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**Second Interim Report:
An Evaluation of the Bexar and Hidalgo County Public
Defender Offices After One Year of Operation**

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Executive Summary

In early 2005, The Spangenberg Group (TSG)¹ 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 second of three reports to be issued under the contract. Our first report, the site work for which was conducted in October 2005, provided an overview of the startup of the offices and a baseline evaluation of the systems in place in each county prior to the establishment of the public defender offices.² Our current report provides an evaluation of each public defender office after one year of operation. The report includes two evaluation protocols – one for evaluating appellate public defender offices and a second that can be used to evaluate misdemeanor and/or felony public defender offices. In addition, we have included a narrative section on how to evaluate these programs using national standards. We have divided the report into three parts: Part 1 is an introduction applicable to both counties, Part 2 is an evaluation of the Appellate Public Defender Office (APDO) in Bexar County, and Part 3 is an evaluation of the Hidalgo County Public Defender's Office (Hidalgo PD).

TSG and Task Force staff visited Bexar and Hidalgo Counties in late October 2006, one year after each office became fully operational. We conducted interviews with many of the same people interviewed for our Initial Interim Report, as well as several additional people involved in the criminal justice systems in each county, and all but one staff member in both public defender offices. In addition, we analyzed data from courts, auditors' offices, jails and the public defender offices in each county.

We found that in one year both public defender offices have made significant improvements to their respective indigent defense systems, and we believe the offices will continue to improve the systems over time. Not only has the quality of indigent defense services improved in each county, initial data indicates 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. While a number of improvements to each system are evident after only one year of operation, we will be able to get a much better snapshot of the improvements each office has made once they have been in operation for two full years, as the first year does not give a complete picture of the impact of a public defender office. Start up costs, the time it takes to phase in a full caseload and the fact that appeals take close to, if not more than, a year to resolve, are all factors that affect the data analyzed. The following are some key findings and recommendations for each county.

¹ The Spangenberg Group (TSG) is a nationally recognized expert in the area of improving indigent defense systems. Established in 1985, TSG has conducted research in all 50 states, and internationally.

² 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), available at <http://www.courts.state.tx.us/tfid/pdf/FinalRevisedVersionInitialInterimReport.pdf>.

BEXAR COUNTY APPELLATE PUBLIC DEFENDER OFFICE

Key Findings:

- The APDO has successfully sped up the appellate process while providing high quality defense for indigent appellants. The data confirms that the timing of appeals for the APDO is far shorter than the timing of appeals for assigned counsel. The office requests fewer continuances than assigned counsel; thus their briefs are filed sooner and the public defender cases reach final disposition sooner.
- By working with the trial courts and the Fourth Court of Appeals, the Chief Appellate Defender has been able to expedite the process of evaluating possible procedural default cases to determine whether the defendant in fact has a right to appeal, while still protecting the rights of defendants.
- Defendants assigned to the APDO are less likely to have more than one attorney assigned to their case. Generally speaking, the fewer number of attorneys assigned over the life of the appeal, the shorter the appeal takes. It also drives up the cost of an appeal to have multiple attorneys assigned to the case.
- The Chief Appellate Defender has created a very well-functioning office staffed with experienced attorneys and an excellent administrative assistant.
- The Chief Appellate Defender also created a comprehensive and well thought out policy and procedures manual.
- We were told by numerous stakeholders, including justices from the Fourth Court of Appeals and the County Judge, that indigent appellants are receiving consistent high-quality representation in a shorter amount of time, a great improvement from the assigned counsel-only system previously in place.

Key Recommendations:

- The Chief Appellate Defender should be present at any commissioners court meeting when the APDO is discussed and have an open line of communication with the commissioners court as needed.
- The APDO should revisit its workload standards originally created by the Chief Appellate Defender, and rework them into practical standards the office can use immediately. This will provide an objective way of measuring workload and an objective maximum workload standard. This helps in predicting the public defender office budget and staffing needs, and provides the county with budget predictability over time.
- The review of procedural default cases does not take as long as an appeal, but should be counted towards the workload of the office. Once an accurate workload is established, we can calculate an accurate cost-per-case. To accomplish this, attorneys at the APDO

should record the amount of time they spend on each case during a specified amount of time and then use this information to calculate a “case-weight”, which can then be used to determine how much money a particular type of case costs on average.

- The Chief Appellate Defender should not have a full caseload, as she needs time for administrative tasks, oversight, and supervision. We recommend the Chief Appellate Defender’s caseload be decreased to 50 percent of a full-time caseload and adjust as needed. With the Chief Appellate Defender taking a reduced caseload, the office will need an additional staff attorney.
- The APDO has an immediate need for an additional support staff position. This is due in part to the great length of time and effort that appellate defenders must spend obtaining the record from the court reporters.
- The salary and staffing levels of the APDO are significantly less than those of the Appellate Section of the District Attorney’s Office, which has only a slightly larger caseload and handles the same types of cases. According to national standards, the APDO should not only have parity of salary, but parity of staff and resources with the Appellate Section of the District Attorney’s Office (reflective of the percentage of all appeals the APDO handles).

HIDALGO COUNTY PUBLIC DEFENDER’S OFFICE

Key Findings:

- The establishment of the Hidalgo PD did not significantly increase annual indigent defense expenditures for misdemeanor cases, and expenditures continued to rise at a similar pace to the year prior. The average cost-per-case for public defender cases is significantly less than the average cost-per-case for assigned counsel misdemeanor cases.
- The Chief Public Defender has developed an extensive policy and procedures manual that should be used as a model for other public defender offices.
- The Hidalgo PD has been able to successfully shorten the time from arrest to pre-disposition release, and arrest to final disposition throughout the county, thus reducing the pretrial jail population and subsequently the amount of money spent on housing inmates in the Hidalgo County Jail. This has also helped save money by reducing jail overcrowding and thus the costs for housing inmates in other institutions has decreased.
- To help reduce the number of days defendants spent in custody pre-disposition, the Hidalgo PD files bond reduction motions or motions for a personal recognizance bond when appropriate. Not only are the public defender efforts reducing the amount of money the county spends on housing defendants in jail prior to their initial appearance, but the ability of the Hidalgo PD to successfully reduce bond amounts also saves their clients money.

- In its continual efforts to speed up the system, the Hidalgo PD worked with the county jail to streamline the process of accepting approved bond reduction motions by fax, and some magistrates will now also accept bond reduction motions by fax. In a county as large in square miles as Hidalgo, this saves a significant amount of travel time.
- The Hidalgo PD has set up several system checks to monitor the length of time in-custody defendants spend in jail. If a public defender client has been in custody for more than six days without charges filed, the Chief Public Defender will contact the district attorney's office to find out why charges have not been filed yet. The Hidalgo PD also monitors the time from judgment to release, and has decreased this time from over a day to less than half a day.
- For non-public defender pretrial inmates, on a weekly basis the Hidalgo PD will receive a list of inmates who have been in custody for 30 days or more, and the Chief Public Defender will determine why the defendants are still in custody. This additional service the public defender provides to the county helps to reduce the jail population and catch cases that have "fallen through the cracks."

Key Recommendations:

- The Hidalgo PD does not have formal workload standards, but should develop them as soon as possible. Workload standards 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.
- Pay parity with the Misdemeanor Section of the District Attorney's Office ends after one year of practice. There should not only be salary parity but parity of support staff and resources as well, reflective of the percentage of misdemeanor cases the Hidalgo PD handles. A reconsideration of assistant public defender salaries after one year of practice is recommended.
- Over the last year, the Hidalgo PD has lost three attorneys including the first assistant attorney. We were told that all three attorneys left because the pay is significantly less than what an attorney could make in private criminal practice. Part of the discrepancy in pay may be due to the fact that attorneys in private practice can earn more taking felony cases, while attorneys in the public defender's office in Hidalgo County handle only misdemeanor cases. Therefore assistant public defender salaries will hit a ceiling unless or until they receive appropriate training and begin to take felony appointments.
- We recommend that the Chief Public Defender add formal policies on annual performance evaluations and specific training requirements to the Hidalgo PD policy and procedures manual.
- For the initial in-custody interview, public defender staff attorneys do not discuss the facts of the case with the defendants. We recommend that at the initial in-custody interview, the public defender gather specific information about the case essential for

prompt investigation of the case, such as the client's recounting of the events and whether there were any witnesses.

- The nature of the criminal justice system in Hidalgo County results in a number of in-custody or jail cases pleading to time served at first appearance (or arraignment), as defendants have typically already spent a significant amount of time in jail. There are a number of factors that affect this, including the length of time law enforcement takes to get offense reports to the District Attorney's Office, and the amount of time the court takes in setting the first appearance date after charges have been filed. Participants in the criminal justice community need to work together to continue to shorten delays within the system.

Part 1: Introduction

This report is the second of three reports required pursuant to a contract between The Spangenberg Group (TSG) and 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. 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 prior to the establishment of the public defender offices.³ The purpose of our current report is to provide an evaluation of each public defender office after one year of operation, examining both qualitative and quantitative factors to determine the effectiveness of the offices. In addition, we have created an evaluation protocol, not only to evaluate the public defender offices Bexar and Hidalgo Counties, but to be used to evaluate future public defender offices in Texas.

The Spangenberg Group 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.

The current evaluation seeks to utilize both data and on-site observations to provide an analysis of the effectiveness of each office. Financial data was obtained from County Auditor Offices, and caseload data was made available by the court system and public defender offices in each county. The baseline assessment was conducted just prior to the establishment of the offices; however, there were several problems with the way data was collected in each county, which hindered our ability to provide an accurate picture of each system prior to the establishment of the offices. Our concerns about the data were raised in our last report; however, these concerns have not been fully addressed.⁴

To obtain qualitative information for the evaluation, interviews were conducted with many of the stakeholders originally interviewed to learn how satisfied they are with the new programs. We also interviewed all available staff members in each public defender office to assess how well the offices are operating programmatically and administratively. This included an examination of training, supervision, case assignment, the adequacy of support services, and other performance evaluation measures.

³ A link to the report is available at <http://www.courts.state.tx.us/tfid/pdf/FinalRevisedVersionInitialInterimReport.pdf>.

⁴ 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*, 6, 18 (May 11, 2006) [hereinafter *Initial Interim Report*] (analyzing our initial concerns about the data). A more detailed discussion about the current problems with the data can be found in the "Evaluation of Data" sections for each county in this report.

The Public Defender Offices

The Bexar County Appellate Public Defender Office (APDO) was established to improve the quality and timeliness of appellate briefs and to manage costs more effectively. In addition, some local officials felt that the method of appointment, whereby a small number of assigned counsel were appointed directly by the trial court judges, created an appearance of impropriety. Also, because the caseload fell on a small group of lawyers, there was serious appellate delay.

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 county was awarded \$370,076 to open the office, or 80 percent of the budget for the first year. The office is entering its second year, at which time funding from the state is decreased to 60 percent of the expenses, while the county pays the remainder. Funding continues to decrease by 20 percent annually until the county becomes responsible for complete funding of the office.

With a staff of four appellate attorneys, the APDO handles approximately 85 percent of all indigent criminal and juvenile delinquency direct appeals at the Fourth Circuit Court of Appeals in Bexar County. The remaining criminal and juvenile delinquency cases, primarily conflict cases, are handled by a small group of attorneys who have met the qualifications outlined in the Bexar County Plan.⁵ Appointments are still made by the trial court judges; however, when the APDO is appointed, no specific attorney is assigned, and the Chief Appellate Defender will assign cases based on individual attorney caseload to ensure that workload is evenly distributed among the staff.

The Hidalgo County Public Defender's Office (Hidalgo PD) was created to ensure that all eligible indigent defendants are appointed counsel, improve the quality of court-appointed counsel, and help reduce jail overcrowding by decreasing the amount of time defendants spend in custody pre-disposition. Prior to the establishment of the office, attorneys that met the qualifications outlined in the Hidalgo County Plan either received appointments from the bench in each courtroom, generally on a first-come, first-served basis, or were appointed from the wheel (a rotating list of attorneys eligible for appointment), and all attorneys were paid on a flat fee or hourly rate basis.⁶ This continues to be the case, although court-appointed counsel now receive a smaller number of appointments.

Like Bexar County, the Hidalgo County Commissioner's Court applied for and received a discretionary grant of \$395,490 (80 percent of the first year's budget) from the Task Force to establish a misdemeanor public defender office. The funding scheme is the same, with the county taking on increasing responsibility for the funding of the office. Both programs also have an oversight board, which will be discussed in further detail later in this report.

The Hidalgo PD is currently staffed by five attorneys, including the Chief Public Defender, who has a reduced caseload. At the time of TSG's site visit there was one vacant

⁵ See *id.* at 5.

⁶ See *id.* at 16-17.

senior-level attorney position in the office. This position has since been filled; however, there are now two open staff attorney positions – one of which was created in January 2007 to cover a newly created county court. In addition to receiving 25 percent of all misdemeanor appointments in county court on a rotating wheel of appointments, the office is also assigned cases directly from the bench, which amounts to approximately 25 percent of the total cases assigned to the office.

Site Work

The APDO became fully staffed and operational by late October 2005.⁷ One year later on October 23-24, 2006 staff members from TSG, accompanied by staff members from the Task Force, visited Bexar County. During the site visit, we met with the Chief Appellate Defender; all members of the APDO staff including attorneys and support personnel; justices and a staff attorney from the Fourth Court of Appeals; District Court judges with criminal and juvenile jurisdiction; the Executive Director of the Criminal Justice Planning and Coordination Department; the County Judge and several staff members from the Commissioners Court; members of the Public Defender Oversight Committee; the Clerk of the Court and Criminal Clerk of the Court of Appeals; and several staff from the Auditor's Office.

The Hidalgo PD became fully staffed and operational on October 21, 2005. Our site visit took place on October 25-27, 2006. During the site visit, we met with the Chief Public Defender, all but one member of his staff including attorneys and support personnel, judges from the County and District Courts, a Justice of the Peace, various employees from the Auditor's Office, a number of employees from the County Information Technology Department, the Chief Misdemeanor District Attorney, the County Judge, several private court-appointed counsel, an employee from the Indigent Defense Department, and several people from the Hidalgo County Jail including the Commander and Captain. We also conducted court observation in one of the county courts.

TSG would like to thank Bexar County Chief Appellate Defender Angela Moore and Hidalgo County Chief Public Defender Jaime Gonzalez for scheduling the meetings for our site visit, providing data and information about their programs, and answering numerous questions for this report.

Evaluation Protocol

To evaluate the public defender offices in Bexar and Hidalgo Counties, TSG developed two evaluation protocols to be used during our October 2006 site visit – one for misdemeanor public defender offices, the other for appellate defender offices, although both contained a number of similar questions. The evaluation protocol consists of a number of questions, grouped by category, to be asked of stakeholders in each county's criminal justice system. The protocol sought to garner information about system costs, the quality of representation provided by the public defenders, and whether the appropriate population is being served. It should be noted that

⁷ The Chief Appellate Defender was hired in late August 2005 and began accepting appointments in early August 2005, prior to the office becoming fully staffed.

the evaluation protocol developed for evaluating misdemeanor public defender offices can also be used to evaluate public defender offices handling felonies or a mixed caseload.

There are two broad categories to examine when evaluating public defender offices. First is an examination of the program qualifications in place in the jurisdiction being evaluated, in other words the specific policies or systems that every public defender office should have in place. This would include issues regarding eligibility for public defense, availability of counsel, attorney qualifications, conflict of interest policies, etc. The second category is a performance evaluation of the office. This includes the quality of the legal work in the office, whether investigations are conducted, experts are sought, what motions are made, etc. In addition to these two categories, data must be sought from the public defender offices, courts, auditor offices, jails, and any other stakeholders.

There are certain sections of the evaluation protocol that are applicable to both appellate and misdemeanor public defender offices. These include:

Program Qualifications

- **Independence of the Public Defender and Office:** to determine whether the public defender office, and the chief public defender is sufficiently independent from the judiciary and any oversight board
- **Training:** to determine whether recent law graduates are receiving necessary and appropriate training prior to commencing representation, and whether staff attorneys receive periodic refresher trainings and topic-specific trainings on pertinent issues
- **Caseload/Workload:** to determine whether there are safeguards in place to monitor attorney caseload and workload, that assignments are appropriately spread out among staff counsel, and whether there are mechanisms to curb assignments when the office and/or an individual attorney becomes overloaded
- **Case Conflicts:** to ascertain whether there are written office policies regarding the timely identification of conflicts, representation of co-defendants or other situations where a conflict may arise, and to address case overload situations
- **Personnel Policies:** every office should have a policies and procedures manual and written attorney performance standards
- **Personnel Resources:** to determine staffing levels are appropriate based on office workload at each level of attorney experience, and support-staff to attorney ratios
- **Equipment and Law Library Resources/Availability:** to determine whether the public defender office provides staff counsel with the necessary office infrastructure needed to perform their duties, and to make sure staff counsel are provided with updated legal materials to keep them abreast of new developments in the law

Performance Evaluation

- **Supervision:** to ascertain whether new attorneys are receiving necessary supervision, periodic staff evaluations are taking place, and all attorneys are able to seek assistance from a more experienced attorney

- **Attorney/Client Contact:** to determine whether counsel is maintaining the appropriate level of contact with their clients, and keeping them informed at critical stages of the process

Evaluation of Data

- **Data Reporting:** to ascertain which organizations in the county are collecting pertinent data and whether this data is compatible and can be analyzed together to create a full picture of indigent defense services in the county
- **Data Elements to Track:** a list of suggested data elements to track to determine things such as average cost-per-case, average number of days a misdemeanor defendant spends in custody pretrial, etc., is included in each evaluation protocol

To evaluate the appellate public defender program in Bexar County, additional questions regarding appellate representation were asked in the following categories:

Program Qualifications

- **Anders Policies:** to ascertain whether there are written policies regarding the use of *Anders* briefs, and how often *Anders* briefs are being filed
- **Other Workload Factors:** to determine what other factors affect attorney workload such as policies on requesting oral arguments, contact with trial counsel, review of guilty plea cases, etc.

Performance Evaluation

- **Brief Preparation:** to ascertain whether there are written office policies regarding the preparation of briefs and whether these policies are sufficient to produce high-quality briefs

To evaluate the misdemeanor public defender program in Hidalgo County, additional questions regarding misdemeanor representation were asked in the following categories:

Program Qualifications

- **Parity with the District Attorney's Office:** parity should exist between public defender and district attorney offices with regards to workload, salary and other resources such as benefits, technology and support staff
- **Other Workload Factors:** to determine what other factors affect attorney workload such as prosecutorial practices that affect workload (e.g., discovery, timeliness and reasonableness of plea offers), waiting time in court, percentage of clients in jail, etc.

Performance Evaluation

- **Investigation:** to determine the resources available to defense counsel to conduct investigations, and whether investigations are conducted when necessary
- **Expert/Other Services:** to determine the resources available to defense counsel to access expert services or other services such as interpreters or mental health/psychiatric exams
- **Motions, Hearings:** to ascertain whether public defender counsel is filing the necessary and appropriate motions
- **Case Dispositions:** to determine whether an unacceptably high percentage of cases are disposed of by plea at arraignment
- **Case Processing in the Court System:** to examine what outside factors may be affecting the timely processing of misdemeanor cases through the criminal justice system, including actions by law enforcement or the district attorney's office

To complete the evaluation, after both protocols we have included a “how-to” evaluate an office based on the answers provided by public defender staff and major criminal justice stakeholders. The summaries are by no means exhaustive, but provide direction in evaluating public defender offices. The best way to evaluate the efficacy of a public defender office is through comparison with national standards. Therefore, we have included national standards from a number of sources including the American Bar Association, the National Legal Aid and Defender Association, and the National Advisory Commission on Criminal Justice Standards and Goals.

