</sup> In most public defender offices, attorneys do not handle only one type of case, and therefore these advisory standards adopted by NAC should provide for a mixture of various types of cases to assure that attorneys are not overloaded.

<sup>39</sup> For example: Florida, Georgia, Indiana, Massachusetts, Minnesota (varies from 250-400 cases annually), Oregon, and Vermont. New York City has also adopted the NAC caseload standards.

<sup>40</sup> Bureau of Justice Assistance, Keeping Defender Workloads Manageable, 8 (2001), at <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

<sup>41</sup> It should be noted that the ABA’s Criminal Justice Standards, Providing Defense Services, Standard 5-4.2 suggest that all public defender staff counsel be full-time and prohibited from engaging in the private practice of law. However, this is an old standard, and it is generally accepted that some public defenders must work part-time.

decline appointments that make workload so large as to interfere with their ability to provide quality representation and ethical obligations. “National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney’s nonrepresentational duties) is a more accurate measurement.”

In addition to the ABA’s Ten Principles of a Public Defense Deliver System, Standard 5-5.3 of the ABA’s Criminal Justice, Providing Defense Services states:

(a) Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

(b) Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments. Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.

The new ABA Ethics Opinion 06-441, promulgated by the ABA Standing Committee on Ethics and Professional Responsibility in May 2006, places the responsibility for workload and discipline on each individual attorney, each attorney’s supervisor, and if necessary the chief public defender.<sup>42</sup> The opinion requires defenders with excessive caseloads who cannot obtain relief from within their agency to seek permission to withdraw from a judge. Failure to do so could constitute a violation of the rules of professional conduct. In addition, the ethics opinion states that the head of a defender agency and any supervisors have a duty to assure that staff counsel do not have excessive caseloads. If staff counsel do have excessive caseloads and the chief public defender and/or supervisors fail to take steps to remedy this, they will also be committing disciplinary violations. These ethical requirements are far more stringent than the standards for effective assistance of counsel established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). According to that decision, to prove ineffective assistance of counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness and, if so, whether there is a reasonable probability that the result of the proceeding would have been different but for counsel’s substandard performance.

Workload standards are often reached through the use of case-weighting studies, which allow a jurisdiction to determine how much work is required in certain types of cases. This

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<sup>42</sup> ABA Ethics Opinion 06-441, “Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation.”

allows a jurisdiction to translate caseload (the number of cases a lawyer handles) into workload (the amount of effort, measured in units of time, for the lawyer to complete work on the caseload).<sup>43</sup>

## **F. Other Workload Factors**

The public defender office should develop a cooperative working relationship with the prosecutor's office. Both offices should work together to resolve, when appropriate, any local systemic problems. In addition, discovery should be provided in a timely manner by both sides:

Each jurisdiction should develop time limits within which discovery should be performed. The time limits should be such that discovery is initiated as early as practicable in the process. The time limit for completion of discovery should be sufficiently early in the process that each party has sufficient time to use the disclosed information adequately to prepare for trial.<sup>44</sup>

Further, "the prosecuting attorney should not, because of the pendency of plea negotiations, delay any discovery disclosures required to be made to the defense under applicable law or rules."<sup>45</sup> Defense counsel should also be provided adequate time to investigate the facts of the case prior to plea negotiations: "a defendant with counsel should not be required to enter a plea if counsel makes a reasonable request for additional time to represent the defendant's interests."<sup>46</sup>

Oftentimes defense counsel must spend a significant part of every day in court waiting for their cases to be called. This time should be considered when determining appropriate caseload levels, as in-court waiting time can take away from the time attorneys have to prepare for cases and meet with clients. When possible, the chief public defender should make every effort to work with the courts to reduce in-court waiting time. In addition, the percentage of an attorney's clients that are in jail should also be considered when determining workload. It is often very time-consuming for attorneys to visit in-custody clients. Also, in rural areas or where public defenders are responsible for a number of courts, travel time between courts should also be considered when determining workload.

## **G. Case Conflicts**

Each public defender office should have written uniform policies regarding conflicts of interest. A conflict occurs most frequently when a public defender office has been assigned co-defendants in a case; however, a conflict of interest may also exist when the public defender office is assigned a defendant who was a witness in a case the office handled previously, or a defendant may be related to someone who works in the office.