Specifically we used the American Bar Association's (ABA) Ten Principles of a Public Defense Delivery System (appended to this report), and a variety of ABA Criminal Justice Standards, including: Criminal Appeals, Defense Function, Discovery, Guilty Pleas, Pretrial Release, Prosecution Function, Providing Defense Services, and Special Functions of the Trial Judge.⁸ We also discuss a formal opinion by the American Bar Association's Standing Committee on Ethics and Professional Responsibility that was recently issued: “Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation”⁹ (also appended to this report).

The National Legal Aid and Defender Association (NLADA) also has a number of national standards that were used for this report: Guidelines for Legal Defense Systems in the United States (1976); Standards and Evaluation Design for Appellate Defender Offices (1980); Defender Training and Development Standards (1997); and Performance Guidelines for Criminal Defense Representation (1995; Second Printing 1997; Third Printing 2001).¹⁰

⁸ The ABA's Ten Principles of a Public Defense Delivery System can be found at: <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>. For links to the ABA's Criminal Justice Standards, please see <http://www.abanet.org/crimjust/standards/home.html>.

⁹ The ethics opinion is currently available on the web and is free for ABA members. Otherwise, hardcopy or PDF versions can be purchased for a small fee: <http://www.abanet.org/cpr/pubs/ethicopinions.html>.

¹⁰ Links to these standards can be found at: http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_NLADA.

Finally, we examined the National Advisory Commission on Criminal Justice Standards and Goals: Standards for the Defense (1973); the National Conference of Commissioners on Uniform State Laws: Model Public Defender Act (1970);¹¹ and the Institute for Law and Justice's Compendium of Standards for Indigent Defense (2000).¹²

In addition to national standards, standards created by the Task Force, Texas Code of Criminal Procedure and local county plans, should be used in the evaluations.

Evidence of the Benefits of Establishing a Public Defender Office

In November 2006 the Task Force published *Evidence for the Feasibility of Public Defender Offices in Texas*, which examined some of the benefits that Texas has already seen from the state's five long-standing public defender offices.¹³ The study divides these benefits by category: cost effectiveness, budget stability, and quality control over cases. The study also looks at the impact of court discretion on the efficacy of public defender offices. Based on TSG's site work and data collection we have attempted to address the impact that the Bexar and Hidalgo County public defender offices have had on these areas. Because the programs have only been in operation for one year at the time of our evaluation, our preliminary results may change over time, and it will be necessary to revisit the data in the future to get a clear picture of the cost savings and efficacy of the public defender offices.

The following is a brief discussion of how each public defender office relates to the principles discussed in the Task Force report. Each subject is fleshed out in the body of our report, and a more specific conclusion is provided for each county.

Cost effectiveness

Due to the nature of appellate cases, it is too soon to determine the cost-effectiveness of the Bexar County Appellate Public Defender Office. Many appeals take longer than a year from assignment to decision by the court of appeals, and the data we have to analyze from Bexar County includes the public defender office's first year only. Therefore, a cost-per-case comparison is premature.

With regards to Hidalgo County, 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. (See Table 8, pg. 68.) We expect that once the public defender office has been operating with a full staff for one year (in its first year of operation there was some attrition and a position remained open for six months),

¹¹ Links to these standards are also available at:

http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_NLADA.

¹² See <http://www.ojp.usdoj.gov/indigentdefense/compendium/welcome.html>. The Compendium was prepared by the Institute for Law and Justice and supported by a contract with the Bureau of Justice Assistance, United States Department of Justice. It presents national, state, and local standards relating to five functions of indigent defense: Administration of defense systems (Volume I), Attorney performance (Volume II), Capital case representation (Volume III), Appellate representation (Volume IV), and Juvenile justice defense (Volume V).

¹³ See Texas Task Force on Indigent Defense, *Evidence for the Feasibility of Public Defender Offices in Texas*, Nov. 9, 2006, at http://www.courts.state.tx.us/tfid/pdf/PD%20Feasibility_Final.pdf.

assigned counsel payments will continue to drop. In addition, the public defender average cost-per-case is significantly lower than the assigned counsel cost-per-case.

Budget stability

Since both offices have only been operating for one year at the time of our analysis, it is too early to determine whether the Bexar and Hidalgo public defender budgets will remain stable should workload fluctuate considerably. However, experience has shown us that public defender offices have predictable budgets over time, which allows county and/or state governments to continuously allocate sufficient funding for indigent defense services each year depending upon the annual number of appointed cases.

Quality control over cases

Both public defender offices have established extensive policy and procedure manuals that contain attorney performance standards that exceed those required by each county's indigent defense plan. In addition, both offices have developed a strong infrastructure, including an informal quality control review in Bexar County (all attorneys review every brief before being submitted) and a more formal mentoring/supervision system in Hidalgo County. In both jurisdictions we heard praise for the quality of work produced by each office, and the systematic improvements each office has fostered in the criminal justice system. For instance in Bexar County, appellate delay has been greatly reduced, and in Hidalgo County the number of days defendants spend in-custody predisposition has decreased significantly.

Impact of court discretion on efficacy of public defender office

In Bexar County the courts appoint the APDO to 85 percent of indigent criminal appeals at the Fourth Circuit Court of Appeals, and there has been no indication that judicial discretion has negatively impacted the ability of the APDO to function. Some concern was raised about the fact that several individuals/groups have oversight over the APDO, and this should be monitored over time to ensure that the functioning of the APDO is not adversely affected in any way.

The Hidalgo PD is required to accept 25 percent of all in-custody misdemeanor appointments. In some courts appointments are also made directly from the bench, significantly increasing the percentage of cases that the public defender office handles. Thus far the public defender office has been able to handle this larger caseload; however, caseloads should be closely monitored to ensure that the office does not get overloaded.

Through site work and data analysis it is clear that the Bexar County Appellate Public Defender Office and the Hidalgo County Misdemeanor Public Defender Office have improved the quality of indigent defense services in their respective counties. The ways in which this has been achieved are detailed throughout this report.

Part 2: Bexar County Appellate Public Defender Office

I. EVALUATION OF THE BEXAR COUNTY APPELLATE PUBLIC DEFENDER OFFICE

Using the evaluation protocol, TSG interviewed a number of stakeholders in the criminal justice system in Bexar County to ascertain how well the one-year old appellate public defender office was performing. We looked at whether the APDO had certain program qualifications in place necessary to properly operate any appellate public defender office, and then we evaluated the overall performance of the office. In addition, we obtained data from the courts, auditor's office and the public defender office to provide a quantitative picture of the cost and efficiency of the public defender office in comparison to assigned counsel.

1. Program Qualifications

A. Independence of the Appellate Public Defender's Office

There are three organizations that have some oversight over the APDO: the Bexar County Commissioners Court, the Bexar County Public Defender Oversight Board (Oversight Board) and the Criminal Justice Planning and Coordination Department (CJPC). In any jurisdiction that has multiple entities with some oversight over the public defender's office, a careful look must be taken to determine that the public defender office is sufficiently independent to ensure quality representation.

In Bexar County, the commissioners court is responsible for appointing the members of the Oversight Board, receiving and acting upon recommendations from the Oversight Board, setting the budget for the office, and hiring the Chief Appellate Defender.

The Oversight Board consists of seven members including the County Judge, the Executive Director of the Criminal Justice Planning and Coordination Department, a Commissioner, a district court judge, a county court judge (position rotates with a juvenile judge) the Chief Justice of the Fourth Court of Appeals, and a criminal defense attorney. According to the Operations Plan for the Office of the Appellate Public Defender, the duties of the Oversight Board include:

- a. The Board serves to provide advice and counsel to the Court pertaining to the operation and performance of the Office of the Public Defender (OPD).
- b. The Board provides the Court with recommendations for the selection and removal of the Chief Public Defender (CPD).
- c. The Board will receive and interpret regular periodic reports from the OPD.
- d. The Board will provide the Court with its assessment of the reports submitted by the OPD.
- e. The Board makes recommendations for any modifications to policies and procedures.
- f. The Board makes budget recommendations to the Court.

g. The Board is appointed by the Commissioners Court (Court) as defined in the order established to accept the Task Force on Indigent Defense Grant.¹⁴

The Board's scope of involvement and specific responsibilities continue to be discussed and refined as needed.

During our 2006 site visit, we were told that the Oversight Board meets every six months. The Oversight Board is responsible for evaluating current challenges, assisting with budgetary matters, providing ideas to improve the office operations, and advocating for the APDO. The Chief Appellate Defender calls the meetings and sets the agenda.¹⁵ The Chief Appellate Defender also provides the members with reports on caseload statistics, and discusses any issues the APDO is having, what is coming up on the horizon, budgetary issues, and where the office is spending money (although the Oversight Board has no control over the budget). We were told that the Board was helpful in facilitating the establishment of an internship program at the APDO with the local law school.

In addition to the Oversight Board, there is the Criminal Justice Planning and Coordination Department. The CJPC has broad oversight over a number of county departments in Bexar, including the Dispute Resolution, Forensic Science Center (which includes the Medical Examiner and Crime Laboratory), Detention Population Relief, Child and Family Services, and Pre-Trial Services Divisions. The Executive Director of the CJPC is "responsible for the overall operations"¹⁶ of these departments, including the APDO. He also coordinates with the heads of the offices listed above to identify business process improvements related to the judicial system, plans and develops efforts pertaining to the support for the criminal justice system, reports key justice system issues and trends to the Commissioners Court and other elected officials, and reviews expenditure data and oversees development of the annual budget submission of the CJPC, among other responsibilities.

The Chief Appellate Defender clearly has a number of resources to call upon to assist with the development of the public defender office. It is important in a system such as this with so many sources of oversight, that the Chief Appellate Defender remains independent and retains the ability to advocate on behalf of his/her office. During our site visit we were told that the Bexar County Chief Appellate Defender does not present the public defender office budget to the commissioners court. This is not common practice among public defender offices across the United States, and we strongly believe that the Chief Appellate Defender should be present during these commissioners court meetings. It is vitally important that the Chief Appellate Defender have the ability to engage the commissioners court in meaningful dialog, answer questions that the CJPC is unable to answer, and have an open line of communication with the commissioners court as needed.

¹⁴ Operations Plan for the Office of the Appellate Public Defender (May 11, 2005).

¹⁵ According to the Operations Plan for the Office of the Appellate Public Defender, it is the responsibility of the executive director of the CJPC to convene and oversee Board meetings.

¹⁶ Bexar County Position Description, Executive Director of Criminal Justice Planning and Coordination Department.

The judiciary, Oversight Board and CJPC should have clearly delineated responsibilities with regards to the APDO. Responsibilities should include advice and assistance with setting office policy, guidance on budgetary issues, and ideas to improve the system.

Also, the method of removal of the Chief Appellate Defender is not readily apparent from the materials we were provided. The Operations Plan for the Office of Appellate Public Defender states that the method of removal of the Chief Appellate Defender is to be determined by the commissioners court; however, the exact method was not stated in the Operations Plan. It is our professional opinion, supported by ABA and NLADA standards, that the Chief Appellate Defender may only be removed for cause, not at will, and there should be some appeal process in the instance of removal.

B. Training

The Bexar County Chief Appellate Defender assembled a very experienced and talented group of appellate attorneys, with prior appellate experience ranging from 8 to 24 years. There is a training budget, and attorneys may attend outside trainings; however, no formal in-house training is offered. We were told that within three months of the office becoming fully operational, all staff, including the Chief Appellate Defender, attended an advanced appellate defender training sponsored by a national organization. Since that time, each staff attorney has attended at least one other training, either organized by the State Bar of Texas or a national defender organization. It appears that staff counsel at the APDO are receiving necessary and appropriate training.

Criminal defense trainings are offered by the State Bar of Texas, the appellate courts and the Texas Criminal Defense Lawyers Association throughout the year, including trainings specific to criminal appeals. The Bexar County Indigent Defense Plan does require that an attorney accepting appellate appointments must have completed ten hours of continuing legal education (“CLE”) in criminal law or procedure in the past year, with carryover allowed for one year only. There are no specific training requirements included in the Operations Plan for the APDO, although the statement of grant award from the Texas Task Force to Bexar County does include staff training and orientation as an element to be evaluated.

While the training normally required for newly practicing attorneys is not needed in the APDO, periodic ongoing continuing legal education programs for attorneys should be conducted, including trainings on specific pertinent topics. We also advise that every newly hired attorney, regardless of experience level, attend the first available criminal appeals training – as this public defender office did. There should be an attorney resource manual, similar to the manual created by the Chief Appellate Defender, for all newly hired staff attorneys. In addition, all staff members, including secretarial staff, should receive training on the importance of the appellate defender and the relationship and duties of each staff member.

C. Caseload

The development of caseload and workload standards are necessary elements of an effective public defender system. Caseload is a maximum case count per attorney, without

giving weight to the complexity of the case. Workload takes into account other factors that may cause one type of case to be more time-consuming than another. With regards to appeals this may include the severity of the underlying charge, the length of the transcript and size of the record, etc.¹⁷ The Chief Appellate Defender has established caseload limits, and had created workload standards that were found to be unworkable, as discussed further below. We recommended that the Chief Appellate Defender revise and implement workload standards immediately, and revisit both the caseload and workload standards every six months, and adjust each as needed.

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.” Commentary to Standard 5-5.3 of the ABA Criminal Justice Standards, Providing Defense Services, references the public defender caseload standards developed by NAC, noting they “have proven resilient over time, and provide a rough measure of caseloads.”

It is important to note that the NAC standards restrict appellate defenders to 25 appeals *annually*. According to the APDO policy and procedures manual, attorneys at the APDO may not have more than 25 cases *open for briefing*, at any given time; and the APDO should not exceed 200 cases per year. With four full-time staff attorneys, this would mean no more than 50 cases per attorney per year. This is significantly higher than the NAC standards. It is a real possibility that should the office accept the maximum number of cases allowed by its standards, attorneys would likely be overloaded, and the quality of work could suffer.

We asked each attorney about the make-up of their current open caseload. One responded that she has under 10 cases waiting to be briefed, six of which have due dates within the next three months. She said that she feels the caseload is manageable, although she does read trial records at home. She also noted that there are periodic meetings in the office to balance the caseload, particularly because sometimes it is difficult to tell how time-consuming a case will be until the full record has been received. Another attorney estimated that he has between 8-10 cases waiting to be briefed, and felt that his caseload is manageable. He does 80 percent of the juvenile appeals in the office (he has an extensive background in juvenile appeals); however 80 percent of his time is spent on felony appeals, and he is working on one death penalty appeal. A third attorney has six cases waiting to be briefed and seven cases waiting for a completed record. She told us her caseload is lower than others, but she has one death penalty appeal and just filed another death penalty appeal one month prior.

D. Workload

The workload of appellate defender offices is affected more by court rules, system structures, and legislative mandates than any other area of criminal practice. For instance

¹⁷ 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.

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 is therefore imperative that workload standards be put in place to help manage the office and ensure the least amount of extensions possible.

While the office was in its nascent stage, the Chief Appellate Defender undertook the development of specific workload standards for her staff counsel. The standards required a certain number of work units, which were calculated by the length of the transcript, whether an oral argument was granted, etc. However, after less than a year the workload standards were abandoned for a simpler straightforward case-counting method, with the Chief Appellate Defender taking into account the complexity of the case, the length of the record/transcript, and the current caseload of each attorney. For a small office the Chief Appellate Defender felt that this system worked best.

During our site visit, all three of the staff attorneys agreed that the system works well and workload is spread evenly among the staff. For instance, one attorney who handles most of the juvenile appeals in addition to felony appeals, has a higher caseload than the others, but his workload is similar as juvenile appeals take less time. None of the attorneys felt that it was a problem that there is no formal case-weighting system in the office. It was pointed out that as long as the office remains small, it works well; however, if the office increased in size, there might be a need for a more formal system.

We disagree and strongly suggest that the office revisit its workload standards originally created by the Chief Appellate Defender, and rework them into practical standards the office can use immediately. This will provide an objective way of measuring workload and an objective maximum workload standard, allowing for easy monitoring of attorney workload. The workload standards should be reviewed periodically as modifications may be necessary. In addition to monitoring attorney workload, it will provide the chief public defender with an objective way of measuring how long one appeal takes. This helps in predicting the public defender office budget and staffing needs, and provides the county with some budget predictability over time.

There was some fear that the additional task of reviewing appeals to determine whether an indigent defendant has procedurally defaulted on his/her right to appeal would add significantly to each attorney's workload.¹⁸ It appears that the Chief Appellate Defender was able to work with the Fourth Court of Appeals and the district court clerks to streamline the process while preserving defendants' rights. This allows for a fairly quick turnover of these cases, as appellate defenders do not have to write lengthy *Anders* briefs and track down the record in cases where defendants are statutorily denied the right to appeal absent certain circumstances.

The general consensus among staff attorneys in the office is that the guilty plea reviews do not take much time. One attorney estimated that these cases take between 1-2 hours a week because they were able to streamline the process. Another said that they are a quick read and

¹⁸ Most of these cases involve defendants attempting to appeal from a guilty plea. There are two situations where a defendant has procedurally defaulted their right to appeal: an appeal from a guilty plea, and when a notice of appeal is filed five years after conviction.

have very little effect on workload. Still another said each case takes approximately 30 minutes to review the record and write the letter to the court. We believe that some procedural default cases take longer than suggested, depending on the length of the record and whether there were any contested hearings in the trial court, and therefore a more thorough investigation and more time is needed. Also, because some of these procedural default cases may take longer than estimated above, the cases should not be left out when calculating an attorney's workload and sufficient attention should be paid to each case. This is when workload standards are particularly important, as procedural default cases should be counted when calculating total office workload for budgetary and staffing considerations, but these cases do take less time than a formal appeal and should thus be weighed less when calculating total workload.

When the office was created, no one estimated that so much of the Chief's time would be administrative, and thus factored in a full caseload for the Chief Appellate Defender. It is common practice among appellate defender offices for the Chief to have a limited caseload, and in our opinion Chief Appellate Defender should have a reduced caseload. Based upon our experience with appellate defender offices of this size, to determine an appropriate caseload level, we recommend the Chief Appellate Defender begin with 50 percent of a full-time caseload and adjust as needed.

Each attorney in the office has been assigned an appeal from a death sentence. We were told that two additional death penalty appeals are coming down the pipeline. Attorneys work in pairs on death penalty appeals, although one attorney has a specialty in this area and may be assigned more complex cases. This attorney is also an excellent resource for other attorneys in the office.

E. Case Conflicts

There is a strict policy in the APDO to not represent co-defendants on appeal. On occasion the office will be assigned co-defendants; however, there is a computerized system for checking conflicts, by which the office manager enters the cause number of every case assigned into the Access database and if the same cause number is already entered indicating a co-defendant, the office will withdraw from the case.

While the office has yet to turn down assignments because of overload, according to the APDO policy manual, if the office's caseload exceeds the cap discussed above, the Chief Appellate Defender must "file a motion with the trial courts, requesting that the appointments cease until the APDO has provided effective assistance of counsel to those clients already appointed."¹⁹ This was written to comport with the new ABA Ethics Opinion 06-441, promulgated by the ABA Standing Committee on Ethics and Professional Responsibility in May 2006, which 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

¹⁹ While writing this report we were informed by the Chief Appellate Defender that the office has filed its first motion to withdraw due to overload with the presiding judge. This is clearly an indication that the office is in danger of becoming overloaded with cases, and a case-weighting system should be developed as soon as possible to determine additional staffing needs and office caseload limits.

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.

F. Personnel Policies

The Chief Public Defender developed a detailed personnel manual, which was appended to our first interim report. This well thought-out and detailed manual lays out policies regarding minimum work standards, the filing of *Anders* briefs, the preparation of appeal briefs including the timeliness of briefs and 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.

The policies for the hiring and firing of APDO staff are laid out in the APDO Operations Plan. The Chief Appellate Defender is responsible for hiring staff “in a manner consistent with the Bexar County personnel Policy and Procedures.” There is no mention of who has the authority to fire staff; however, it is likely this responsibility also lays, and if not it should, with the Chief Appellate Defender. The responsibility to hire and fire staff should lay with the Chief Defender.

Employee evaluations were conducted by the Chief Appellate Defender and copies of the evaluations were provided to the Executive Director of the CJPC. The evaluations were based on the county evaluation system as specifically requested by the CJPC Executive Director, and stated in the contract between the Task Force and the county. As per county requirements, the Executive Director evaluated the Chief Appellate Defender.

G. Personnel Resources

There are four full-time attorneys in the office, including the Chief Appellate Defender who has a full caseload. The least experienced staff attorney had eight years of legal experience when joining the office. Two attorneys had well over 15 years of appellate experience. There is one secretary for the entire office. The Chief Appellate Defender has been able to utilize outside assistance, which has helped keep caseloads at a manageable level. For instance, she created a program with the local law school to establish a year-long law clerk position, and is hoping to extend this to two positions a semester. In addition, the Chief Appellate Defender has coordinated with local civil law firms in the area to write briefs for the APDO *pro bono*. A local firm has completed two briefs so far, with the APDO closely supervising. Finally, a recent college graduate has been volunteering on a full-time basis with the office. While the ability to utilize outside resources without an increase in budget is to be commended, it is our feeling that without the current volunteer, and all of the outside help the office receives, it is very likely the office would have an immediate need for an additional employee.

There is one support staff person in the office. The administrative assistant creates files, enters data into the APDO’s case-tracking system, prints out the defendant’s criminal history, prepares the docketing statement for the Fourth Court of Appeals, prepares the designation of

record for the trial court, is responsible for entering all requisitions on the county's web-based system, types the table of contents and table of authorities for all of the briefs, and performs all other general office duties such as answering phones, sorting mail, etc. The administrative assistant is bilingual and will translate client letters for the attorneys from Spanish to English and type letters to clients from English to Spanish.

The general consensus in the office is that the administrative assistant is very busy but does an excellent job. The office is lucky to have an assistant with so much experience and the ability to multitask. We were told that despite how hard the administrative assistant works, the attorneys do the best with the resources they have, but must do a number of administrative tasks themselves. It was suggested that ideally the office would have one more support staff – a paralegal – to help with the workload. One attorney said that she spends a large amount of time completing records, trying to get in touch with the court reports and collecting all the evidence from the trial. She suggested another paralegal or secretary would help with this, and lighten the load of the administrative assistant.

If an employee must miss a significant amount of work, for maternity leave or extended sick leave, the Chief Appellate Defender hires contract counsel. The payment for contract counsel comes out of the APDO budget. The Chief Appellate Defender told us that she prefers to pay contract counsel from her budget rather than ask the court to reassign their cases to appointed counsel, because it allows her oversight of the cases.

The APDO's budget is reviewed by the Oversight Board and presented to the commissioners court by the Executive Director of the CJPC. While the budget is, for the most part, defined by the terms of the Task Force discretionary grant as agreed to by the county, the Chief Appellate Defender should take an active role in shaping the budget and presenting it to the commissioners court.

H. Parity with the District Attorney's Office

The ABA's Ten Principles of a Public Defense Delivery System, Principle 8 states that in order to have a properly functioning system there must be parity between defense counsel and the prosecution. This includes "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)."

The appellate section of the District Attorney's Office has a chief, six staff attorneys, an office assistant II (who was promoted to office supervisor in August 2006), an advocate and a part-time paid intern as compared to the APDO's chief, three staff attorneys and an office assistant IV. The Chief of the Appellate Section of the District Attorney's Office does handle some appeals, although he does not have a full-time caseload as does the Chief Appellate Defender. Attorneys with the Appellate Section of the District Attorney's Office handle all of the same types of cases that the APDO attorneys handle, and they also handle writ responses; although we were told that substantive writ responses are only provided in capital cases, and there are likely only 2-3 of these writ responses annually. The APDO accepts appointments in 85 percent of all indigent appeals, although this percentage is expected to increase to 90-95

percent (if it has not already), depending on the number of conflict of interest cases. Therefore, the appellate section of the District Attorney’s Office has a larger staff than the APDO,²⁰ with only a slightly larger caseload, for the same type of work.²¹

With regards to salary, the Chief of the Appellate Section of the District Attorney’s Office, who has over 25 years of experience, makes almost \$22,000 more than the Chief Appellate Defender, who has 20 years of experience. At every experience level, appellate staff attorneys with the District Attorney’s Office make significantly more than staff attorneys with the APDO. An attorney with 10 years experience at the District Attorney’s Office makes over \$10,000 more than an attorney with the APDO who has 15 years experience. In fact, an attorney with the APDO who is about to reach the 10 year mark makes \$16,548 less than attorneys with the District Attorney’s Office with 10 years experience. An attorney with the APDO who has 25 years of experience makes only \$2,000 more than an attorney with the District Attorney’s Office who has one month of appellate experience and has been practicing for under 10 years. Finally, the office assistant with the APDO makes \$6,000 less than the office assistant with the District Attorney’s Office, and the APDO assistant is at a higher county position grade (OA IV versus OA II).

Table 1: Salary Comparisons for the APDO and District Attorney’s Office Appellate Division Staff with Equivalent Experience Levels

APDO	Difference	District Attorney’s Office
Chief	\$22,000	Chief
25 years	\$35,376	Over 25 years
15 years	\$14,952	Over 10 years
10 years	\$16,548	10 years
Office Assistant IV	\$6,084	Office Assistant II

It is clear that all staff in the APDO, from the Chief Appellate Defender to the office assistant, are paid significantly less than their counterparts in the Appellate Division of the District Attorney’s Office. In order to retain such a talented and experienced staff, the APDO must be provided with additional funds to increase salaries.

I. Anders Policies

The APDO office manual has an extensive written policy on the filing of *Anders* briefs. The policy requires that *Anders* briefs be filed sparingly, and the decision to file a brief be discussed with the other members of the attorney staff. There is a very strict standard to determine what cases have “no arguable merit.” In addition, 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. The standards outlined in the

²⁰ This includes: three additional staff attorneys, an advocate, a part-time paid intern, and a chief with a reduced caseload (which leaves more time for supervision and administrative work).

²¹ Arguably APDO has more work, as framing the legal issues for an opening brief can be more difficult and time-consuming than filing a reply brief.

policy manual closely mirror those found in the NLADA Standards for Appellate Defender Offices.

In our professional opinion, an appellate defender office policy regarding the filing of *Anders* briefs should follow the case law strictly, unless *Anders* has been modified by state law. According to *Anders v. California*:

[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court-not counsel-then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.²²

We find the APDO *Anders* policy to be an accurate interpretation of the law, and is an appropriate policy. From the data collected, it appears that *Anders* briefs are filed sparingly by the APDO: in fiscal year 2006 of the 69 briefs filed, 10 were *Anders*, or 14 percent. Assigned counsel, on the other hand, filed *Anders* briefs in a larger percentage of cases: *Anders* briefs accounted for 32 percent of all briefs filed by assigned-counsel in fiscal year 2004; 40 percent in fiscal year 2005; and 25 percent in fiscal year 2006.

J. Other Workload Factors

In our evaluation of the APDO, we looked at several other factors that affect attorney workload including: requests for oral argument; contact with trial counsel, including those cases where ineffective assistance of counsel is alleged; additional responsibilities assigned to the office by the court of appeals above and beyond normal appeals; the relationship with the prosecutor; and any other outside factors affecting attorney workload.

The APDO policy manual states that oral arguments are sought in the court of appeals “only where the case is a novel issue or where argument is clearly justified.” There was not much mention of oral arguments taking place, and it appears that requesting oral arguments are not typical local practice. No oral arguments were reported in appeals court data for assigned counsel in fiscal years 2004 and 2005, and in fiscal year 2006 assigned counsel had 4 oral arguments, while the APDO had 3 oral arguments.

The policy manual also has well defined policies regarding contact with trial counsel, both generally and specifically in cases where ineffective assistance of counsel is alleged. Appellate defenders are required to notify trial counsel that they have been appointed and are encouraged to cooperate with trial counsel. If ineffective assistance of counsel is alleged, trial counsel should be notified and all cases where claims of ineffectiveness are raised must be carefully screened.

²² 386 U.S. 738, 743 (1967).

The NLADA Standards and Evaluation for Appellate Defender Offices also suggests that appellate counsel work with trial counsel in a training capacity and take an active role in the continuing legal education of the entire bar – instructing trial counsel on new or developing legal trends, how to properly preserve issues at trial that may be appealed, and educate on recent decisions that may impact trial cases. We were told that the office is trying to become an institutional resource for trial counsel, although currently there is not a lot of collaboration with trial counsel. The Chief Appellate Defender has coordinated a death penalty training for trial counsel with the American Bar Association, and has plans to conduct a training on the immigration consequences of a guilty plea for the local defense bar. Also, when the office was first established, the Chief Appellate Defender wrote an article for the local bar association’s magazine to reach out to trial counsel, and has met with several local trial attorneys.

The APDO took on the responsibility for reviewing procedural default appeals to determine whether any right to appeal exists; the responsibility for determining this had previously varied from court-to-court. This additional work above and beyond what is normally required from an appellate defender office had the potential of adding significantly to the office’s workload. By working with the trial courts and the Fourth Court of Appeals, the Chief Appellate Defender was able to get copies of the record in each case put on CD-Rom, including plea agreements, waiver of appeal, motions filed, rulings on motions, etc., and developed a form letter for the Fourth Court if there is no right to appeal.

Finally, we were told that the Appellate Assistant District Attorneys work well with the office, and were receptive to the formation of an appellate defender office.

One additional issue that surfaced during our site work was the length of time and effort that appellate defenders must spend obtaining the record from the court reporters. We were told that oftentimes attorneys must spend a great deal of their own time tracking down the record, contacting court reporters, and attempting to complete the record. Occasionally attorneys will receive the record and review it thoroughly to find that exhibits are missing or findings of fact/conclusions of law are missing. One staff attorney commented that if the records were in better shape, it would lighten her workload. In one particularly egregious situation, she tracked her time in one case and found that she spent 24 hours of her own time attempting to complete the record. Staff counsel have dealt with court reporters that would not return their calls. One staff attorney commented that the delay by the court reporters does not affect the quality of the work, but it affects the time it takes cases to finish the appellate process. The Chief Appellate Defender estimated that 20-50 percent of their appeals are missing part of the record.

Because the time starts tolling for the filing of the initial brief when one part of the record has been provided, the APDO has worked with the Court of Appeals to allow the APDO to file motions for recalculation of time, so that time does not start tolling until the record is complete. Clearly this lack of cooperation from the court reporters is something that is beyond the control of the Chief Appellate Defender, and is not a problem exclusive to Bexar County. It is important, however, that the Chief Appellate Defender continues to work with the courts to remedy this problem and attorneys no longer waste their time completing the record. It may be necessary for the APDO to receive additional support staff to assist with completing the record.

K. Equipment and Law Library Resources/Availability

The office appears to have the necessary office equipment. Since the office is relatively new, the equipment is new. Each attorney has a computer, as does the administrative assistant. However, there is not an extra computer available for the law school interns. The office has all other necessary office supplies such as photocopiers, fax machines, e-mail, video player and internet.

Attorneys have unlimited access to Lexis for legal research, there is CD-Rom availability, and there is a shared drive on the computer so that they can access each other's briefs. There were a number of publications in the conference room, including updated legal publications.

In addition, the office has a video teleconferencing system, which allows attorneys to "meet" with their clients via videophone, rather than spend time at the jail. Although most of the attorneys would prefer to meet with their clients in-person, the videophone has proven to save time.

2. Performance Evaluation

The Chief Appellate Defender developed a policy and procedures manual, which includes a variety of performance measures for staff counsel and the office. These performance measures reflect the goals and mission of the APDO: to provide effective and timely assistance of counsel while zealously representing their clients. To reach this end, 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." Adherence to these standards is determined through monitoring the caseload and workload of the entire office and each individual attorney, and a review of each brief submitted to the Fourth Court of Appeals. It is important to note that there are no similar performance requirements for assigned counsel.

K. Supervision

The APDO operates under the human resources policies of Bexar County; however, we recommend that the Chief Appellate Defender address the issue of internal supervision in the APDO policy and procedures manual. The manual should include policies such as who will have a supervisory role and the duties of a supervisor, which should include periodically reviewing staff attorneys' performance, conducting formal evaluations, training and mentoring new staff attorneys, and assuring appropriate staff counsel caseloads.

The Chief Appellate Defender is responsible for overseeing the operations of the APDO, assigning cases, managing caseloads, overseeing staff, and dealing with any administrative issues, among other duties. As mentioned previously, the office is comprised of very experienced attorneys – with over 65 years of combined legal experience between the four attorneys. Therefore, a less formal system of supervision appears to work well for the office.

Every brief submitted to the Fourth Court of Appeals is reviewed by every attorney in the office to provide suggestions on the direction of the arguments and to spot typos. This serves not only as a quality control measure, but is a form of informal supervision. Generally all *Anders* briefs are reviewed by every attorney as well, although on occasion they may only have two other attorneys review an *Anders* brief. We do not think that it is necessary for every attorney to review every brief, and like other appellate defender offices around the country, believe that briefs should be reviewed by only one other attorney. One staff attorney said that reviewing a brief takes about 1-3 hours and has improved the quality of his work. Another said that peer-review of briefs takes approximately 10 percent of her time, and usually briefs are in nearly final format so there is not a lot of editing to do. Regardless, we strongly recommend that every brief be reviewed by only one attorney.

In addition, there are regular staff meetings to discuss caseloads and share ideas about the direction of arguments.

L. Brief Preparation

The APDO policy manual addresses the quality and timeliness of briefs, reflected in the performance measures listed above. 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 stated earlier, the Chief Appellate Defender has assembled a very talented group of appellate attorneys. We heard from judges and court personnel that prior to the establishment of the APDO, oftentimes assigned counsel briefs were logically inconsistent and the point of the arguments was not always readily apparent, however, since the APDO opened this is no longer a problem. We were told that the quality of the briefs has improved greatly, the consistency of the work is better, the attorneys in the APDO are clearly committed to their clients and the system, and the timing of appeals is far shorter and there are fewer extensions.

With regard to timeliness, 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.” We were told that when the office first opened the intention was to have a policy of not seeking any extensions. However, this was not a workable policy, and normally in cases with smaller records they will not ask for more than one extension and in death penalty cases they will ask for the full amount of extensions the court will allow. We were specifically told by justices and court personnel from the Fourth Court of Appeals that they have never had to send a letter to the APDO notifying the office that a brief was overdue, something that regularly occurred when the system was assigned counsel only. This is a good indicator that the APDO is able to handle their current workload.

The data confirms that the APDO files far fewer applications of extension of time than assigned counsel and the time from the notice of appeal filed to brief filed is much shorter. Table 2 in Section 3 “Evaluation of Data”, page 45 below, illustrates that the timing of appeals (for cases in which a brief was filed and there was a disposition) for the APDO is far shorter than

the timing of appeals for assigned counsel. Delay is a major criticism of the justice system, and the APDO's ability to reduce the amount of time an appeal takes is not only cost effective, but it bolsters public trust and confidence within the justice system.

M. Attorney/Client Contact

The APDO policy manual lays out in detail the requirements for client contact. All clients must be visited at least once by the attorney actually providing representation in that case, where possible. In addition, staff attorneys must inform all clients of the status of their case 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 defense.

Whether clients are visited in person seemed to depend on the attorney assigned to the case, and where the client was being held. One attorney said that counsel can utilize the video teleconferencing system for jail clients and for clients in prison, contact is done via mail. This attorney sees clients in a quarter to a third of cases. Another staff attorney said the goal is to see every client at least once, and in 90 percent of cases this goal has been attained. The remaining 10 percent of cases involve clients that have been moved out of the county jail. For additional visits, this attorney will use the video teleconferencing system unless the client is mentally ill, in which case she will visit them directly. All attorneys noted that the video teleconferencing system saves a lot of time waiting in jail to see clients, and all hope that a similar system will eventually be set up in the prison system as well. Despite the time-saving effects of the video-teleconferencing system, we believe that the system should not be used as a substitution for an initial in-person interview.

3. Evaluation of Data

To determine whether the APDO is more efficient than assigned counsel, we received data from the Bexar County Auditor's Office, the Fourth Court of Appeals, and the APDO. There were still some challenges with the way data is stored, although it was much easier to analyze data this time around. Whether or not a case involved an *Anders* brief is still not tracked as a separate data element by the courts, and thus a manual search through the "notes" field in the court database was done to determine whether an *Anders* brief was filed. Also, the Auditor's Office tracks payments made to assigned counsel by the cause number used in the trial court and not the cause number given by the Fourth Court of Appeals. Therefore, it was difficult to match court data with data from the Auditor's Office on vouchers paid. Finally, for cases in which there was more than one charge involved at the trial court level, some assigned counsel billed their cases using the trial court's cause number for one charge involved in the appeal, and some billed using all the cause numbers assigned by the trial court. In other words, if a case had three charges all with different cause numbers the attorney may bill for work done on the appeal under one cause number or divide the bill equally among all three cause numbers. So we had to group the appellants by name and all payments made under the appellant's name by date to determine the total amount paid for one case.

With regards to the data tracked by the APDO, we would like to stress the importance of carefully recording which cases are the procedural default review cases in a separate field in the APDO database. When the case is open, it is marked as a “to be determined” case, and these cases should retain an indication that it was a procedural default case even after a letter to the court has been submitted and the court rules on whether the defendant procedurally defaulted on his/her right to appeal.

The following table illustrates assigned counsel data from fiscal year 2006 only. We have included a similar table as an appendix with assigned counsel data going back to fiscal year 2004. For both the APDO and assigned counsel, the table includes only those cases where a brief was filed and the case was disposed.

Neither the APDO nor assigned counsel are appointed until after the notice of appeal is filed; except in limited circumstances where court-appointed trial counsel also represents the defendant on appeal. (The notice of appeal is filed either by the defendant or his/her trial counsel.) However, we still measured the time it takes from notice of appeal to a particular event in the appellate process. We did this to illustrate how long an appeal takes from start to finish, not merely after appellate counsel is appointed.