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<sup>43</sup> Bureau of Justice Assistance, Keeping Defender Workloads Manageable, 9 (2001), at <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

<sup>44</sup> ABA Criminal Justice Standards: Discovery, Standard 11-4.1 Timely performance of disclosure

<sup>45</sup> *Id.* at Standard 14-3.1. Responsibilities of the prosecuting attorney.

<sup>46</sup> *Id.* at Standard 14-1.3. Aid of counsel; time for deliberation.

The determination about whether something is a conflict should not be left solely in the hands of a trial attorney. A written policy should require that at least a supervisor review staff counsel's suggestion about whether something is a conflict. This written policy should also take into consideration the rules/procedures in the office's particular jurisdiction. For example, in some states an attorney is not required to declare a conflict until trial; in other states an attorney is prohibited in all cases from representing co-defendants. Therefore it is important to be sure that the law in your state is reflected in the written conflict policy in the public defender office.

There are a number of ways that public defender programs deal with co-defendants; however, typically the public defender should represent the first co-defendant that is appointed to the office, and the court should be notified that any additional co-defendants must be reassigned outside of the office. The office should put the reason for the conflict in writing when requesting that the court reassign the case.

It is also important to be aware that conflicts may not be discovered until a considerable amount of time has been put into a case. Therefore, it is also critical to have some type of computer case-tracking system available at the time of appointment in order to determine whether a conflict of interest may exist.

## **H. Personnel Policies**

Every public defender program should have written personnel policies that are adopted by the board of directors or chief public defender if there is no board. In addition to general human resources policies, such as vacation and sick time, the personnel manual should include performance standards for staff attorneys, supervisors, and support staff personnel, particularly investigators.

Both the American Bar Association and the National Legal Aid and Defender Association have developed performance standards for criminal defense representation.<sup>47</sup> These performance standards cover a comprehensive list of issues that defenders must deal with at each stage of a criminal proceeding, including initial interviews, pretrial proceedings, investigations, trial preparation, sentencing options, etc. Each public defender office should have a set of performance guidelines that are patterned after either the NALDA standards or other national standards, as they reflect the knowledge and experience gained by many public defenders over the years.

Certain cases are more complex than others, which makes the drafting of general performance guidelines a difficult task; however, there are procedures common to all criminal cases with which an attorney must be familiar. Just as criminal cases vary substantially in their detail, jurisdictions vary in practice and procedure, and performance guidelines should take into account practice requirements of the jurisdiction. Performance guidelines are intended to be comprehensive, but not exhaustive. Depending upon the type of case in a particular jurisdiction there may well be additional actions that an attorney should take or consider.

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<sup>47</sup> For the ABA Standards, please see [http://www.abanet.org/crimjust/standards/dfunc\\_toc.html](http://www.abanet.org/crimjust/standards/dfunc_toc.html); for the NLADA Standards, please see [http://www.nlada.org/Defender/Defender\\_Standards/Performance\\_Guidelines](http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines).

With regard to the hiring and firing of public defender staff:

Defender staff attorney appointments should be made by the Defender Director, based upon merit, entirely free of political and other irrelevant factors.... Defender promotion policies should be tied to merit and performance criteria, and removal of staff attorneys should be only for cause, except during a fixed probationary period which an office may employ for newly hired attorneys.<sup>48</sup>

As stated above, performance reviews of all staff should occur at least twice annually and should be put in writing. Supervisors should conduct these periodic staff evaluations based on objective standards.

## **I. Personnel Resources**

There are no national standards on the appropriate ratio of support staff to attorneys for public defender offices. The ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-1.4. Supporting services states:

The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process.

NLADA has developed a similar standard: “social workers, investigators, paralegal and paraprofessional staff as well as clerical/secretarial staff should be employed to assist attorneys in performing tasks not requiring attorney credentials or experience and for tasks where supporting staff possess specialized skills.”<sup>49</sup>

When a public defender office first opens, the number of necessary support staff may be difficult to calculate. NLADA Guidelines recognize this difficulty: “defense system personnel needs should be projected by means of detailed resource planning. Such planning requires, at a minimum, detailed records on the flow of cases through the criminal justice process and on the resources expended on each case at each step in the process.”<sup>50</sup> Chief defenders should be responsible for adjusting the number of support staff as they see necessary depending on the workload of the office, such that attorney administrative work is minimized, and the office should be provided with sufficient funds to do so. There should be sufficient secretarial staff so that attorneys do not have to undertake administrative work that can be performed by another, such as typing up form letters and motions.

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<sup>48</sup> NLADA Guidelines for Legal Defenses Systems in the United States, Standard 5.9 Recruitment, Hiring, Promotion and Removal of Defender Office Personnel (1976).

<sup>49</sup> NLADA Guidelines for Legal Defenses Systems in the United States, Standard 4.1 Task Allocation in the Trial Function: Specialists and Supporting Services (1976).

<sup>50</sup> *Id.* at Standard 3.3 Projecting Defense System Personnel Needs.

With regards to the use of law students/interns, the NLADA Guidelines for Legal Defenses Systems in the United States, Standard 4.4 Use of Law Students, states:

[L]aw schools throughout the nation should be encouraged to establish closely supervised clinical criminal law courses in cooperation with local defender offices.... Law student programs should not be viewed as a long-term answer to the problem of adequately meeting the needs of defendants in the criminal justice system.

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

Every defender office should have adequate bilingual staff/interpreters. If not, there should be a mechanism for providing an interpreter at every meeting the attorney has with his/her client.

Finally, the chief public defender should be responsible for creating the office budget, and should participate in any state, county or local hearings regarding the budget.

#### **J. Parity with the District Attorney's Office**

A number of national standards call for, at minimum, pay parity between public defender and prosecutor or other court system offices. The ABA Ten Principles of a Public Defense Delivery System, Principle 8 (Feb. 2002) states that in a properly functioning system:

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. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.

The NLADA Guidelines for Legal Defense Systems in the United States, and the National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts also discuss pay parity.<sup>51</sup>

#### **K. Investigation**

It is a fundamental principle of criminal defense representation that an attorney should conduct a prompt independent investigation of a client's case. "Counsel has a duty to conduct an

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<sup>51</sup> For instance, "[t]he budget of a public defender for operational expenses other than the costs of personnel should be substantially equivalent to, and certainly not less than, that provided for other components of the justice system with whom the public defender must interact, such as the courts, prosecution, the private bar, and the police." National Advisory Commission on Criminal Justice Standards and Goals, Standards for the Defense, Standard 13.14 Supporting Personnel and Facilities (1973).

independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible."<sup>52</sup>

NLADA proposes that each defender office have a minimum of one investigator for every three staff attorneys; however, it is not clear whether this applies to offices handling misdemeanor cases only. Presumably the standard relates to offices with mixed felony and misdemeanor representation, and thus a lower ratio of investigators to attorneys may be appropriate for misdemeanor public defender offices. In addition, the NLADA standards recommend that investigators receive criminal investigation training, and have investigative experience.<sup>53</sup>

There should be an investigation request form developed for new public defender offices. The form should contain specific information on what tasks the attorney would like the investigator to perform, what the attorney seeks to find, and any pertinent information the attorney has in the client's case file. The investigator should not be used for in-person client meetings in lieu of the staff public defender assigned to the case.

Attorneys should not interview witnesses unaccompanied, and it is advisable that an investigator either conducts the interview or accompanies the attorney on the interview:

Unless defense counsel is prepared to forgo impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person.<sup>54</sup>

## **L. Expert/Other Services**

Notwithstanding the fact that experts are not used as often in representation of a defendant for a misdemeanor charge as they are in felony cases, misdemeanor public defender offices should have a clearly articulated policy of the use of experts. Prior approval for an expert should be provided by the chief public defender or supervisor. Judges or other county officials should not be responsible for approving expert requests. "Defender office budgets should include funds for procurement of experts and consultants... [and] [d]efender offices should not be required to seek prior approval or post-expenditure ratification of payments for such services except in those limited cases where the expenditure is extraordinary."<sup>55</sup>

The importance of securing expert services is articulated in numerous national standards. ABA Standards for Criminal Justice, Providing Defense Services, Standard 5-1.4 states:

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<sup>52</sup> NLADA Performance Guidelines for Criminal Defense Representation, Guideline 4.1 Investigation (2001).

<sup>53</sup> NLADA Guidelines for Legal Defense Systems in the United States, 4.1 Task Allocation in the Trial Function: Specialists and Supporting Service.