Table 2: Comparison of Public Defender and Assigned Counsel Timing for Appeals in FY 2006 For Dispositions in Which a Brief was Filed

Data Set	Appellate Public Defender Office			Assigned Counsel		
	<i>Anders</i>	Non- <i>Anders</i>	Total ²³	<i>Anders</i>	Non- <i>Anders</i>	Total
Number of Briefs Filed	5	42	47	7	23	30
Average # of days from Sentence to NOA	137 (10.5)**	82	89	15	127	100
Average # of days from NOA to Clerk Record Filed	40	57	55	41	59	54
Average # of days from NOA to Reporter Record Filed	115	97	99	96	116	111
Average number of Extensions Filed	1.8	0.6	0.7	2.6	1.4	1.7
Average # of days from NOA to Brief Filed	179	149	152	156	201	191
Average # of days from NOA to State Brief Filed		216	216		280	280
Average # of days from NOA to Reply Brief Filed		245	245		303	303
Average # of days from NOA to At Issue	241	217	220	292	289	289
Average # of days from NOA to Final Disposition	314	311	311	369	411	401

* “NOA” is Notice of Appeal, “At Issue” is when the all materials are submitted to the Fourth Court of Appeals and the case is awaiting a decision.

**The APDO received one case where the notice of appeal was not filed until nearly two years after the date of sentencing by the trial court. Thus the number in parentheses does not include this case when calculating the average time from sentence to notice of appeal.

²³ For each data set, totals were reached by taking the average of all cases combined.

This table indicates that at every stage in the appellate process, except for the length of time from the notice of appeal to the clerk's record filed, the APDO takes less time than assigned counsel.²⁴ For instance, the data indicates that the APDO receives the reporter's record on average 12 days sooner than assigned counsel. This supports what we were told by attorneys at the APDO: that they spend a significant amount of time tracking down the record. It should be noted that before the APDO receives the record, an attorney is unable to work on the case, and his/her time to submit a brief has not yet begun to toll. Time to submit a brief begins to toll once the reporter's record is filed. The average time from notice of appeal to the reporter's record filed for the APDO is 99 days, and 111 days for assigned counsel. If one subtracts this number from the average number of days from notice of appeal to at issue (or when all materials are submitted to the Fourth Court of Appeals and the case is awaiting decision), it will illustrate the total amount of time spent on average by counsel preparing the appeal. For the APDO this number is 121 days, and for assigned counsel it is 178 days. Thus the APDO spends, on average, 57 days, or nearly two months less preparing an appeal than assigned counsel.

This is reflected in the number of extensions filed by the APDO and assigned counsel. In fiscal year 2006, the APDO filed, on average, 0.7 requests for extensions of time, compared to 1.7 extensions by assigned counsel. In past years, assigned counsel has filed an average of 3 requests for extensions of time (FY 2004) and 2.2 requests for extension of time (FY 2005). By significantly reducing the average number of extensions filed, the APDO has made the appellate system much more efficient and more cost effective. It would follow that because the APDO has fewer requests for extension of time, the office has a shorter time from the notice of appeal filed to the brief filed. In fiscal year 2006, assigned counsel took, on average, 191 days from the notice of appeal filed to the brief filed. The APDO took, on average 39 days less, or 152 days on average.

The state even files its briefs sooner when it is an APDO case versus an assigned counsel case – on average the state files 25 days sooner for APDO cases. The average time from notice of appeal filed to the at issue date, or when all materials are submitted to the Fourth Court of Appeals and the case is awaiting a decision, is over two months shorter for the APDO – 220 days for the APDO versus 289 days for assigned counsel on average. It should be noted that the Fourth Court of Appeals takes on average 21 days longer from at issue to handing down a final disposition in assigned counsel cases than APDO cases. Therefore, when looking at the number of days from notice of appeal to final disposition, this additional 21 days should be considered.

In our Initial Interim report, we found “that a significant percentage of the appeals had a number of attorneys involved during the pendency of each appellate action, including retained, appointed and pro se representation.”²⁵ Table 3 below illustrates the number of cases on average where more than one attorney was involved during the appeal. We were not able to determine from the data in cases where “pro se” was indicated whether the defendant merely filed the notice of appeal, or completed additional work for the appeal. Thus the table does not include information on pro se representation. This table represents only those cases where a brief was filed and the case was disposed.

²⁴ Please note that this table includes only those cases where a brief was filed and there was a disposition in the case.

²⁵ *Initial Interim Report* at 9.

Table 3: Percentage of Cases Where More Than One Attorney Was Involved

	Assigned Counsel			APDO
	FY 2004	FY 2005	FY 2006	FY 2006
Total Number of Briefs Filed	60	79	30	47
Percent of Cases Involving Retained Attorneys	30%	20%	10%	10%
Percent of Cases Involving More than One Appointed Attorney	20%	23%	25%	15%
Average # of EOT Requested by Appointed Attorneys	3	2.2	1.7	0.7

* “EOT” is Extension of Time

The following tables include all cases disposed whether a brief was filed or not:

Table 4: Number of Appointed Attorneys Involved in Assigned Counsel Cases

	FY04	FY05	FY06
1 attorney	63	65	27
2 attorneys	12	16	9
3 attorneys	4	3	
Total # of Cases	79	84	36
% of Total w/ More Than One Attorney	20%	23%	25%

Table 5: Number of Appointed Attorneys Involved in APDO Cases

	<i>Anders</i>	<i>Non-Anders</i>	Grand Total
No Appointed Attorney Involved – APDO only	4	138	142
1 Appointed Attorney	1	23	24
2 Appointed Attorneys		2	2
Total Number of Cases	5	163	168
% of Total w/ More Than One Attorney	20%	15%	15%

According to the tables above, defendants assigned to the APDO are less likely to have more than one attorney assigned to their case. For instance, in FY 2006 for assigned counsel cases, nine of the 36 cases had more than one appointed attorney assigned to a case. In that same year, only 15 percent, or 26 of 168 cases handled by the APDO cases were previously handled by assigned counsel. In these APDO cases, the number of cases where assigned counsel was involved in the case decreased over the course of the year – and we believe that this number will continue to decline.

The data also shows that the average number of extensions of time requested by assigned counsel is greater in cases where appointed-counsel is involved than in cases where the APDO is assigned. Generally speaking, the greater the number of attorneys assigned over the life of the appeal, the longer the appeal takes. It also drives up the cost of an appeal to have multiple

attorneys assigned to the case. By having an institutional provider present, the trial court is able to assign a case to an attorney much faster in the process so the defendant does not have to appear pro se, which reduces delay in the process.

All of the data indicates, as did several justices at the Fourth Court of Appeals and court personnel, that the APDO is more efficient and appeals handled by the APDO take less time than assigned counsel. As discussed in the introduction to this report, however, due to the nature of appellate cases, it is too soon to determine the cost-effectiveness of the APDO. Many appeals take longer than a year from assignment to decision by the court of appeals, and the data we have to analyze from Bexar County includes the public defender office's first year only. Also, because the APDO reviews procedural default cases in addition to its normal workload, and these cases take much less time than cases where a brief is filed, merely dividing the number of cases assigned to the office in a year by the annual budget, does not give an accurate cost-per-case. Cases in which a brief is filed should be given more weight than procedural default cases. Thus to truly get an accurate cost-per-case, attorneys at the APDO should record the amount of time they spend on each case during a specified amount of time, for instance four months, and then use this information to calculate a "case-weight", which can then be used to determine how much money a particular type of case costs on average.

4. Conclusion

The Chief Appellate Defender has created a very well-functioning office staffed with experienced attorneys and an excellent administrative assistant. The Chief Appellate Defender also created a comprehensive and well thought out policy and procedures manual. Having observed many newly created offices around the country, the Bexar County APDO stands out as an exemplary program, and we commend the Chief Appellate Defender for creating such a successful office. The county commissioners did a wonderful job choosing the Chief Appellate Defender, who is highly respected by county officials, judges, her staff and the bar, and has done an excellent job working with members of the criminal justice community and the local bar to expand the capabilities of the office and provide better services to indigent appellants.

Every public defender office needs an objective way of measuring workload. Therefore, we recommend that the Chief Appellate Defender revisit the workload standards that she created when the office was formed and rework the standards until they are appropriate for the office. There is a possibility that the office may become overloaded with cases, and updated objective workload standards can help better monitor workload. Workload standards are objective tools and help in determining future budgets based on court caseload data. Also, for any public defender office, the chief defender should constantly review the written office policies and procedures and adjust as needed.

The Bexar County Constitutional Judge should monitor oversight of the office to ensure independence. The oversight roles of the Oversight Board and CJPC should be clarified with regards to the APDO. Also, since the District Attorney, or a representative from the office, is present at county commissioners court meetings when the District Attorney's Office is discussed, in the interest of fairness, the Chief Appellate Defender should be present at all public

commissioners court meetings when the APDO is discussed, particularly in reference to the APDO budget.

We were told by numerous stakeholders, including justices from the Fourth Court of Appeals and the County Judge, that indigent appellants are receiving consistent high-quality representation in a shorter amount of time, a great improvement from the assigned counsel-only system previously in place. The office requests fewer continuances than assigned counsel; thus their briefs are filed sooner and the public defender cases reach final disposition sooner. In fact, in every time period we analyzed but one (where the APDO and assigned counsel were equal) the APDO was more efficient than assigned counsel. The office files significantly less *Anders* briefs than assigned counsel, which could indicate that the office provides better representation to indigent appellants overall. APDO cases have fewer attorneys assigned over the life of the case, thus decreasing the amount of duplicate work done on each appeal, and thus saving the county money for work that would have otherwise been billed by multiple attorneys.

While it is too soon to fully ascertain the fiscal impact of the APDO on the cost of appellate defense services, it is likely that the ability of the APDO to reduce the amount of time an appeal takes translates into a more cost-effective system. It is also clear that the APDO has greatly improved the system of representation for indigent criminal and juvenile delinquency appellants in Bexar County.

II. 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

III. 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.²⁶

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.

²⁶ ABA's Criminal Justice Standards: Providing Defense Services, Standard 5-1.3 Professional independence.

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.²⁷

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

²⁷ For example: Arizona, Georgia, Indiana, Vermont and Washington. New York City has also adopted the NAC standards.

straightforward burglary charges or complicated child sex abuse charges, are given equal weight by NAC standards.²⁸

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.²⁹ 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.³⁰ 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.³¹ 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.” 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

²⁸ Bureau of Justice Assistance, *Keeping Defender Workloads Manageable*, 8 (2001), at <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

²⁹ ABA Ethics Opinion 06-441, “Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation.”

³⁰ 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.

³¹ 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.

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).³²

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.

³² 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.³³

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.”³⁴ 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.”³⁵ 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.

³³ NLADA Standards and Evaluation for Appellate Defender Offices, Standard K. Training.

³⁴ *Id.* at Standard II. Criteria for Assuring the Efficiency of the Legal Representation, H. Feedback.

³⁵ *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.³⁶

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

³⁶ 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.³⁷

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

³⁷ 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.”³⁸

M. *Anders* Policies³⁹

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.⁴⁰

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

³⁸ NLADA Standards and Evaluation for Appellate Defender Offices, Standard D. Scope of Representation.

³⁹ “*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.

⁴⁰ *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.⁴¹

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.⁴²

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.⁴³

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

⁴¹ *Id.*

⁴² See NLADA Standards and Evaluation for Appellate Defender Offices, Standard I., Client Contact.

⁴³ *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.

Part 3: Hidalgo County Public Defender's Office

I: EVALUATION OF THE HIDALGO COUNTY PUBLIC DEFENDER’S OFFICE

Just as we have done for the Bexar Appellate Defender Office, we performed a similar evaluation of the Hidalgo County Public Defender’s Office. This included developing a separate evaluation protocol for the misdemeanor office and interviewing stakeholders in the Hidalgo County criminal justice system. Again, we have structured our analysis by examining the program qualifications in place and then conducting a performance evaluation. In addition, we collected and analyzed data from various criminal justice stakeholders including the public defender’s office, the courts, the Office of Indigent Defense Services, and the auditor’s office.

1. Program Qualifications

A. Oversight of the Public Defender and Office

The Chief Public Defender reports to a Public Defender Oversight Board. The Oversight Board consists of five members: the statutory Hidalgo County Judge, a district court judge, a County Commissioner, a private criminal defense attorney, and a county court at law judge who serves as the Chair. There are no formal meetings – the Chief Public Defender sends Board members a report once a month, which contains a count of cases for the office, by court. The oversight is very informal, and if the Chief Public Defender has an issue that he needs assistance with, he will contact the Chair of the Oversight Board first for assistance. Any solution proposed by the Chair will likely be approved by the remainder of the board members. The Chief Public Defender reported that if the office is becoming overloaded with cases, he can approach the Oversight Board to assist him in reducing appointments temporarily, although this has not happened yet. The job description of the Chief Public Defender states that “general policy direction is received from the Public Defender Oversight Committee and the Hidalgo County Commissioner’s Court.” There does not appear to be any issue of the Oversight Board overstepping its boundaries or interfering in the legal practice of the Hidalgo PD.

The Chief Public Defender was hired, and can be terminated, by the commissioners court upon recommendation by the Oversight Board.

B. Training

The policy and procedures manual for the Hidalgo PD has a section on attorney training. It sets forth a mentoring/training program for new attorneys. Each new attorney will be assigned a senior attorney to act as a mentor. The mentor has a number of specific duties such as introducing new attorneys to judges, court personnel, and members of the District Attorney’s Office; attending court hearings and participating in cases that go to trial; and meeting to discuss both the mentor and new attorney’s cases. Other than this informal mentoring system, there is no specific required training for new attorneys in the PD policy and procedures manual, nor any required trainings for experienced staff. The PD manual also includes information on investigator training, requiring the investigator to receive training and certification under the guidelines of the National Association of Investigative Specialist.

The Hidalgo County plan does require attorneys who accept appointments in misdemeanor cases to average 10 hours annually of continuing legal education courses relating to criminal law. The Hidalgo PD will cover all expenses to send attorneys to CLE seminars. The Chief Public Defender recommends staff attorneys take certain CLE courses specific to their practice. We were told that all staff attorneys have more than the requisite CLE hours needed for state and local standards and have attended at least one or more of the following trainings in the last year: Texas Criminal Defense Lawyers Association (TCDLA) - Forensics Course; TCDLA - DWI Course; TCDLA - Criminal Trial Boot Camp; Hidalgo County Bar Association - Criminal Law Boot Camp; and a State Bar of Texas - Family Law and Immigration Law Course.

In our Initial Interim Report we raised concern about the training in the office related to the immigration consequences of a criminal conviction, in light of Hidalgo County's close proximity to the Mexican border. We were told that there has not been much training on these collateral consequences, although the Chief Public Defender is trying to get a CLE course locally on the subject.

The Hidalgo PD Policy and Procedures Manual serves, in part, as a training manual as well as policy/procedures manual. It contains extensive information on issues that arise at specific stages of the criminal justice process, including bond reduction motions, examining trials, preparing for trial, conducting legal research, etc. The manual provides detailed information on such issues as spotting clients with mental health issues, how to examine the district attorney's file, common codes used in plea recommendations, how to use the office investigator, and how to use experts. The manual should be used as a model for other trial public defender offices; however this manual, absent additional specific on-the-job training and mentoring, does not suffice for lawyers recently admitted to the bar.

During our site visit we interviewed three of the four assistant public defenders, which is an entry-level attorney position. Three of the four assistant public defenders had very little prior criminal law experience when they were hired; one had previously served as an assistant district attorney, although she had been doing civil work for some time before joining the public defender. Two of the current assistant public defenders have been with the office since it opened in October 2005. All three staff attorneys interviewed reported receiving on the job mentoring, but only for a few weeks. One attorney overlapped with the outgoing first assistant, who had been responsible for some attorney training, and she was able to shadow him for one week. Other than that, she received very little in-house training, although she had been with the district attorney's office for two years. Another attorney reported that the first assistant mentored her for a few weeks and attended court with her. The third attorney reported that the Chief Public Defender and first assistant supervised him in court for awhile, but otherwise there has been no formal in-house training.

Local practice dictates the type of on-the-job training staff attorneys receive. Hidalgo County has a very low misdemeanor trial rate, it is far less than one percent, and based upon our observations and what we were told by a number of people, most jail cases (or cases where the defendant remains in-custody) plead at initial appearance.⁴⁴ Therefore all attorneys received informal on-the-job training on how to enter a plea, but very little trial training. One attorney did

⁴⁴ These jail cases account for approximately 42 percent of the Hidalgo PD's total caseload.

second chair a trial and conducted the opening argument, but the primary attorney conducted much of the trial. In light of this, and because the positions at the public defender's office attract entry-level attorneys, we strongly recommend that the office continue to require that every newly hired attorney, regardless of experience level, attend the next available criminal trial training, such as the TCDLA criminal trial boot camp training.

C. Caseload

The development of caseload and workload standards are necessary elements of an effective public defender system. *Caseload* is a maximum case count per attorney, without giving weight to the complexity of the case. *Workload* takes into account other factors that may cause one type of case to be more time-consuming than another. With regards to misdemeanor cases, this may include whether a client is in custody, his/her criminal history, immigration status, the severity of the charge, the number of charges involved, and whether the client pleads at arraignment, at a later date or the case is resolved by a trial.

The Chief Public Defender developed its caseload standards based on standards used by other public defender offices, taking into consideration the NAC standard of 400 misdemeanors (excluding traffic) per attorney annually.⁴⁵ The policy manual explains that this standard "may be modified by agreement of the Commissioner's Oversight Committee, Board of Judges, and the Public Defender's Office." Staff attorneys with the Hidalgo PD are limited to 400 misdemeanor cases per attorney annually; however, due to the method of case assignment, we are unable to determine caseload by attorney.

Each attorney is assigned to a particular courtroom and is generally responsible for all of the cases assigned to the public defender in that courtroom. In each county court the public defender office should receive every fourth case from the wheel for a total of 25 percent of all cases assigned to a particular county court at law. However, some judges also make assignments directly from the bench. When this occurs, the public defender assigned to that court receives additional appointments, beyond the 25 percent.

The judge in county court four provides the majority of bench assignments. According to records from the Hidalgo PD, from October 21, 2005 – October 17, 2006, of the total 560 cases assigned from the bench, 371 were from county court four. Because most courts conduct arraignments at the same time, the system for assigning cases in county court four lends itself to having a "rover" position at the Hidalgo PD, or an attorney not specifically assigned to a particular county court, but one that picks up assignments as needed. Currently the rover position, which is a first assistant position, is unfilled, so the chief public defender fills in as needed. The remaining staff attorneys will complete arraignments in their assigned courtrooms and then move to other courts where they are needed for arraignment. This is particularly true in county court four, where because of the volume of bench assignments, two to three staff attorneys from the Hidalgo PD help with assignments at the jail docket (when in-custody defendants are arraigned).

⁴⁵ National Advisory Commission (NAC) on Criminal Justice Standards and Goals (1973).

Table 6 breaks out the number of cases disposed of by each attorney in the Hidalgo PD from October 2005 to September 2006. According to this data two attorneys exceeded the 400 annual caseload limit, although one exceeded the limit by 99 cases. There are 113 cases that do not have an attorney's name indicated, so it is possible that more than two of the attorneys exceed the 400 limit. Several of the attorneys did not start until sometime between August and October 2006 or spent less than a full year in the office.

**Table 6: Public Defender Caseloads by Attorney
For All Dispositions in FY 2006**

Attorney	Total
BLANK	113
BILLY	46
ELIZABETH	24
JENN	405
JIMMY	65
JULIAN	69
LAURA	395
MARTIN	382
PETE	499
Grand Total	1998 ⁴⁶

The nature of the misdemeanor practice in Hidalgo County results in quick turnover of cases. Two of the three staff attorneys interviewed during our site visit have been with the office for a month and a half or less, therefore it was too soon to obtain an accurate picture of their caseloads. One attorney interviewed had been with the office since it opened, and she estimated that she has approximately 50 open cases. She explained that about half of those cases are clients that were able to make bond and failed to appear in court for arraignment, and will likely never show up in court unless they are returned on a warrant. The remainder of her cases are set for a motion to suppress, a status hearing, or did not want to plea at arraignment so they are set for a pretrial date, which generally takes place 1-2 months after arraignment if the client is out of custody. Another attorney, who had been with the office for approximately a month and a half said that he has 3-5 cases pending: either waiting for pretrial hearings or motions to suppress. The remainder of the cases he has handled pled guilty at arraignment.