<sup>54</sup> ABA Criminal Justice Standards: Defense Function, Standard 4-4.3 Relations With Prospective Witnesses.

<sup>55</sup> NLADA Guidelines for Legal Defense Systems in the United States, Guideline 3.4 Nonpersonnel Needs in Defender Offices.



[A jurisdiction's] legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process....”

Public defenders and court-appointed counsel have a professional responsibility to zealously represent their clients and to analyze both the factual and legal issues in the case. Appropriate requests for and use of expert services and investigators are implicit in meeting ethical obligations lawyers have to their clients.

Public defender offices should also establish relationships with local social service agencies, such as those providing mental health or substance abuse counseling, so that attorneys may easily refer their clients to what can often be necessary services.

## **M. Motions, Hearings**

“The attorney has an obligation to attempt to secure the pretrial release of the client under the conditions most favorable and acceptable to the client.”<sup>56</sup> It is important that any public defender office have provisions for the early appointment of counsel so that counsel may advocate for pretrial release, particularly in misdemeanor cases where a court is more likely to grant pretrial release than when a defendant is charged with a felony. Where appropriate attorneys should seek a client's release on personal recognizance, particularly where the defendant has been granted bail but is unable to post bond.

According to the NLADA Standards:

a. Counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and, where appropriate, to make a proposal concerning conditions of release.

b. Where the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under the procedures available.

c. If the court sets conditions of release which require the posting of a monetary bond or the posting of real property as collateral for release, counsel should make sure the client understands the available options and the procedures that must be followed in posting such assets. Where appropriate, counsel should advise the client and others acting in his or her behalf how to properly post such assets.<sup>57</sup>

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<sup>56</sup> NLADA Performance Guidelines for Criminal Defense Representation, Guideline 2.1 General Obligations of counsel Regarding Pretrial Release.

<sup>57</sup> *Id.* at Guideline 2.3 Pretrial Release Proceedings.

With regards to other pretrial motions, after a thorough investigation into the case and considering applicable law, defense counsel “should considering filing an appropriate motion whenever there exists a good-faith reason to believe that the applicable law may entitled the defendant to relief...”<sup>58</sup> The NLADA Performance Guidelines for Criminal Defense Representation, Guideline 5.1, The Decision to File Pretrial Motions, provides a very detailed list of issues that counsel ought to consider addressing in a pretrial motion. This guideline should be provided to public defender staff counsel as part their performance measures. In addition, Guideline 5.2, Filing and Arguing Pretrial Motions and Guideline 5.3, Subsequent Filing of Pretrial Motions should also be included in attorney performance measures regarding pretrial motions.

## **N. Equipment and Law Library Resources/Availability**

The national standards regarding public defender office equipment and law library resources are very detailed. With regards to office equipment:

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

Defender office facilities should include separate offices for management, legal and social work staff, shared space for investigators, paraprofessionals and other support staff, secure space for confidential records, equipment and petty cash, and reasonable allocations of ancillary space related to staff size for reception and client waiting areas, conference rooms and library, mailroom and reproduction, supplies and storage....

Defender offices should be equipped with quality communications and reproduction equipment. Where data requirements so warrant, defender offices should have data processing facilities and services on lease or contract which are designed for defender requirements. If the defender office is included in a criminal justice information system, the system should be required to meet defender specifications regarding reporting frequency, data definition and format.<sup>59</sup>

With regards to library materials, the National Advisory Commission on Criminal Justice Standards and Goals, Standards for the Defense, Standard 13.14 Supporting Personnel and Facilities recommends that:

The defender office should have immediate access to a library containing the following basic materials: the annotated laws of the State, the State

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<sup>58</sup> *Id.* at Guideline 5.1, The Decision to File Pretrial Motions.

<sup>59</sup> NLADA Guidelines for Legal Defense Systems in the United States, Guideline 3.4 Nonpersonnel Needs in Defender Offices

code of criminal procedure, the municipal code, the United States Code Annotated, the State appellate reports, the U.S. Supreme Court reports, Federal courts of appeal and district court reports, citators governing all reports and statutes in the library, digests for State and Federal cases, a legal reference work digesting State law, a form book of approved jury charges, legal treatises on evidence and criminal law, criminal law and U.S. Supreme Court case reporters published weekly, loose leaf services related to criminal law, and, if available, an index to the State appellate brief bank.