If the Chief Public Defender feels that the office is becoming overloaded, he can seek assistance from the Oversight Board, however, this situation has not arisen and the Chief is considering taking more cases. The judge in county court four, who is also the Chair of the Hidalgo PD Oversight Board, suggested that the public defender start taking 30 percent or more of the case assignments in each county court. The office currently accepts 25 percent of assignments off the wheel. In addition, the office receives a number of bench assignments, which account for 27 percent of the total number of assignments the office receives. If the Hidalgo PD were to take 30 percent of all assignments off the wheel, this would amount to an additional 349 cases annually (if indigent appointments remain steady). This is slightly less than what is considered a full annual caseload of 400 cases per attorney; however, coupled with the

⁴⁶ This grand total differs slightly with the grand total provided in Table 9 on page 69. This is because the data in Table 6 was provided by the public defender office and the data in Table 9 was provided by the county.

number of bench assignments the office receives, the office would need at a minimum one additional staff attorney to handle 30 percent of all assignments off the wheel.

The Hidalgo PD contracted with Defender Data to begin using a computerized case management system. In January 2007, several months after the software was purchased, the system was installed, and the office now has a state-of-the-art system to store data and track cases. While waiting for the new system to be installed, the office tracked caseload data in an Access database. It is imperative that this new system include information on the number of cases assigned to each individual *attorney*, not merely the number of cases assigned in each courtroom, so that the Chief Public Defender may easily monitor caseload.

There is also a county-wide computer system, called Able-Term, for the entire criminal justice system in Hidalgo County, which law enforcement, the District Attorney's Office, and the courts can access. The Office of Indigent Defense Services, the agency responsible for interviewing all in-custody misdemeanor defendants who have indicated to the arraigning magistrate or justice of the peace that they would like appointed counsel, also has access to Able-Term. The public defender can access Able-Term to gather information on clients, including addresses, family members, employment information, etc.

Public defenders are permitted to take private cases without the approval of the Chief Public Defender, as long as the client does not give rise to, or the appearance of, a conflict of interest. Attorneys may accept cases in an area of the law with low potential for conflict; however, attorneys are specifically prohibited from accepting private criminal cases.⁴⁷ At least one staff attorney handles private cases. In our opinion, a full-time public defender should not be permitted to handle private cases while employed by the public defender agency; however, if a public defender is engaged in private practice, he/she should be monitored closely to determine whether the attorney is spending the required time on his/her public defender cases. The ABA's Criminal Justice Standards, Providing Defense Services, Standard 5-4.2 suggests that all public defender staff counsel be full-time and prohibited from engaging in the private practice of law.

D. Workload

There are several factors that affect the workload of staff attorneys at the Hidalgo PD Office. The culture of the criminal justice system in Hidalgo County, which is largely affected by the county's proximity to the Mexico border, results in a large number of misdemeanor jail cases (defendants that remain in-custody) pleading out at initial appearance (or arraignment). This affects attorney workload such that attorneys spend less time on each case, as fewer cases are prepared for trial. Attorney workload in court is also affected by the system. For jail cases, attorneys generally have approximately 15-20 minutes in court at arraignment before the judge takes the bench to talk with their clients, after which time the clients generally enter a plea. Typically public defenders will handle between 4-6 cases at initial appearance. With the short amount of time they have to discuss a client's case, if the attorney has more than eight or 10 cases set for arraignment one morning, another public defender will come to the courtroom to assist with arraignments.

⁴⁷ Art.26.044(i)(1), Code of Criminal Procedure.

Many of the public defender clients live in Mexico and only cross the border to work. If the client has crossed the border illegally, after arrest the Department of Homeland Security will be notified within a day of arrest, and the defendant will be placed on a border patrol hold, which prevents the defendant from bonding out. Therefore, the defendant must remain in-custody until arraignment, which occurs up to 16 days after arrest. At that point, most of these defendants want to enter a plea of guilty so they can be deported and return home to their families. Very few defendants want to fight their charges, as it will only result in additional jail time while the defendant awaits a trial date.

Some defendants who are in the United States illegally are able to contact their employers prior to the Department of Homeland Security being notified of their immigration status, and are able to bond out before they are placed on a border patrol hold. If this happens, the public defender remains assigned to the case and the case will proceed as any other case would with an out-of-custody defendant. Thus if the defendant bonds out before a boarder patrol hold is issued, the defendant's immigration status will have no effect on the length of the case.

Also, because a large percentage of the public defender's clients raise immigration issues, this can increase attorney workload, as the attorney must be aware and trained on the immigration consequences of a criminal conviction, and must discuss this with the client. It is crucial that staff attorneys are trained and able to fully inform clients about the immigration consequences of an arrest and conviction.

Finally, attorney workload should remain fairly consistent for all staff as at this time the office only handles misdemeanors. Of course certain misdemeanors may take more time, such as assault and DWI cases, therefore these types of cases will result in a heavier workload. Also, the Hidalgo PD's contract with the county states that the office may handle misdemeanor cases with concurrent felonies. This has not happened yet, but there has been continued dialog between the Chief Public Defender and the Oversight Board regarding the Hidalgo PD handling felonies. Recently a decision was made that the Hidalgo PD will continue to handle misdemeanors only, but may begin to handle bond reduction motions in felony cases.

The Hidalgo PD does not have formal workload standards, but should develop them as soon as possible. Workload standards 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.

Formal workload standards can be developed in two ways. First, and most accurately, time studies or case-weighting studies are done to determine how much time an attorney spends on different tasks involved in each case. From that, the average amount of time each type of misdemeanor case takes can be calculated and then based on the number of annual hours an attorney is expected to work one can calculate the number of cases an attorney can handle in one year. We were told that the Chief Public Defender currently requires that his staff attorneys record the amount of time they spend on each case, both in- and out-of-court, in order to illustrate how much the case would have cost based on the hourly rates charged by assigned-counsel. This time is kept in a computerized database, and can be used to calculate case-weights

for the office. Time should be recorded accurately and reflect work done on all cases including any work done on cases transferred out of the office, where counsel is retained, or where the case is reassigned due to a conflict of interest.

Second, a more informal approach to calculating case-weights could be conducted by dividing attorneys' average annual "billable hours," or the average number of hours attorneys work during the course of a year, by the average attorney caseload in the office. Factoring in holidays, sick and vacation time, average annual billable hours may be anywhere from 1700-1800 hours. Once the calculation is made, this figure will be the average number of hours spent on each case. Based on certain deficiencies in the criminal justice system in Hidalgo County, which fosters a system in which a large percentage of defendants plead at arraignment, the average time spent on each case may be lower than it should be. For instance, the vast majority of defendants represented by the Hidalgo PD that are on border patrol holds will plead guilty at arraignment so that they can be released immediately and return home. If the time from arrest to arraignment were shortened, these in-custody defendants may want to challenge the charges against them, and thus the public defenders would be able to spend more time on trial preparation. Therefore, additional time should be added to the average number of hours spent on each case when determining a final appropriate workload.

E. Other Workload Factors

It appears that the Hidalgo PD has a good working relationship with District Attorney's Office. The Chief of the Misdemeanor Section at the District Attorney's Office has been supportive of the office, and noted that it helps to have an institutionalized presence working for indigent defendants. Also, the Hidalgo PD has improved the previous problem of attorneys not being present in court, as the public defenders are always in court.

There is open file discovery in Hidalgo County; however, attorneys in the Hidalgo PD generally do not review the assistant district attorney's case file until they are in court at arraignment. This is due to the fact that public defenders do not always receive a case file until the day before arraignment. Since public defenders must have a district attorney present in the office with them while they review the DA's file, and there is not always a prosecutor available on such short notice, the public defender must wait until arraignment the following day to review the district attorney's case file. One public defender said that she calls the DA's office first before she walks over to the office, but there is not always someone there to meet with her. When this happens, the attorney must wait until she is in court at arraignment to review the police report and district attorney's recommendation. Another attorney said that she usually has the opportunity to review the case file in the DA's office the day before arraignment.

Assistant public defenders indicated that for the most part plea offers from the district attorneys are fair based on the circumstances of each case. Because these are misdemeanor cases and many defendants have already served, on average, two weeks in jail pretrial, many plead to time served.

Most attorneys are in court every morning except Fridays, and generally from 9:00 or 9:30 a.m. to 11:30 a.m. to 12:00 p.m. Therefore they have afternoons to get work done and

interview clients. There is some waiting time in court, although no attorney reported that it was unreasonable.

Every week one staff public defender is assigned jail duty. This entails visiting the jail to meet with pretrial defendants to whom the office has been assigned. These defendants have not had formal charges filed yet. The number of defendants the attorney must interview depends upon the day. Generally there are more people to meet on Mondays and Tuesdays, as these are the people arrested over the weekend. The attorney on jail duty at the time of our site visit said that on Tuesday of that week she had 10 defendants to interview, on Wednesday she met with two, and on Thursday, the date of the interview, only one defendant was scheduled. Another attorney reported that interviews take place in the afternoons, and if the attorney is at the jail by 2 p.m., they can typically interview 5-6 defendants by 5 p.m. In any given week, a public defender will likely see 10-20 defendants. If there are less than five clients to interview on a particular day, for the most part attorneys will utilize the video teleconferencing system available in the Office of Indigent Defense to speak with clients, as visiting the jail is time-consuming. Also, attorneys may receive appointments late in the day at which time they will use the video teleconferencing system to speak with in-custody clients. While we believe that the video-teleconferencing system is an excellent resource for the public defender's office and saves attorney time, we also believe that every defendant should be interviewed in-person for the first attorney-client meeting, and the video-teleconferencing system can be utilized for subsequent communications.

The purpose of these interviews is to meet with the defendants to see if someone can help the defendant make bond, to check to see if the defendant has a border patrol hold from the Department of Homeland Security, or if they are on probation. Attorneys will then spend time calling each in-custody defendant's family to see if someone can help the defendant pay his/her bond. If a defendant has a border patrol hold, he/she is unable to bond out. In these cases, the attorney will contact family members to let them know where the defendant is, but otherwise an attorney's ability to advocate for the defendant pretrial is limited.

In addition, the Hidalgo PD does not know which attorney will be representing a defendant at this time because a case is not assigned to a particular courtroom until charges have been filed. Thus the defendant is likely meeting with an attorney who will not be the same person representing them in court. However, there is vertical representation from arraignment through the life of the case, as the defendant is represented by the same attorney.

We were told that it is very rare that defendants being held in custody want to fight their case. As discussed above with regards to defendants on border patrol holds, this is primarily due to the fact that defendants spend, on average, close to two weeks in custody before arraignment or initial appearance. At that time, most defendants want to be released from custody and will plead to time served, rather than spend additional time in jail awaiting trial. For public defender clients that remain out-of-custody, most want to fight their charges, and are thus not resolved until a pretrial hearing or at trial.⁴⁸

⁴⁸ The misdemeanor trial rate in Hidalgo County is much less than one percent. Therefore, most cases are resolved prior to trial.

F. Case Conflicts

The Hidalgo PD policy and procedures manual discusses the issue of conflicts of interest. It includes conflicts where the public defender already represents, or has in the past, the victim, a co-defendant, or adverse witness in the case. The manual requires a conflicts check on each case early in the appointment process. At the time of our site visit, the office did not have software necessary to check for conflicts; however, a new case management system has been installed and is checking for conflicts. Prior to the new system, over the last year, conflicts were not always spotted in a timely fashion.

G. Personnel Policies

The Chief Public Defender developed a very detailed and extensive Policy and Procedures Manual, which not only covers human resources-type issues and specific office policies, but serves in part as a training manual. (See Section B, Training.)

The manual also contains written performance guidelines; however, they are not extensive. The section discussing performance evaluations appears to be for the office as a whole, not individualized attorney evaluations, and it is in part based on objective measures set forth by the Commissioners Court, including monthly case flow and length of time between certain stages of the process (e.g., arrest to appointment, arrest to release, etc.). There is a discussion of attorneys and support staff being bound by attorneys' ethical standards, and a discussion of client confidentiality. There is no mention of performance reviews or whether compliance with any performance standards is mandatory or voluntary. We were told that the Chief Public Defender deals with performance issues on a case-by-case basis and addresses any problems/concerns immediately with the attorney in question. We recommend that the Chief Public Defender institute a policy of annual performance evaluations for each employee.

H. Personnel Resources

The Hidalgo PD is a fairly young office in terms of criminal law experience. Of the four staff attorneys in the office, the most senior has been licensed for four and a half years and worked for the Hidalgo County District Attorney's Office for two. She has been with the office for two months. Another has been practicing for three years and started with the Hidalgo PD office after two years practicing civil law. A third attorney was recently admitted to the bar, and this was his first job out of law school. The fourth staff attorney had been licensed for one year practicing civil law prior to joining the public defender office when it began. The Chief Public Defender has been a lawyer for four years, all of which time he has spent as an assistant district attorney.

At the time of our site visit, there was an open first assistant staff attorney position. This position is the second most senior attorney position in the office, and position duties include assisting the Chief Public Defender with training, mentoring and supervision. The attorney in this position had served as a "roving" attorney, primarily handling cases in county court four, where most bench assignments come from. While staff may be able to cover the additional work

without a “roving” attorney, the office needs a more senior staff attorney to assist with training and mentoring, as recently hired staff received very little assistance of this kind.

There are two support staff in the office, an administrative assistant and an investigator. All but one of the staff members are bilingual, something that is crucial in this area as a number of the clients served by the Hidalgo PD are from Mexico. The office does not utilize law students/interns.

The Chief Public Defender hired an excellent administrative assistant, who contributed greatly towards establishing the office infrastructure. She is responsible for maintaining the office computer system, inputting all case information into the system, documenting the case disposition, tracking cases to determine when they are filed by the DA’s office, tracking inmates that have been in custody for more than six days so that the Chief PD can contact the DA’s Office to find out why charges have not been filed, contacting the court coordinator to inform him/her that there is a new in-custody public defender client and request that the court coordinator put the public defender client on the docket within a day or two for arraignment, and performing other general office administrative tasks. Attorneys are responsible for typing motions and maintaining case files.

I. Parity with the District Attorney’s Office

There is parity for the starting salary of trial public defenders and misdemeanor assistant district attorneys at \$43,000 annually; however, after a year of practice in the District Attorney’s Office, assistant district attorneys will make \$3,100 more than second-year assistant public defenders (\$47,500 for assistant district attorneys compared to \$44,400 for assistant public defenders). Also, because public defenders handle only misdemeanor cases in Hidalgo County, they do not receive the same pay increases attorneys at the District Attorney’s office do when they move from the misdemeanor to felony division. The investigator in the misdemeanor unit at the DA’s Office makes significantly more than the investigator from the Hidalgo PD Office, although the secretaries in the DA’s Office makes several thousand dollars a year less than the secretary in the PD Office (however the secretary in the PD Office is responsible for five attorneys, while the secretaries in the DA’s Office are responsible for one attorney each).

There are an equal number of attorney positions in the Hidalgo PD and the District Attorney’s Misdemeanor Unit; however, the “floating” attorney position at the Public Defender’s Office is not filled. Therefore, there are five assistant district attorneys (one in each of four county courts and one floating attorney) and one Chief Misdemeanor District Attorney. The DA’s Misdemeanor Unit has far more support staff however, with one secretary assigned to every county court, one receptionist, one victims’ coordinator, and one investigator. In addition, the District Attorney’s Office receives in-kind services from all local police departments.

In addition to the issue of pay parity with the District Attorney’s Office, is how much more an attorney can make in private criminal practice. Over the last year, the Hidalgo PD has lost three attorneys including the first assistant attorney who assisted the Chief Public Defender with training and supervising staff attorneys and carried a full caseload. We were told that all three attorneys left because the pay is significantly less than what an attorney could make in

private criminal practice. It is important to note that part of the discrepancy in pay may be due to the fact that attorneys in private practice can earn more taking felony cases, while attorneys in the public defender's office in Hidalgo County handle only misdemeanor cases. Therefore assistant public defender salaries will hit a ceiling unless or until they begin to take felony appointments. While every attorney entering a public defender office must expect that they will make less than attorneys in private practice, public defenders should make at least the same amount as assistant district attorneys with the same level of experience. Thus, a reconsideration of assistant public defender salaries after one year of practice is recommended.

J. Equipment Resources/Availability & Law Library Resources

The Hidalgo PD opened in October of 2005, and the office equipment was purchased at the time the office opened. Therefore the office infrastructure is in very good condition. The Chief Public Defender was provided with enough start-up money to purchase an appropriate number of computers and other necessary office supplies. The biggest issue in the public defender's office is the lack of space. The only space to privately interview clients is the kitchen, which is very small. The Chief Public Defender does have his own office, but all attorneys must share office space. We were told that the office is expanding to additional space soon.

2. Performance Evaluation

K. Supervision

The Chief Public Defender is currently the only supervisor in the office. The Chief Public Defender does have a limited caseload, which provides him with more time to mentor new attorneys. We recommend all Chief Public Defenders have a limited caseload.

When the office is fully staffed, the first assistant will also provide a supervisory role. As outlined in the first assistant job description, the first assistant will "supervise personnel; instruct, assign, review and plan work of others; monitor standards," etc. Because the staff attorneys are entry level positions and most did not have prior criminal law experience, it is imperative that the first assistant position be filled.

There do not appear to be regular attorney evaluations; however, the Chief Public Defender will address problems as they arise. Annual performance evaluations should occur for each assistant public defender and should be conducted by the Chief Public Defender and any supervisors.

L. Investigation

The Hidalgo Public Defender has a full-time investigator on staff who is also responsible for some administrative tasks. She estimates that approximately three-quarters of her time is spent on investigations, the remainder on administrative tasks such as payroll, paying bills, dealing with human resources issues, accounting, auditing invoices, and submitting requisition information to the county.

Because the office was new, the investigator and the Chief Public Defender worked together to develop an investigation request form. The investigator also developed evidence log reports, evidence release reports, employee evaluation reports, etc. The majority of investigatory work involves DWI and assault cases. The investigator has worked on four trials – primarily DWI cases and one domestic violence case. At the time of our site visit she had two outstanding investigator request forms.

The investigator also actively assists the Chief Public Defender with bond reduction motions. The investigator talks to the district attorney's office to obtain background information about the defendant – whether he/she had any priors, was the defendant a good citizen, etc. – and then she checks the county-wide criminal justice system to perform a criminal history check, and checks Westlaw to determine whether the defendant has a criminal history in other states. Also, she drives the information about the defendant over to the magistrate for a bond reduction motion if the magistrate does not accept motions via fax. The assistance from the investigator in this area likely helps expedite bond reduction motions, thus releasing defendants from jail pretrial and saving the county money for housing inmates.

Of the three attorneys interviewed, the attorney who had only been with the office for a few weeks had not needed to use the investigator yet because she was just becoming familiar with her cases. One attorney who has been with the office for a year said that she uses the investigator infrequently. When she does, she asks the investigator to obtain the police report, find witnesses, take pictures, etc. She said that in misdemeanor cases there are typically not a lot of witnesses involved, and if she does have witnesses, the attorney prefers to talk with them herself.⁴⁹ The investigator assisted the third attorney interviewed with a motion to suppress in a DWI case and has taken crime scene photos.

M. Expert/Other Services

The office has \$10,000 budgeted for contract services, which includes money to be used for experts and other services such as copy machine repair or contracting an appeal to outside counsel. If the Chief Public Defender needs additional money for contract services, he is able to move money from other line-items. Thus far the office has not used any experts and has not had to contract with outside counsel to appeal one of their cases. However, if the office were to utilize an expert, the public defender does not need prior approval from a judge and the Chief Public Defender would be responsible for reviewing an attorney's request for an expert and authorizing the request. This is due, in part, to the fact that the Chief Public Defender is the only person with the authority to sign a purchase order. We are somewhat concerned that the public defender office has not found the need to utilize an expert for even one of the 2,220 cases it handled in fiscal year 2006.

⁴⁹ According to the ABA Criminal Justice Standards: Defense Function, Standard 4-4.3 Relations With Prospective Witnesses, "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."

With regards to hiring an interpreter, there is always a Spanish interpreter in court at every hearing. For other languages, the public defender office generally utilizes a family member to translate during attorney-client meetings, after permission is given by the defendant. For court hearings, the court is responsible for hiring an official translator. In some instances there has been a delay in obtaining an official translator for in-court proceedings, however in these instances the defendant has been out-of-custody.

For other services, such as transcription services, the court pays any expenses the public defender encounters.

N. Motions, Hearings

One of the primary reasons for establishing the Hidalgo PD was to reduce the number of days defendants spent in custody pre-disposition. To accomplish this, the Hidalgo PD files bond reduction motions or motions for a personal recognizance bond (or “PR bond”) when appropriate. According to data received by the Hidalgo PD, as of November 14, 2006, the office had filed 61 bond reduction motions, requested 36 PR bonds, and requested 25 cash/surety bonds for their clients. The return rate for clients released on a PR bond is 87 percent, which illustrates that the Hidalgo PD is asking for PR bonds in appropriate cases. Not only are the public defender efforts reducing the amount of money the county spends on housing defendants in jail prior to their initial appearance, the ability of the Hidalgo PD to successfully reduce bond amounts saves their clients money.

While conducting initial jail visits, the attorney on duty notifies the Chief Public Defender if a client may qualify for a PR bond. The Chief Public Defender handles all PR bond requests. Judges do not typically grant PR bonds from the bench without prior approval from the assistant district attorney, so the Chief Public Defender contacts the District Attorney’s Office when seeking a PR bond. Otherwise, the arraigning magistrate has authority to reduce bond or grant a PR bond. However, since magistrates are located all over the county, it can often be very time consuming to file bond reduction motions with the magistrate who initially set bond, unless, as stated above, the magistrate accepts faxed bond reduction motions.

There is a mechanism to file a writ of habeas to get the issue of bond moved from the magistrate or justice of the peace to the county court judge; however, the case may not always be heard by the county judge in a timely manner. Therefore, the investigator must spend time driving bond reduction motions to magistrates around the county. To save time and streamline the process, the Chief Public Defender worked with the jail so that the jail now accepts signed bond reduction motions by fax, which saves the Hidalgo PD the time of running the signed motion over to the jail.

Other motions filed are motions to suppress, which are primarily filed in DWI cases, to challenge probable cause for arrest or the initial stop. All attorneys but the newest reported filing motions to suppress.

O. Case Dispositions

The following summary of how Hidalgo County Public Defender cases proceed through the criminal justice system will illustrate the positive ways in which the Hidalgo PD has worked to decrease time in custody pretrial. Most of the discussion is in reference to in-custody clients as one of the mandates of the Hidalgo PD was to handle primarily jail cases, and help decrease the in-custody jail population.⁵⁰

Within 48 hours of arrest, all defendants must see a magistrate to be informed of the nature of the charges, to ask for court-appointed counsel, and to have bond set. Magistrates are available 24 hours a day and Hidalgo County employs a video teleconferencing system for magistration. Since our initial site visit, additional magistrates and justices of the peace have begun to utilize the video-teleconferencing system, which is a positive time-saving device for the county. As discussed in our previous report, “[t]here are no recommended bond [schedules] or county policies on setting bond; the discretion is left to the justice of the peace or magistrate setting bond. In addition, court-appointed lawyers are not appointed until after magistration, therefore defendants rarely have assistance of counsel when bond is set.”⁵¹ Because of the lack of assistance of counsel when bond is set, we strongly suggest that the county develop a reasonable uniform bond schedule. The Hidalgo PD works very hard to get their clients’ bonds reduced or to get their clients released on PR bonds, which in turn helps to reduce the county jail population. If there were a uniform bond schedule, the public defender office would often be able to spend less time on bond reduction motions and more time investigating cases and defending their clients.

Depending on the day of arrest (weekend or weekday), within two to three days after arrest the public defender office is notified that it has a new in-custody client. The attorney from the public defender office who is on jail duty that week will visit the client the afternoon after they are notified of appointment. Sometimes this contact takes place over videophone. At the time of the initial jail visit charges have not been filed against the defendant. Therefore the public defender does not talk with the client about the specifics of his/her case. Rather this meeting is primarily to address the issue of bond. Attorneys will inquire about family/friends that may assist the defendant in bonding out of custody. The attorney may also inquire about how the defendant may want to proceed in the case, i.e. plea or fight the charges.

The attorney returns to the office and contacts family members in an attempt to help the client get out on bond. If the defendant is unable to post bond, or if the defendant is on a border patrol hold from the Department of Homeland Security and thus ineligible for bond, the defendant must wait in custody until charges are filed by the district attorney. On average it takes 10.1 days from arrest to the charges filed and the complaint signed for public defender clients, and slightly longer for assigned counsel clients (11.5 days). We were told that the reason for delay is the failure of law enforcement agencies to submit their incident reports to the district attorney in a timely manner. During this time, the administrative assistant at the Hidalgo PD monitors in-custody defendants to determine when a public defender client has been in custody for more than six days without charges filed. When this happens, she notifies the Chief Public

⁵⁰ Despite this, in FY 2006, 58 percent of the Hidalgo PD clients were non-jail (or out-of-custody) cases.

⁵¹ *Initial Interim Report* at 21.

Defender, who then contacts the district attorney's office to find out why charges have not been filed yet.

For non-public defender pretrial inmates, on a weekly basis someone from IDS will generate a list of inmates who have been in custody for 30 days or more. This list is given to the Chief Public Defender to find out why they are still in custody. This additional service the public defender provides to the county helps to reduce the jail population and catch cases that have "fallen through the cracks." However, if the inmate already has counsel, this notice should be provided to the attorney representing the inmate, and it should be that attorney's responsibility to get the defendant released, or move the case forward. It is likely that many of these defendants may not be represented by counsel, and thus the public defender is in an ideal position to assist these inmates by notifying the court if counsel has not been appointed, or other factors that may be affecting the timely processing of the inmates' cases.

Once the complaint has been signed, an arraignment date is set. According to data from the Hidalgo PD, it takes 6.5 days on average from the date the complaint is signed to the arraignment. We were told that part of the reason for this delay is in the court clerk's office. In-custody defendants are then brought to court en masse for initial appearance or arraignment. At this time, a public defender client will likely meet his attorney for the first time, and speak with her/him for a few minutes before entering a plea. Most defendants have already spent close to two weeks in jail at this point. We were told that many are offered time served, and rather than spend additional time in jail to fight the charges, they will accept the plea. The public defender remains in court all morning for the arraignment session to assist the court as needed with defendants who are not represented by counsel.

An order for release is signed by the judge and the papers are brought by courier to the jail. We were told that it used to take over a day from judgment to release; however, someone from the Hidalgo PD continually checks the county-wide case tracking system to determine whether a defendant has been released. This has decreased the time from judgment to release to .4 days.

P. Attorney/Client Contact

In many instances, client contact is limited to the initial in-custody interview where the attorney does not discuss the facts of the case, and an in-court meeting at arraignment for 5-10 minutes before, in most cases, a plea is entered. The attorney conducting the in-custody interview may not be the same attorney assigned to represent the defendant in court. We were told that at the time of the initial interview, the attorney asks whether the client is thinking about entering a plea or contesting the charges, although at this point charges have not even been filed yet. If a client is not in-custody, attorneys may interview the client in the public defender's office, although unless the attorney and client meet in the kitchen, there is no confidential meeting space in the office. There is also a video teleconferencing system in the jail and public defender attorneys may access the system from the IDS office, which is a short walk away. Finally, at the jail, public defenders have access to private rooms in each cell block to talk with clients.

To facilitate a prompt investigation of the case, we recommend that at the initial in-custody interview, the public defender gather at least the following information from each defendant: the client's story about what happened; whether there were any witnesses, and any information about the witnesses; whether the defendant waived his/her Miranda rights; and whether the defendant was mistreated during the arrest in any way.

3. Evaluation of Data

Data was received from the courts, with assistance from the IDS Office, the Hidalgo County Jail, and the Hidalgo PD. We encountered a number of problems while attempting to evaluate the data, primarily due to the way the Hidalgo County Jail enters case data. The "person identifier," "arrest ID," and particularly the "case number" from the court were not always entered properly for each defendant, which made it difficult to match the jail data with the court data. We were also unable to receive accurate appointment data for assigned counsel, thus we cannot determine how many additional defendants received assistance of counsel as a result of the new public defender office. It is likely that the number of defendants receiving assistance of counsel rose, but without better data reporting, we cannot say this definitively.

For all Hidalgo PD data, we evaluated information from fiscal year 2006, which runs from October 1, 2005 to September 30, 2006. However, the public defender office did not become fully operational until October 21, 2005, thus fiscal year 2006 includes time in which the Hidalgo PD was not fully operational. To get an accurate picture of the Hidalgo PD Office caseload, we will have to analyze data from its second full year of operation, which should show a better picture of the caseload the office is able to handle. With regards to calculating cost-per-case for the Hidalgo PD, during the first year of any public defender office's operations there are a number of start-up costs, or one-time only costs that will not be regular costs present in future years. We have attempted to take out these costs from the total Hidalgo PD expenditures – for things such as the purchase of furniture and computers – but a more accurate picture of the office expenditures can be captured after the office completes its second full year of operation.

Table 7 represents all cases handled by assigned counsel and public defenders for which there was a matching arrest date and person identifier (PID) in the data provided by the Hidalgo County Jail. A "case" is counted by arrest date and person identifier, regardless of the number of charges or cause numbers associated with the arrest. A public defender case was designated in- or out-of-custody based on the status of the defendant at the time the public defender office was appointed. The table includes only those cases for which the release type was not "released to other agency," as the defendant was not actually released in those cases, but transferred to another facility. These cases do not include probation violations or motions to adjudicate guilt, and the public defender cases do not include cases with an outcome of "transferred," "attorney" (hired private attorney), or "codef" (conflict due to representation of co-defendant).⁵² The total number of cases for Assigned Counsel for 2006 may not represent the most accurate number of

⁵² Please note that the analysis of days to release provided in our *Initial Interim Report* (May 2006) includes additional cases not counted in this report. Last year we included cases in which a defendant was transferred to another agency. Thus comparisons to fiscal year 2004 and 2005 data should only be made with the data provided in this report.

cases represented, since vouchers for representation in those matters may not have been submitted prior to our receipt of data from the county auditor’s office.

The category “arrest to release before or at disposition” reflects the average number of days to release for defendants who were released anytime prior to or one day following the final disposition of the matter. This illustrates that the public defender office was able to have their clients released from jail sooner than assigned-counsel clients at any point prior to a final disposition being entered. This includes instances where the attorney was able to get a bond reduced and the defendant was able to bond out of jail prior to final disposition, or where a defendant was released on PR bond. This category also includes those cases where an in-custody defendant plead to time served. The category “arrest to release” includes the cases in the latter category in addition to those cases where the defendant was released after sentencing or disposition (e.g., the defendant received a sentence of jail time in addition to time already served). “Days from arrest to disposition” includes all time from arrest to final sentencing or disposition. In the table, “MA” indicates a Class A Misdemeanor, which has a higher penalty than a “MB” or Class B Misdemeanor.

Table 7: Comparison of Assigned Counsel and Public Defender Misdemeanor Representation in Specified Cases*

		Assigned Counsel			Public Defender		
		FY2004	FY2005	FY2006	FY2006		
					Out-of-Custody	In-Custody	Total
MA	Case Count*	1280	1286	809	306	187	493
	Arrest to Complaint	13.8	14.2	12.6	11.2	9.4	9.9
	Arrest to Release Before or at Disposition	11.4	11.8	15.4	7.3	15.2	10.7
	Arrest to Release	14.4	15.3	20	9.3	21.7 ⁵³	13.8
	Arrest to Disposition	147.9	128.1	73.5	149.8	15.1	82.9
MB	Case Count*	2493	2582	1626	697	324	1021
	Arrest to Complaint	13.4	11.5	10.7	13.1	8.6	9.7
	Arrest to Release Before or at Disposition	7	7.1	9.9	6	15.5	9.8
	Arrest to Release	9	9.4	12.7	6.3	16.7	9.7
	Arrest to Disposition	157.7	127.1	81.9	194.2	16.9	119.6
Total Case Count*		3773	3868	2435	1003	511	1514
Total Days from Arrest to Complaint		13.6	12.6	11.5	12.4	8.9	9.8
Total Days from Arrest to Release Before or at Disposition		8.5	8.6	11.7	6.4	15.4	10
Total Days from Arrest to Release		10.9	11.4	15.1	7.2	18.4	11
Total Days from Arrest to Disposition		154.4	127.4	79.1	181.4	16.3	107.9

* For both assigned counsel and public defender cases the table only includes cases for which there was matching jail data. It does not include: cases that were released to another agency, probation violations, and motions to adjudicate guilt. PD cases do not include transferred cases, when a private attorney was hired, or a conflict due to representation of a co-defendant.

⁵³ This number is affected by a few cases where the defendant remained in custody for a substantial amount of time awaiting trial.

As previously indicated, the Hidalgo PD was created in part to reduce the amount of time misdemeanor defendants spend in custody predisposition, which would in turn reduce jail overcrowding. While the average number of days a defendant spends in custody pretrial has grown steadily over the last several years, the number of days public defender clients spend in custody pretrial is less than that for assigned counsel in fiscal year 2006, which saves the county money. (See Table 7, above)

The average number of days a defendant spends in custody from arrest to release for all levels of misdemeanor is 15.1 for assigned counsel clients and 11 for PD clients, or a difference of over 4 days. Looking only at public defender data where there was a matching arrest date and person identifier in the Hidalgo County Jail data to the data provided by the court, the public defender handled 511 jail cases. (This number is likely higher, but we encountered significant challenges matching jail data to court data.) At \$40 a day to house an inmate in the Hidalgo County Jail, this results in a significant savings to the county: 511 inmates spending four days less in jail at \$40 a day to house an inmate equals a savings of \$81,760. Public defender clients are also released almost two days sooner than assigned counsel clients in those cases where the defendant is released prior to or one day following the disposition of the case: 11.7 days on average for assigned counsel clients versus 10 days on average for public defender clients.

If one looks at the public defender data regarding days from arrest to disposition, it is clear that out-of-custody cases take far longer to resolve than in-custody cases (181.4 days versus 16.3 days). There are a number of factors that cause out-of-custody cases to take longer; and generally speaking, in the criminal justice system in-custody cases take priority over out-of-custody cases. Another factor affecting length from arrest to disposition for out-of-custody defendants is the county's pretrial diversion program. For cases involving pretrial diversion the defendant is typically given one year of probation and upon successful completion, the case is considered disposed. During the course of the year, the case remains open even though counsel has very little involvement in the case. Therefore, cases involving pretrial diversion inflate the total number of days from arrest to disposition for out-of-custody cases for both assigned counsel and the Hidalgo PD.

During our site visit we were told that a significant amount of time still passes from arrest date to the complaint signed by the District Attorney's Office, although this time has decreased over the last four fiscal years.⁵⁴ We were told that the delay is due to a delay by law enforcement in providing the DA's with the offense report. For public defender clients the time from arrest to complaint signed amounts to 9.8 days on average, or 1.7 days shorter than assigned counsel clients. There are 28 law enforcement agencies in Hidalgo County, and the DA's Office has no ability to require law enforcement to get their offense reports in sooner.

Delay also occurs from the time the complaint is signed by the DA to the first court hearing, or arraignment. According to data received from the Hidalgo PD, for public defender clients this is on average 6.5 days. We were told that this delay is due, in part, to the court clerk who assigns cases hearing dates.

⁵⁴ In FY 2003, the time from arrest to filing of the complaint was 19.2 days on average. In FY 2004 it was 13.6, in FY 2005 it was 12.6 and in FY 2006 it was 11.5 for assigned counsel and 10.1 for the public defender's office.

During our site visit we met with several personnel from the Hidalgo County Jail, including the commander and captain. We were told that the number of inmates being housed outside of the jail due to overcrowding has diminished greatly since the public defender office was established, and jail officials attribute this in part to the public defender's office. Also, on October 31, 2005, there were 1,328 defendants being held at the jail, and approximately 30 percent of those defendants were being held pretrial on a misdemeanor offense. One year later in October 2006, on the date of our second site visit, there were 1,045 defendants being held at the jail, with 142 or 13.5 percent being held pretrial on a misdemeanor offense. It is likely that the presence of the public defender has reduced the number of defendants held in custody pretrial – due in large part by the system checks that the public defender office has established. These checks include things such as continually reviewing a list of inmates, generated by IDS, that have been in custody for longer than 30 days without arraignment, and communicating with the District Attorney's Office as to why these defendants have not been arraigned. During our site work we were told that such systemic checks have helped the system run more smoothly and efficiently, both for public defender and appointed-counsel clients.

With regards to indigent defense expenditures, 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. 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. For several months, the office had an unfilled first assistant attorney position, so the office was not able to accept as many appointments as it would have had it been fully staffed. The attorney turnover in the office may also have decreased the number of cases the office was able to accept, as new attorneys start out with a reduced caseload. Therefore, we expect that once the public defender office has been operating with a full staff for one year, assigned counsel payments will continue to drop as the public defender office will be able to accept a full caseload.

Table 8: Indigent Defense Costs

	Assigned Counsel Payments	Public Defender Expenditures	Total Indigent Defense Costs	Percent Increase in Costs
FY 2004	\$1,130,948	N/A	\$1,130,948	
FY 2005	\$1,406,103	N/A	\$1,406,103	24%
FY 2006	\$1,372,932	\$412,690*	\$1,785,622	27%

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

Finally, to determine average cost-per-case we looked at case disposition data. The following table includes only cases disposed in each fiscal year.

Table 9: Comparison of Cases Disposed and Cost-per-Case

Assigned Counsel			
	FY2004	FY2005	FY2006
Case Count	4643	6114	5019
Probation Violations	467	810	1079
Motions to Adjudicate Guilt	33	77	98
Total Cases	5143	7001	6196
Cost-per-Case	\$224	\$238	\$236

Public Defender			
	Non-Jail Case	Jail Case	Total FY2006
Case Count	1009	788	1797
Probation Violations	141	63	204
Motions to Adjudicate Guilt	14	6	20
Total Cases	1164	857	2021
Cost-per-Case			\$204

As Table 9 indicates, the Hidalgo PD cost-per-case is significantly lower than the assigned counsel cost-per-case - \$204 in FY 2006 for the Hidalgo PD versus \$236 for assigned counsel. We expect the Hidalgo PD to continue to exhibit a lower cost-per-case than assigned counsel.