All public defender offices should have access to some type of computerized case-search database such as Lexis, Westlaw or a similar database, and provide training as needed.

### **O. Case Dispositions**

It is understood that most criminal cases are resolved by plea agreement, and this is necessary for the efficient functioning of the criminal justice system. What is at issue here is whether defense counsel has undertaken a proper investigation into his/her client's case to ensure a fair plea deal. The point in the criminal justice process in which a plea most often occurs generally depends on the local practice. If arraignment takes place a day or two after arrest, it is likely that defense counsel has been unable to appropriately investigate the case prior to the client entering a plea. If arraignment takes place two weeks after arrest, thus possibly allowing the attorney sufficient time to investigate a case, then a plea at that time may be appropriate. Therefore, at what stage a plea is entered is not as crucial as whether defense counsel has had sufficient time to conduct an appropriate investigation, fully advise the defendant of his/her options, and provide the defendant with sufficient time to consider the plea agreement.

The ABA Criminal Justice Standards, Pleas of Guilty, Standard 14-3.2. Responsibilities of defense counsel, states, in part:

(b) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.

(e) At the outset of a case, and whenever the law, nature and circumstances of the case permit, defense counsel should explore the possibility of a diversion of the case from the criminal process.

(f) To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

Parts "e" and "f" are also very important considerations when evaluating a plea agreement. Defense counsel should receive training so that they are able to advise defendants

about the collateral consequences of a guilty plea, and defendants must be provided sufficient time to fully consider and weigh these consequences. Also, as the standard states, the possibility of diversion, if available, should be explored by counsel.

## **P. Attorney/Client Contact**

The questions in this section serve two purposes: first, to determine whether attorneys are meeting certain necessary performance requirements with regards to client contact; and, second, to use the answers as factors to be weighed in determining workload.

“The purpose of the initial interview is both to acquire information from the client concerning pretrial release and also to provide the client with information concerning the case.”<sup>60</sup>

A client interview should take place as soon as possible after arrest. For in-custody clients the meeting should be in-person at the jail in a private area where counsel and client will not be overheard. If a client is out-of-custody, there should be sufficient confidential office space for counsel to meet with his/her client in the public defender office.

The distance, travel time and wait time at jail should all be factors used in determining an attorney’s workload.

## **Q. Case Processing in the Court System**

The method and timing for processing criminal cases varies greatly across the United States. The first place to look to determine whether cases are being processed as expediently as possible would be state and local rules regarding criminal case processing. In Texas, this would include the most recent County Plan in the jurisdiction in question, and the Texas Code of Criminal Procedure, particularly, but not limited to, Chapter 26 (Arrestment).

In terms of national standards, the NLADA Guidelines for Legal Defenses Systems in the United States discuss at what point defense counsel should become involved in criminal justice process, and what procedures public defender programs should employ to ensure early representation of counsel:

### **1.2 Time of Entry**

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

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

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

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<sup>60</sup> NLADA Performance Guidelines for Criminal Defense Representation, Guideline 2.2 Initial Interview.

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

(a) Respond to all inquiries made by, or on behalf of, any eligible person whether or not that individual is in the custody of law enforcement officials;

(b) Establish the capability to provide emergency representation on a 24-hour basis;

(c) Implement systematic procedures, including daily checks of detention facilities, to ensure that prompt representation is available to all persons eligible for services;

(d) Provide adequate facilities for interviewing prospective clients who have not been arrested or who are free on pretrial release;

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

## **R. Data Reporting**

For case counting and assignment purposes, the public defender office should establish a clear definition of a case, in consultation with the courts and district attorney's office. The most frequent and acceptable method of counting criminal cases is recommended by the National Center for State Courts, which states that a single criminal case should be counted by "each defendant and all charges involved in a single incident."<sup>61</sup> The Texas Task Force on Indigent Defense has adopted a similar definition of a case, which is the same definition used by the Texas Office of Court Administration:

For the purpose of these reports, the number of criminal cases reported on this monthly reporting form should be based on the number of defendants named in an indictment or information (documents filed to bring charges against a person). That is:

1. If a single indictment or information names more than one defendant, there is more than one case: as an example, if three defendants are named in one indictment, count this as three cases.

2. If the same defendant is charged in more than one indictment or information, there is more than one case: as an example, if the same person is named in four separate indictments, count this as four cases.

3. Finally, if an indictment or information contains more than one count (Article 21.24, CCP), report this as one case and report the case under the category for the most serious offense alleged.

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<sup>61</sup> STATE COURT MODEL STATISTICAL DICTIONARY 19 (1989).

Every case that the appellate public defender office receives should be entered into a case management system. This will allow for the counting of all cases including those where the office withdraws due to a conflict of interest, and thus will assist the chief appellate defender in determining case assignments or additional staffing needs.

Every case that the public defender office receives should be entered into the case management system. In the “Data Elements to Track” section we provided a list of data elements that should be tracked for each case. The more complete the case management system is in terms of capturing relevant data, the greater variety of reports the office may run, and thus the office will be better at advocating for additional money or illustrating its efficiency and cost-effectiveness. Sample reports may be created that illustrate the following: number of cases handled by each individual attorney/the whole office, attorney workload, number of days between events, cost-per-case, etc. The chief public defender should be responsible for reporting data to the county, any oversight board/entity, the Task Force, etc.

#### **S. Data Elements to Track**

Every public defender system should have a case-tracking system in place that is able to store the necessary data needed to evaluate the public defender office from a quantitative standpoint. For many small offices in the initial stages of development, this may be achieved by a simple Microsoft Access or Excel database. As public defender offices begin to grow, a more advanced case-tracking system may be necessary.

According to the NLADA *Guidelines for Legal Defense Systems in the United States*, 3.4 Nonpersonnel Needs in Defender Offices:

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

Included in the evaluation protocol is a list of data elements that should be tracked by every misdemeanor public defender office. Each case tracked should include all pertinent dates, such as date of arrest, date of arraignment, and date of disposition, and the cases should also be tracked by the most serious charge (if more than one charge is alleged). Every case that the public defender office is assigned should be entered into the office’s database, even if the public defender office withdraws due to conflict or other reasons – and the reason for withdrawal should be indicated. The numbers should be run periodically to determine whether the public defender office is providing services in a timely cost-efficient manner, and to determine where improvements, if any, need to be made.

## EVALUATION PROTOCOL FOR MISDEMEANOR\* PUBLIC DEFENDER OFFICES

### A. Oversight of the Public Defender and Office

1. Is there a public defender oversight board? If so, is the makeup of the board sufficiently varied to include a variety of stakeholders?
2. What is the role of the oversight board? What is the chief public defender's relationship to the board?
3. Who calls and runs meetings? How often do meetings occur?
4. Does the oversight board improperly interfere with the handling of cases/legal issues?
5. Must the board approve budget requests?
6. Is the board able to advocate effectively on behalf of the public defender office?
7. Does the oversight board hire the chief public defender? If not, who does?
8. Can the board fire the chief public defender at will or must it be for cause?
9. What is the judiciary's role with regards to the chief public defender and the office?
10. Do judges provide advice regarding public defender office policy, such as caseload?
11. Do judges attempt to influence any legal aspects of the office's cases or legal policy in the office?
12. What is the chief public defender's relationship to county officials?

### B. Supervision

1. What are supervisors' roles and what are their responsibilities? Are these duties written?
2. Is there an adequate ratio of supervisors to staff counsel?
3. Are there policies for mentoring roles?
4. Are there timely and consistent staff evaluations? Is hiring and firing based on objective evaluations?
5. Are supervisors' caseloads limited?
6. Are there incentives for supervisor promotions? Is supervisor status the only promotion available to attorneys?

### C. Training

1. What kind of training is there for new personnel?
2. Are new lawyers provided training on trial skills, local practices, criminal procedure and criminal law?
3. What about specific trainings on issues such as immigration or defending clients with mental health issues?
4. Is there a policy for routine refresher training?
5. What is the process for attorneys to attend outside trainings? Are their costs covered?

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\* While this protocol was developed to be used in evaluating a misdemeanor public defender office, it can also be used to evaluate a felony-only or mixed felony and misdemeanor public defender office as well.