4. Conclusion

The Chief Public Defender has developed an extensive policy and procedures manual that should be used as a model for other public defender offices. He built a well structured office that is able to challenge and fix some of the systemic deficiencies in the criminal justice system in Hidalgo County. For instance, the Hidalgo PD has been able to successfully shorten the time from arrest to pre-disposition release, and arrest to final disposition throughout the county. This has, in turn, had an effect on the pretrial jail population, and has helped reduce jail overcrowding.

The positive effects of the Hidalgo PD are not only reflected in public defender cases, but in assigned counsel cases as well. For instance, the time between certain events decreased for assigned counsel cases in fiscal year 2006, particularly in reference to number of days from arrest to filing and total number of days from arrest to final disposition. This is may be a result of the Hidalgo PD speeding up the process for the resolution of misdemeanor cases.

The Hidalgo PD has also saved the county money by decreasing the number of days defendants spend in-custody pretrial, thus reducing the amount of money spent on housing inmates in the Hidalgo County Jail. This has also helped reduce jail overcrowding and the Hidalgo County Jail houses far fewer inmates in other institutions. In addition to saving money spent on housing inmates pretrial, the public defender average cost-per-case is significantly lower than the assigned counsel cost-per-case. Also, despite the fact that total indigent defense expenditures for misdemeanor cases rose in fiscal year 2006, the percentage increase in

expenditures from fiscal year 2005 to fiscal year 2006 was not significantly higher than it had been the previous year, and we expect assigned counsel costs to continue to decline over time.

One concern about the public defender program is the high attrition rate for staff attorneys. Over the last year, the Hidalgo PD has lost three attorneys including the first assistant attorney primarily because the pay is significantly less than what an attorney could make in private criminal practice. Steps should be taken to increase retention rates, possibly by expanding the office to take felony appointments, so that attorneys have the possibility of promotion.

Also, case assignments should be monitored by the Chief Public Defender and the Oversight Board to ensure that assignments remain consistent and caseloads remain reasonable. For instance, if the judge in county court four reduces the amount of bench assignments to the public defender, caseloads would drop to a level that would no longer make the public defender office cost-effective. On the other hand, if all judges began increasing bench assignments to the same level as county court four, attorney caseloads may become too high, in violation of ABA ethical standards. With the installation of a new case management system in the Hidalgo PD Office in January 2007, the Chief Public Defender will be able to review the effectiveness and efficiency of the program, generate statistical information about attorney caseload, better formulate budget requests, and illustrate cost savings.

Overall the Hidalgo Public Defender Office has provided the county with an institutional provider of indigent defense services that is able to not only advocate for a community that does not have a uniform voice, but has been able to institute practices in the criminal justice system that serve to expedite the process of resolving misdemeanor cases, reduce jail overcrowding, and assist defendants in being released from custody earlier than before. Finally, we believe that indigent misdemeanor defendants now receive better representation than they had prior to the establishment of the Hidalgo PD.

II. 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?
6. Is training required for non-attorney staff?

* 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.

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

III. 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.⁵⁵

⁵⁵ 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.”⁵⁶ A number of states have adopted the NAC caseload limit for misdemeanor indigent defense representation, while others have lower caseload limits.⁵⁷

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.⁵⁸

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.⁵⁹

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

⁵⁶ 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.

⁵⁷ 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.

⁵⁸ Bureau of Justice Assistance, Keeping Defender Workloads Manageable, 8 (2001), at <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

⁵⁹ 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.⁶⁰ 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

⁶⁰ 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).⁶¹

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.⁶²

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.”⁶³ 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.”⁶⁴

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.

⁶¹ Bureau of Justice Assistance, Keeping Defender Workloads Manageable, 9 (2001), at <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

⁶² ABA Criminal Justice Standards: Discovery, Standard 11-4.1 Timely performance of disclosure

⁶³ *Id.* at Standard 14-3.1. Responsibilities of the prosecuting attorney.

⁶⁴ *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.⁶⁵ 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.

⁶⁵ For the ABA Standards, please see http://www.abanet.org/crimjust/standards/dfunc_toc.html; for the NLADA Standards, please see 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.⁶⁶

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.”⁶⁷

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.”⁶⁸ 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.

⁶⁶ NLADA Guidelines for Legal Defenses Systems in the United States, Standard 5.9 Recruitment, Hiring, Promotion and Removal of Defender Office Personnel (1976).

⁶⁷ NLADA Guidelines for Legal Defenses Systems in the United States, Standard 4.1 Task Allocation in the Trial Function: Specialists and Supporting Services (1976).

⁶⁸ *Id.* at Standard 3.3 Projecting Defense System Personnel Needs.

With regards to the use of law students/interns, the NLADA Guidelines for Legal Defense 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.⁶⁹

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

⁶⁹ 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."⁷⁰

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.⁷¹

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.⁷²

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."⁷³

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:

⁷⁰ NLADA Performance Guidelines for Criminal Defense Representation, Guideline 4.1 Investigation (2001).

⁷¹ NLADA Guidelines for Legal Defense Systems in the United States, 4.1 Task Allocation in the Trial Function: Specialists and Supporting Service.

⁷² ABA Criminal Justice Standards: Defense Function, Standard 4-4.3 Relations With Prospective Witnesses.

⁷³ 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.”⁷⁴ 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.⁷⁵

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

⁷⁴ NLADA Performance Guidelines for Criminal Defense Representation, Guideline 2.1 General Obligations of counsel Regarding Pretrial Release.

⁷⁵ *Id.* at Guideline 2.3 Pretrial Release Proceedings.

whenever there exists a good-faith reason to believe that the applicable law may entitle the defendant to relief....”⁷⁶ 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.⁷⁷

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 code of criminal procedure, the municipal code, the United States Code Annotated, the State appellate reports, the U.S. Supreme Court reports,

⁷⁶ *Id.* at Guideline 5.1, The Decision to File Pretrial Motions.

⁷⁷ NLADA Guidelines for Legal Defense Systems in the United States, Guideline 3.4 Nonpersonnel Needs in Defender Offices

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.”⁷⁸

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 (Arrest).

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

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

⁷⁸ NLADA Performance Guidelines for Criminal Defense Representation, Guideline 2.2 Initial Interview.

(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;

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."⁷⁹ 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.

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

⁷⁹ STATE COURT MODEL STATISTICAL DICTIONARY 19 (1989).

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.

Appendix A: ABA 10 Principles of Public Defense Delivery System

ABA



TEN

PRINCIPLES

OF A PUBLIC DEFENSE DELIVERY SYSTEM

February 2002

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TEN PRINCIPLES

OF A PUBLIC DEFENSE DELIVERY SYSTEM

February 2002

Approved by American Bar Association House of Delegates, February 2002. The American Bar Association recommends that jurisdictions use these Principles to assess promptly the needs of public defense delivery systems and clearly communicate those needs to policy makers.

INTRODUCTION

The *ABA Ten Principles of a Public Defense Delivery System* were sponsored by the ABA Standing Committee on Legal and Indigent Defendants and approved by the ABA House of Delegates in February 2002. The Principles were created as a practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems. The Principles constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney. The more extensive ABA policy statement dealing with indigent defense services is contained within the ABA Standards for Criminal Justice, *Providing Defense Services* (3d ed. 1992), which can be viewed on-line (black letter only) and purchased (black letter with commentary) by accessing the ABA Criminal Justice Section homepage at <http://www.abanet.org/crimjust/home.html>.

ACKNOWLEDGMENTS

The Standing Committee on Legal Aid and Indigent Defendants is grateful to everyone assisting in the development of the *ABA Ten Principles of a Public Defense Delivery System*. Foremost, the Standing Committee acknowledges former member James R. Neuhard, Director of the Michigan State Appellate Defender Office, who was the first to recognize the need for clear and concise guidance on how to design an effective system for providing public defense services. In 2000, Mr. Neuhard and Scott Wallace, Director of Defender Legal Services for the National Legal Aid and Defender Association, jointly produced a paper entitled “The Ten Commandments of Public Defense Delivery Systems,” which was later included in the Introduction to Volume I of the U.S. Department of Justice’s Compendium of Standards for Indigent Defense Systems. The *ABA Ten Principles of a Public Defense Delivery System* are based on this work of Mr. Neuhard and Mr. Wallace.

Special thanks go to the members of the Standing Committee and its Indigent Defense Advisory Group who reviewed drafts and provided comment. Further, the Standing Committee is grateful to the ABA entities that provided invaluable support for these Principles by co-sponsoring them in the House of Delegates, including: Criminal Justice Section, Government and Public Sector Lawyers Division, Steering Committee on the Unmet Legal Needs of Children, Commission on Racial and Ethnic Diversity in the Profession, Standing Committee on Pro Bono and Public Services. We would also like to thank the ABA Commission on Homelessness and Poverty and the ABA Juvenile Justice Center for their support.

L. Jonathan Ross
Chair, Standing Committee on
Legal Aid and Indigent Defendants

ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

Black Letter

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



ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

With Commentary

1 The public defense function, including the selection, funding, and payment of defense counsel,¹ is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.² To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.³ Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.⁴ The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.⁵

2 Where the caseload is sufficiently high,⁶ the public defense delivery system consists of both a defender office⁷ and the active participation of the private bar. The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services.⁸ The appointment process should never be *ad hoc*,⁹ but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.¹⁰ Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.¹¹

3 Clients are screened for eligibility,¹² and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention, or request,¹³ and usually within 24 hours thereafter.¹⁴

4 Defense counsel is provided sufficient time and a confidential space within which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date.¹⁵ Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client.¹⁶ To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.¹⁷

5 Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.¹⁸ National caseload standards should in no event be exceeded,¹⁹ 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.²⁰

6 **Defense counsel’s ability, training, and experience match the complexity of the case.** Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.²¹

7 **The same attorney continuously represents the client until completion of the case.** Often referred to as “vertical representation,” the same attorney should continuously represent the client from initial assignment through the trial and sentencing.²² The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

8 **There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.** 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.²³ Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.²⁴ Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess,

unusual, or complex cases,²⁵ and separately fund expert, investigative, and other litigation support services.²⁶ No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system.²⁷ This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

9 **Defense counsel is provided with and required to attend continuing legal education.** Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.²⁸

10 **Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.** The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.²⁹

NOTES

¹ “Counsel” as used herein includes a defender office, a criminal defense attorney in a defender office, a contract attorney, or an attorney in private practice accepting appointments. “Defense” as used herein relates to both the juvenile and adult public defense systems.

² National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973) [hereinafter “NAC”], Standards 13.8, 13.9; National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) [hereinafter “NSC”], Guidelines 2.8, 2.18, 5.13; American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992) [hereinafter “ABA”], Standards 5-1.3, 5-1.6, 5-4.1; *Standards for the Administration of Assigned Counsel Systems* (NLADA 1989) [hereinafter “Assigned Counsel”], Standard 2.2; NLADA *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984) [hereinafter “Contracting”], Guidelines II-1, 2; National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970) [hereinafter “Model Act”], § 10(d); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979) [hereinafter “ABA Counsel for Private Parties”], Standard 2.1(D).

³ NSC, *supra* note 2, Guidelines 2.10-2.13; ABA, *supra* note 2, Standard 5-1.3(b); Assigned Counsel, *supra* note 2, Standards 3.2.1, 2; Contracting, *supra* note 2, Guidelines II-1, II-3, IV-2; Institute for Judicial Administration/ American Bar Association, *Juvenile Justice Standards Relating to Monitoring* (1979) [hereinafter “ABA Monitoring”], Standard 3.2.

² Judicial independence is “the most essential character of a free society” (American Bar Association Standing Committee on Judicial Independence, 1997).

⁵ ABA, *supra* note 2, Standard 5-4.1

⁶ “Sufficiently high” is described in detail in NAC Standard 13.5 and ABA Standard 5-1.2. The phrase generally can be understood to mean that there are enough assigned cases to support a full-time public defender (taking into account distances, caseload diversity, etc.), and the remaining number of cases are enough to support meaningful involvement of the private bar.

⁷ NAC, *supra* note 2, Standard 13.5; ABA, *supra* note 2, Standard 5-1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2. “Defender office” means a full-time public defender office and includes a private nonprofit organization operating in the same manner as a full-time public defender office under a contract with a jurisdiction.

⁸ ABA, *supra* note 2, Standard 5-1.2(a) and (b); NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

⁹ NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

¹⁰ ABA, *supra* note 2, Standard 5-2.1 and commentary; Assigned Counsel, *supra* note 2, Standard 3.3.1 and commentary n.5 (duties of Assigned Counsel Administrator such as supervision of attorney work cannot ethically be performed by a non-attorney, citing ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct).

¹¹ NSC, *supra* note 2, Guideline 2.4; Model Act, *supra* note 2, § 10; ABA, *supra* note 2, Standard 5-1.2(c); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (provision of indigent defense services is obligation of state).

¹² For screening approaches, see NSC, *supra* note 2, Guideline 1.6 and ABA, *supra* note 2, Standard 5-7.3.

¹³ NAC, *supra* note 2, Standard 13.3; ABA, *supra* note 2, Standard 5-6.1; Model Act, *supra* note 2, § 3; NSC, *supra* note 2, Guidelines 1.2-1.4; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(A).

¹⁴ NSC, *supra* note 2, Guideline 1.3.

¹⁵ American Bar Association Standards for Criminal Justice, *Defense Function* (3rd ed. 1993) [hereinafter “ABA Defense Function”], Standard 4-3.2; *Performance Guidelines for Criminal Defense Representation* (NLADA 1995) [hereinafter “Performance Guidelines”], Guidelines 2.1-4.1; ABA Counsel for Private Parties, *supra* note 2, Standard 4.2.

¹⁶ NSC, *supra* note 2, Guideline 5.10; ABA Defense Function, *supra* note 15, Standards 4-3.1, 4-3.2; Performance Guidelines, *supra* note 15, Guideline 2.2.

¹⁷ ABA Defense Function, *supra* note 15, Standard 4-3.1.

¹⁸ NSC, *supra* note 2, Guideline 5.1, 5.3; ABA, *supra* note 2, Standards 5-5.3; ABA Defense Function, *supra* note 15, Standard 4-1.3(e); NAC, *supra* note 2, Standard 13.12; Contracting, *supra* note 2, Guidelines III-6, III-12; Assigned Counsel, *supra* note 2, Standards 4.1, 4.1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2(B)(iv).

¹⁹ Numerical caseload limits are specified in NAC Standard 13.12 (maximum cases per year: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals), and other national standards state that caseloads should “reflect” (NSC Guideline 5.1) or “under no circumstances exceed” (Contracting Guideline III-6) these numerical limits. The workload demands of capital cases are unique: the duty to investigate, prepare, and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea. *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998). *See also* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) [hereinafter “Death Penalty”].

²⁰ ABA, *supra* note 2, Standard 5-5.3; NSC, *supra* note 2, Guideline 5.1; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980) [hereinafter “Appellate”], Standard 1-F.

²¹ Performance Guidelines, *supra* note 15, Guidelines 1.2, 1.3(a); Death Penalty, *supra* note 19, Guideline 5.1.

²² NSC, *supra* note 2, Guidelines 5.11, 5.12; ABA, *supra* note 2, Standard 5-6.2; NAC, *supra* note 2, Standard 13.1; Assigned Counsel, *supra* note 2, Standard 2.6; Contracting, *supra* note 2, Guidelines

III-12, III-23; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(B)(i).

²³ NSC, *supra* note 2, Guideline 3.4; ABA, *supra* note 2, Standards 5-4.1, 5-4.3; Contracting, *supra* note 2, Guideline III-10; Assigned Counsel, *supra* note 2, Standard 4.7.1; Appellate, *supra* note 20 (*Performance*); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(B)(iv). *See* NSC, *supra* note 2, Guideline 4.1 (includes numerical staffing ratios, e.g.: there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). *Cf.* NAC, *supra* note 2, Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

²⁴ ABA, *supra* note 2, Standard 5-2.4; Assigned Counsel, *supra* note 2, Standard 4.7.3.

²⁵ NSC, *supra* note 2, Guideline 2.6; ABA, *supra* note 2, Standards 5-3.1, 5-3.2, 5-3.3; Contracting, *supra* note 2, Guidelines III-6, III-12, and *passim*.

²⁶ ABA, *supra* note 2, Standard 5-3.3(b)(x); Contracting, *supra* note 2, Guidelines III-8, III-9.

²⁷ ABA Defense Function, *supra* note 15, Standard 4-1.2(d).

²⁸ NAC, *supra* note 2, Standards 13.15, 13.16; NSC, *supra* note 2, Guidelines 2.4(4), 5.6-5.8; ABA, *supra* note 2, Standards 5-1.5; Model Act, *supra* note 2, § 10(e); Contracting, *supra* note 2, Guideline III-17; Assigned Counsel, *supra* note 2, Standards 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA *Defender Training and Development Standards* (1997); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(A).

²⁹ NSC, *supra* note 2, Guidelines 5.4, 5.5; Contracting, *supra* note 2, Guidelines III-16; Assigned Counsel, *supra* note 2, Standard 4.4; ABA Counsel for Private Parties, *supra* note 2, Standards 2.1 (A), 2.2; ABA Monitoring, *supra* note 3, Standards 3.2, 3.3. Examples of performance standards applicable in conducting these reviews include NLADA Performance Guidelines, ABA Defense Function, and NLADA/ABA Death Penalty.

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Appendix B:
ABA Ethics Opinion: “Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation”

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 06-441

May 13, 2006

Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation

All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. If the court denies the lawyer's motion to withdraw, and any available means of appealing such ruling is unsuccessful, the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant.

Lawyer supervisors, including heads of public defenders' offices and those within such offices having intermediate managerial responsibilities, must make reasonable efforts to ensure that the other lawyers in the office conform to the Rules of Professional Conduct. To that end, lawyer supervisors must, working closely with the lawyers they supervise, monitor the workload of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently handled by the individual lawyers.

In this opinion,¹ we consider the ethical responsibilities of lawyers, whether employed in the capacity of public defenders or otherwise, who represent indigent persons charged with criminal offenses, when the lawyers' workloads prevent them from providing competent and diligent representa-

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2003. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in the individual jurisdictions are controlling.

tion to all their clients. Excessive workloads present issues for both those who represent indigent defendants and the lawyers who supervise them.²

Ethical responsibilities of a public defender³ in regard to individual workload

Persons charged with crimes have a constitutional right to the effective assistance of counsel.⁴ Generally, if a person charged with a crime is unable to afford a lawyer, he is constitutionally entitled to have a lawyer appointed to represent him.⁵ The states have attempted to satisfy this constitutional mandate through various methods, such as establishment of public defender, court appointment, and contract systems.⁶ Because these systems have been created to provide representation for a virtually unlimited number of indigent criminal defendants, the lawyers employed to provide representation generally are limited in their ability to control the number of clients they are assigned. Measures have been adopted in some jurisdictions in attempts to control workloads,⁷ including the establishment of procedures for assigning cases to lawyers outside public defenders' offices when the cases could not properly be directed to a public defender, either because of a conflict of interest or for other reasons.

2. For additional discussion of the problems presented by excessive caseloads for public defenders, see "Gideon's Broken Promise: American's Continuing Quest For Equal Justice," prepared by the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants 29 (ABA 2004), available at <http://www.abanet.org/legal-services/sclaid/defender/brokenpromise/fullreport.pdf> (last visited June 21, 2006).

3. The term "public defender" as used here means both a lawyer employed in a public defender's office and any other lawyer who represents, pursuant to court appointment or government contract, indigent persons charged with criminal offenses.