6. Is training required for non-attorney staff?

#### **D. Caseload**

1. Are there standards for maximum caseload? Does the caseload limit mirror the National Advisory Commission limit of 400 misdemeanor cases per attorney annually? If not, what is the caseload limit and why?
2. Is there a case-tracking system in place? If so, what type of case-tracking system is in place? Does the case-tracking system meet the needs of the office and is it set up in a way that will allow it to grow as the office grows? Is there a county-wide case tracking system in place?
3. Who is responsible for monitoring caseload?
4. How are cases allocated in the office? Who makes appointments? Are cases appointed directly from the bench? If so, are there mechanisms in place to avoid overload?
5. How are excessive caseload situations handled? Are there policies for staff attorneys to shut off the flow of new cases when they are overloaded?
6. Do public defenders handle private cases as well? If yes, with what restrictions?

#### **E. Workload**

1. Are there written standards for maximum workload?
2. Is there a case-weighting system?
3. What factors are considered when determining attorney workload?

#### **F. Other Workload Factors**

1. Does the public defender office have a good working relationship with the assistant district attorneys? Is discovery received in a timely manner?
2. Are there any prosecutorial policies or practices that affect workload (e.g., providing discovery, plea offers – are they reasonable and do they come at an early stage in case)?
3. How often are attorneys in court? Does this leave attorneys enough time to get work done in the office?
4. How much time is spent waiting in court?
5. What percentage of your clients are in custody?
6. What is the trial rate for each type of case?

#### **G. Case Conflicts**

1. Are there uniform written policies against handling multiple co-defendants?
2. Are there uniform written policies regarding other conflict of interest cases?
3. Does the office have a case-tracking system that identifies conflicts shortly after appointment? If there is no case tracking system is there timely determination of conflicts?

#### **H. Personnel Policies**



1. Is there a personnel manual with written policies?
2. Has the public defender office developed written performance standards for staff attorneys? Do they reflect any statewide standards if they exist? ABA standards? NLADA standards?
3. Is compliance with performance standards mandatory or voluntary?
4. Is compliance monitored?
5. If standards do exist, what is the perception of their impact on quality of services?
6. Who has the authority to hire and fire personnel?
7. Who has the authority to hire and fire the chief public defender?
8. What is the procedure for filling a vacant position?
9. Do performance reviews occur? Do they occur regularly for all staff?
10. What is the procedure for termination of an employee?

**I. Personnel Resources**

1. What is the number of staff attorneys by level of experience? Are they full-time or part-time?
2. With regards to support staff, what is the:
  - a. Ratio of secretaries to attorneys
  - b. Ratio of investigators to attorneys
  - c. Ratio of paralegal staff to attorneys
  - d. Ratio of social workers to attorneys
  - e. Ratio of sentencing specialists to attorneys?
3. Are law students/interns available? How are they used?
4. Is there adequate bilingual staff/interpreters?
5. Who will type letters, motions, etc? What does the secretary do for the attorneys?
6. Who prepares and oversees the office's budget?

**J. Parity with the District Attorney's Office**

4. Is there salary parity between the Chief Misdemeanor District Attorney and the Chief Misdemeanor Public Defender?
5. Is there salary parity between trial assistant district attorneys and trial public defenders? At all experience levels?
6. Is there comparable staff between the district attorney's misdemeanor section and the misdemeanor public defender's office? Including: attorneys, clerical, investigators, administration, supervisors?

**K. Investigation**

1. Does the office have an on-staff investigator? If so, how many? Is the investigator full or part-time?
2. How often do attorneys normally conduct an independent investigation of a client's case?
3. If there is no on-staff investigator, who conducts the investigations? What is the policy for requesting funds to hire an investigator?
4. Does the investigator perform any duties in addition to conducting investigations?

5. What are the policies and procedures for conducting investigations? Is there an office policy that requires an attorney to file a written request for an investigation?
6. What types of tasks do attorneys assign the investigator? Do attorneys conduct witness interviews? Does the investigator visit clients when the attorney cannot?
7. At what point in the life of the case are investigations conducted? How long after arrest?

**L. Expert/Other Services**

1. In what percentage of cases do attorneys normally request services? (e.g., expert witnesses, mental health or substance abuse counseling, medical/psychiatric exams, forensic/lab tests)
2. What is the process to access experts and non-attorney services (other than investigations)?
3. Do attorneys have any difficulties getting requested services?
4. What is the process for getting interpreters in court, and out-of-court? Are there any problems with getting interpreters?

**M. Motions, Hearings**

1. How often are bond reduction motions filed?
2. How often are defendants granted PR bonds on request? What is the return rate for defendants released on PR bonds?
3. What sorts of pre-trial motions do attorneys file? How often do they normally file them?
4. Is there an electronic motion bank for all attorneys to access?
5. In what percentage of attorneys' cases do they have contested hearings on:
  - a. Bail/bond reduction
  - b. Suppression issues
  - c. Other

**N. Equipment and Law Library Resources/Availability**

1. Photocopiers?
2. Fax machines?
3. Automated telephone system and voice mail?
4. E-mail?
5. Internet?
6. County-owned cars for investigators and/or social workers?
7. Does the office have a law library? Or is there a law library provided by a local bar association or the courts for use by public defender staff?
8. What are the normally circulated publications in the office?
9. Do trial lawyers do any legal research?
10. CD-Rom availability?
11. WESTLAW/Lexis availability?

## **O. Case Dispositions**

What percentage of the office's cases are disposed of at the following stages of the proceedings:

- a. plea at arraignment
- b. plea at pre-trial conference
- c. plea at another stage
- d. bench trial
- e. jury trial
- f. dismissal by prosecution
- g. defendant retained counsel
- h. other (specify)

## **P. Attorney/Client Contact**

1. When and where does initial in-person contact take place for both in-custody clients and out-of-custody clients? Is it possible to meet with clients sooner? Is there private space to speak with clients in- and out-of-custody?
2. Jail Visits
  - a. How far must attorneys travel to visit in-custody clients? (jail and prison)
  - b. What are the attorney visitation hours, and how long do attorneys wait to gain access to clients?
  - c. How often do attorneys make in-custody visits?
  - d. Can attorneys communicate by telephone or video-phone with in-custody clients?
  - e. Are there other adequate means for counsel to maintain confidential correspondence with clients?
3. How often do attorneys normally meet with a client during the life of a case?
4. Are there facilities available to attorneys at court to meet privately with clients/families/witnesses?
5. Do attorneys correspond regularly via mail with their clients? Do attorneys provide clients with copies of discovery, court papers, motions, etc.? Is there an office policy regarding such?
6. Are collect calls from clients accepted?

## **Q. Case Processing in the Court System**

1. Is there a delay in processing criminal cases following arrest in your jurisdiction?
2. If yes, is the delay caused by law enforcement? By the District Attorney's Office? By the courts? By the public defender's office?
3. Does law enforcement get their offense reports to the district attorney in a timely manner?
4. Does the district attorney's office file the charges in a timely manner?
5. Is there a delay from the time charges are filed by the district attorney to a court date being set?

## **R. Data Reporting**

1. What is the definition of a case in the public defender office? Are cases counted by case number, or defendant and incident?
2. Does the public defender case-counting method align or conflict with the case-counting methods of the district attorney and courts?
3. Are cases tracked by case type? Are cases tracked by attorney?
4. If your office handles probation violations, are they counted as new cases?
5. How are conflicts and other withdrawal cases counted?
6. Who is responsible for entering data in your office?
7. Who is responsible for reporting the data to the county? What data is reported, and how often? Who reports the data to the OCA/Comptroller?

## **S. Data Elements to Track**

1. Time from arrest to appointment
2. Time from appointment to initial client interview
3. Time from arrest to complaint filed
4. Time from interview to complaint filed
5. Time from complaint filed to court hearing
6. Time from disposition to release
7. Time from appointment to release
8. Time from arrest to release with judgment
9. Average cost-per-case for the public defender cases; for assigned counsel cases
10. Number of cases appointed from wheel system
11. Number of cases appointed from bench
12. Cost for indigent defense services by county court
13. Number of dispositions broken out by jail and non-jail cases by: jury verdict, non-jury trial, guilty jury verdict, not guilty jury verdict, guilty plea, dismissals, deferred adjudication, order barring offense
14. Average number of court-appointed counsel assigned over time per-defendant
15. Average cost-per-case when a defendant is represented by two or more court-appointed attorneys
16. Daily rate for housing an inmate in the county jail – to calculate possible savings by decreased number of days defendants held pretrial
17. Number of inmates housed in the county jail by category:
  - Pretrial
  - On warrant
  - Serving a short sentence
  - Federal hold for state prison
  - Inmates held in other county jails
  - Inmates held from other counties
  - Inmates held in private jails in county
  - Serving a state sentence