4. U.S. CONST. amends. VI & XIV.

5. The United States Supreme Court has interpreted the Sixth Amendment to require the appointment of counsel in any state and federal criminal prosecution that, regardless of whether for a misdemeanor or felony, leads or may lead to imprisonment for any period of time. See generally, *Alabama v. Shelton*, 535 U.S. 654, 662 (2002); *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984); *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 30-31 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938).

6. Most states deliver indigent defense services using a public defender's office (eighteen states) or a combination of public defender, assigned counsel, and contract defender (another twenty-nine states), according to the Spangenberg Group, which developed a report on behalf of the ABA Standing Committee on Legal Aid and Indigent Defendants. See The Spangenberg Group, "Statewide Indigent Defense Systems: 2005," available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/statewideinddefsystems2005.pdf> (last visited June 21, 2006).

7. See generally, National Symposium on Indigent Defense 2000, *Redefining Leadership for Equal Justice, A Conference Report* (U.S. Dep't of Justice, Bureau of Justice Assistance, Wash. D.C.) 3 (June 29-30, 2000), available at <http://www.ojp.usdoj.gov/indigentdefense/symposium.pdf> (last visited June 21, 2006) (common problem in indigent defense delivery systems is that "lawyers often have unmanageable caseloads (700 or more in a year)").

Model Rules of Professional Conduct 1.1, 1.2(a), 1.3, and 1.4 require lawyers to provide competent representation, abide by certain client decisions, exercise diligence, and communicate with the client concerning the subject of representation.⁸ These obligations include, but are not limited to, the responsibilities to keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; communicate effectively on behalf of and with clients; control workload so each matter can be handled competently; and, if a lawyer is not experienced with or knowledgeable about a specific area of the law, either associate with counsel who is knowledgeable in the area or educate herself about the area. The Rules provide no exception for lawyers who represent indigent persons charged with crimes.⁹

8. Rule 1.1(a) provides that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Rule 1.2(a) states:

[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Rule 1.3 states that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”

Rule 1.4(a) and (b) states:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

9. See ABA Formal Opinion Op. 347 (Dec. 1, 1981) (Ethical Obligations of Lawyers to Clients of Legal Services Offices When Those Offices Lose Funding), in FORMAL AND INFORMAL ETHICS OPINIONS, FORMAL OPINIONS 316-348, INFORMAL OPINIONS 1285-1495 at 139 (ABA 1985) (duties owed to existing clients include duty of adequate preparation and a duty of competent representation); ABA Informal Op. 1359 (June 4, 1976) (Use of Waiting Lists or Priorities by Legal Service Officer), *id.* at 237 (same); ABA Informal Op. 1428 (Sept. 12, 1979) (Lawyer-Client Relationship Between the Individual and Legal Services Office: Duty of Office Toward Client When Attorney Representing Him (Her) Leaves the Office and Withdraws from the Case), *id.* at 326 (all lawyers, including legal services lawyers, are subject to mandatory duties owed by lawyers to existing clients, including duty of adequate preparation

Comment 2 to Rule 1.3 states that a lawyer's workload "must be controlled so that each matter may be handled competently."¹⁰ The Rules do not prescribe a formula to be used in determining whether a particular workload is excessive. National standards as to numerical caseload limits have been cited by the American Bar Association.¹¹ Although such standards may be considered, they are not the sole factor in determining if a workload is excessive. Such a determination depends not only on the number of cases, but also on such factors as case complexity, the availability of support services, the lawyer's experience and ability, and the lawyer's nonrepresentational duties.¹² If a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client or, if representation has not yet begun, she must decline the representation.¹³

A lawyer's primary ethical duty is owed to existing clients.¹⁴ Therefore, a

and competent representation). *See also* South Carolina Bar Ethics Adv. Op. 04-12 (Nov. 12, 2004) (all lawyers, including public defenders, have ethical obligation not to undertake caseload that leads to violation of professional conduct rules).

The applicability of Rules 1.1, 1.3, and 1.4 to public defenders and/or prosecutors has been recognized by ethics advisory committees in at least one other state. *See* Va. Legal Eth. Op. 1798 (Aug. 3, 2004) (duties of competence and diligence contained within rules of professional conduct apply equally to all lawyers, including prosecutors).

10. Principle 5 of *The Ten Principles of a Public Defense Delivery System* specifically addresses the workload of criminal defense lawyers:

Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.

Report to the ABA House of Delegates No. 107 (adopted Feb. 5, 2002), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/10principles.pdf> (last visited June 21, 2006) (emphasis in original).

11. *Id.*

12. *Id.* *See also* Attorney Grievance Comm'n of Maryland v. Ficker, 706 A.2d 1045, 1051-52 (1998) (supervising lawyer violated Rule 5.1 by assigning too many cases to supervised lawyer, assigning cases day before trial, and assigning cases too complex for supervised lawyer's level of experience and ability).

13. Rule 1.16(a) states that "a lawyer shall not represent a client or, where representation has begun, shall withdraw from the representation of a client if the representation will result in violation of the Model Rules of Professional Conduct or other law."

14. *See* ABA Formal Opinion Op. 96-399 (Jan. 18, 1996) (Ethical Obligations of Lawyers Whose Employers Receive Funds from the Legal Services Corporation to their Existing and Future Clients When Such Funding is Reduced and When Remaining Funding is Subject to Restrictive Conditions), in *FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998* at 369 (ABA 2000); ABA Formal Opinion Op. 347, *supra* note 9.

lawyer must decline to accept new cases, rather than withdraw from existing cases, if the acceptance of a new case will result in her workload becoming excessive. When an existing workload does become excessive, the lawyer must reduce it to the extent that what remains to be done can be handled in full compliance with the Rules.

When a lawyer receives appointments directly from the court rather than as a member of a public defender's office or law firm that receives the appointment, she should take appropriate action if she believes that her workload will become, or already is, excessive. Such action may include the following:

- requesting that the court refrain from assigning the lawyer any new cases until such time as the lawyer's existing caseload has been reduced to a level that she is able to accept new cases and provide competent legal representation; and
- if the excessive workload cannot be resolved simply through the court's not assigning new cases, the lawyer should file a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.¹⁵

If the lawyer has sought court permission to withdraw from the representation and that permission has been denied, the lawyer must take all feasible steps to assure that the client receives competent representation.

When a lawyer receives appointments as a member of a public defender's office or law firm, the appropriate action to be taken by the lawyer to reduce an excessive workload might include, with approval of the lawyer's supervisor:

- transferring non-representational responsibilities within the office, including managerial responsibilities, to others;
- refusing new cases;¹⁶ and
- transferring current case(s) to another lawyer whose workload will allow for the transfer of the case(s).¹⁷

15. Whenever a lawyer seeks to withdraw from a representation the client should be notified, even if court rules do not require such notification. *See* Rule 1.4.

16. It should be noted that a public defender's attempt to avoid appointment or to withdraw from a case must be based on valid legal grounds. Rule 6.2(a) provides, in pertinent part, that "[a] lawyer *shall not seek to avoid* appointment by a tribunal to represent a person *except for good cause*, such as representing the client is likely to result in violation of the Rules of Professional Conduct or other law." (Emphasis added). Therefore, a public defender should not claim an excessive workload in an attempt to avoid new cases or to withdraw from current cases unless good cause objectively exists.

17. It is important to note that, for purposes of the Model Rules, a public defender's office, much like a legal services office, is considered to be the equivalent of a law firm. *See* Rule 1.0(c). Unless a court specifically names an individual lawyer within a public defender's office to represent an indigent defendant, the public defender's office should be considered as a firm assigned to represent the client; responsibility for handling the case falls upon the office as a whole. *See* ABA Informal Op. 1428, *supra* note 9 (legal services agency should be considered firm retained by client; responsibility for handling caseload of departing legal services lawyer falls upon office as whole rather than upon lawyer who is departing). Therefore, cases may ethically be reassigned within a public defender's office.

If the supervisor fails to provide appropriate assistance or relief, the lawyer should continue to advance up the chain of command within the office until either relief is obtained or the lawyer has reached and requested assistance or relief from the head of the public defender's office.

In presenting these options, the Committee recognizes that whether a public defender's workload is excessive often is a difficult judgment requiring evaluation of factors such as the complexity of the lawyer's cases and other factors.¹⁸ When a public defender consults her supervisor and the supervisor makes a conscientious effort to deal with workload issues, the supervisor's resolution ordinarily will constitute a "reasonable resolution of an arguable question of professional duty" as discussed in Rule 5.2(b).¹⁹ In those cases where the supervisor's resolution is not reasonable, however, the public defender must take further action.²⁰

Such further action might include:

- if relief is not obtained from the head of the public defender's office, appealing to the governing board, if any, of the public defender's office;²¹ and
- if the lawyer is still not able to obtain relief,²² filing a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.²³

If the public defender is not allowed to withdraw from representation, she must obey the court's order while taking all steps reasonably feasible to insure that her client receives competent and diligent representation.²⁴

18. See note 12, *supra*, and accompanying text.

19. See Comment [2].

20. See, e.g., *Atty. Grievance Comm'n of Maryland v. Kahn*, 431 A.2d 1336, 1352 (1981) ("Obviously, the high ethical standards and professional obligations of an attorney may never be breached because an attorney's employer may direct such a course of action on pain of dismissal. . . .")

21. See Michigan Bar Committee on Prof. & Jud. Eth. Op. RI-252 (Mar. 1, 1996) (in context of civil legal services agency, if subordinate lawyer receives no relief from excessive workload from lawyer supervisor, she should, under Rule 1.13(b) and (c), take the matter to legal services board for resolution).

22. Rule 5.2 makes clear that subordinate lawyers are not insulated from violating the Rules of Professional Conduct and suffering the consequences merely because they acted in accordance with a supervisory lawyer's advice or direction unless it was in regard to "an arguable question of professional duty."

23. A public defender filing a motion to withdraw under these circumstances should provide the court with information necessary to justify the withdrawal, while being mindful of the obligations not to disclose confidential information or information as to strategy or other matters that may prejudice the client. See Rule 1.16 cmt. 3.

24. Notwithstanding the lawyer's duty in this circumstance to continue in the representation and to make every attempt to render the client competent representation, the lawyer nevertheless may pursue any available means of review of the court's order. See *Iowa Supreme Court Bd. of Prof. Ethics & Conduct v. Hughes*, 557 N.W.2d 890, 894

Ethical responsibility of a lawyer who supervises a public defender

Rule 5.1 provides that lawyers who have managerial authority, including those with intermediate managerial responsibilities, over the professional work of a firm or public sector legal agency or department shall make reasonable efforts to ensure that the other lawyers in the agency or department conform to the Rules of Professional Conduct. Rule 5.1 requires that lawyers having direct supervisory authority take reasonable steps to ensure that lawyers in the office they supervise are acting diligently in regard to all legal matters entrusted to them, communicating appropriately with the clients on whose cases they are working, and providing competent representation to their clients. As an essential first step, the supervisor must monitor the workloads of subordinate lawyers to ensure that the workload of each lawyer is appropriate. This involves consideration of the type and complexity of cases being handled by each lawyer; the experience and ability of each lawyer; the resources available to support her, and any non-representational responsibilities assigned to the subordinate lawyers.

If any subordinate lawyer's workload is found to be excessive, the supervisor should take whatever additional steps are necessary to ensure that the subordinate lawyer is able to meet her ethical obligations in regard to the representation of her clients. These might include the following:

- transferring the lawyer's non-representational responsibilities, including managerial responsibilities, to others in the office;
- transferring case(s) to another lawyer or other lawyers whose workload will allow them to provide competent representation;²⁵
- if there are no other lawyers within the office who can take over the cases from which the individual lawyer needs to withdraw, supporting the lawyer's efforts to withdraw from the representation of the client;²⁶ and finally,
- if the court will not allow the lawyer to withdraw from representation, providing the lawyer with whatever additional resources can be made available to assist her in continuing to represent the client(s) in a manner consistent with the Rules of Professional Conduct.

(Iowa 1996) ("ignoring a court order is simply not an appropriate step to test the validity of the order under our Code of Professional Responsibility"); Utah Bar Eth. Adv. Op. 107 (Feb. 15, 1992) (if grounds exist to decline court appointment, lawyer should not disobey order but should seek review by appeal or other available procedure).

25. See note 17, *supra*.

26. See *In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So.2d 1130, 1138-39 (Fla. 1990) (in context of inadequate funding, court stated that if "the backlog of cases in the public defender's office is so excessive that there is no possible way he can timely handle those cases, it is his responsibility to move the court to withdraw"); see also *In re Order on Motions to Withdraw Filed by Tenth Circuit Public Defender*, 612 So.2d 597 (Fla. App. 1992) (en banc) (public defender's office entitled to withdraw due to excessive caseload from representing defendants in one hundred forty-three cases).

When a supervised lawyer's workload is excessive and, notwithstanding any other efforts made by her supervisor to address the problem, it is obviously incumbent upon the supervisor to assign no additional cases to the lawyer, and, if the lawyer's cases come by assignment from the court, to support the lawyer's efforts to have no new cases assigned to her by the court until such time as she can adequately fulfill her ethical responsibilities to her existing clients.

In dealing with workload issues, supervisors frequently must balance competing demands for scarce resources. As Comment [2] to Rule 5.2 observes, if the question of whether a lawyer's workload is too great is "reasonably arguable," the supervisor of the lawyer has the authority to decide the question. In the final analysis, however, each client is entitled to competent and diligent representation. If a supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, under Rule 5.1(c),²⁷ the supervisor himself is responsible for the subordinate's violation of the Rules of Professional Conduct.²⁸

27. Rule 5.1(c) states:

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

See also Rules 1.16 (a) and 8.4 (a).

28. See, e.g., Attorney Grievance Comm'n of Maryland v. Ficker, 706 A.2d at 1052, *supra* note 12); Va. Legal Ethics Op. 1798 *supra* note 9 (lawyer supervisor who assigns caseload that is so large as to prevent lawyer from ethically representing clients would violate Rule 5.1); American Council of Chief Defenders, Nat'l Legal Aid and Defender Ass'n Eth. Op. 03-01 (April 2003), available at <http://www.nlada.org/DMS/Documents/1082573112.32/ACCD%20Ethics%20opinion%20on%20Workloads.pdf> (last visited June 21, 2006) ("chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency's attorneys to provide competent, quality representation in every case... When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency's attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases."); Wisconsin State Bar Prof. Ethics Comm. Op. E-91-3 (1991) (assigning caseload that exceeds recognized maximum caseload standards, and that would not allow subordinate public defender to conform to rules of professional conduct, "could result in a violation of disciplinary standards"); Ariz. Op. No. 90-10 (Sept. 17, 1990) ("when a Public Defender has knowledge that subordinate lawyers, because of their caseloads, cannot comply with their duties of diligence and competence, the Public Defender must take action."); Wisconsin State Bar Prof. Ethics Comm. Op. E-84-11 (1984) (supervisors in public defender's office may not ethically increase workloads of subordinate lawyers to point where subordinate lawyer cannot, even at personal sacrifice, handle each of her clients' matters competently and in non-neglectful manner).

Conclusion

The obligations of competence, diligence, and communication under the Rules apply equally to every lawyer. All lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently. If a lawyer's workload is such that the lawyer is unable to provide competent and diligent representation to existing or potential clients, the lawyer should not accept new clients. If the problem of an excessive workload cannot be resolved through the non-acceptance of new clients or by other available measures, the lawyer should move to withdraw as counsel in existing cases to the extent necessary to bring the workload down to a manageable level, while at all times attempting to limit the prejudice to any client from whose case the lawyer has withdrawn. If permission of a court is required to withdraw from representation and permission is refused, the lawyer's obligations under the Rules remain: the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to provide competent and diligent representation to the defendant.

Supervisors, including the head of a public defender's office and those within such an office having intermediate managerial responsibilities, must make reasonable efforts to ensure that the other lawyers in the office conform to the Rules of Professional Conduct. To that end, supervisors must, working with the lawyers they supervise, monitor the workload of the subordinate lawyers to ensure that the workloads are not allowed to exceed that which may be handled by the individual lawyers. If a supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, the supervisor is responsible for the subordinate's violation of the Rules of Professional Conduct.

Appendix C
Analysis of Appointed Counsel Cases Disposed with Briefs Filed Only: FY 2004-FY 2006

	Fiscal Year 2004			Fiscal Year 2005			Fiscal Year 2006			Grand Total All Years
	<i>Anders</i>	<i>Non-Anders</i>	Total	<i>Anders</i>	<i>Non-Anders</i>	Total	<i>Anders</i>	<i>Non-Anders</i>	Total	
Number of Appellants	24	36	60	34	45	79	7	23	30	169
Number of Briefs Filed	24	36	60	34	45	79	7	23	30	169
Number of Appellate Briefs Filed Late or Over Page Limit	10	5	15	6	13	19	1	5	6	40
Number of State Briefs Filed	5	36	41	2	43	45		23	23	109
Average # of Cases Where Defendant Retained Counsel	0.3	0.3	0.3	0.1	0.2	0.2	0	0.2	0.1	0.2
Average # of Appointed Counsel Involved in a Case	1.5	1.1	1.2	1.2	1.3	1.2	1.3	1.2	1.2	1.2
Average # of EOT Filed by Appointed Counsel	4.9	1.7	3	2.9	1.7	2.2	2.6	1.4	1.7	2.4
Average # of EOT Filed by the State	1.9	1.5	1.7	0.3	1.6	1.1	0	1.7	1.3	1.3
Average # of Days from Sentence to NOA	20	22	21	19	29	24	15	127	100	36
Average # of Days from NOA to Clerk Record Filed	45	42	44	36	42	40	41	59	54	44
Average # of Days from NOA to Reporter Record Filed	120	110	114	94	111	104	96	116	111	109
Average # of Days from NOA to Brief Filed	202	195	197	139	192	169	156	201	191	183
Average # of Days from NOA to State Brief Filed	470	259	285	441	277	284		280	280	284
Average # of Days from NOA to Reply Brief	522	293	350		303	303		303	303	328

	Fiscal Year 2004			Fiscal Year 2005			Fiscal Year 2006			Grand Total All Years
	<i>Anders</i>	Non- <i>Anders</i>	Total	<i>Anders</i>	Non- <i>Anders</i>	Total	<i>Anders</i>	Non- <i>Anders</i>	Total	
Average # of Days from NOA to At Issue	288	260	271	242	278	264	292	289	289	271
Average # of Days from NOA to Disposition	384	392	389	347	411	383	369	411	401	388
Number of Oral Arguments	0	0	0	0	0	0	0	4	4	4
Average Cost-per-Case	\$2,858	\$3,597	\$3,302	\$1,778	\$3,347	\$2,672	\$2,784	\$3,851	\$3,602	\$3,061
Total Paid	\$68,595	\$129,504	\$198,099	\$60,457	\$150,635	\$211,092	\$19,490	\$88,580	\$108,070	\$517,261

Analysis of Appellate Public Defender Office Cases Disposed with Briefs Filed Only

	<i>Anders</i>	Non- <i>Anders</i>	Grand Total
Number of Appellants	5	42	47
Number of Briefs Filed	5	42	47
Number of Appellate Briefs Filed Late or Over Page Limit		1	1
Number of State Briefs Filed		40	40
Average # of Cases Where Defendant Retained Counsel	0.0	0.1	0.1
Average # of Appointed Counsel Involved in a Case	0.2	0.3	0.3
Average # of EOT Filed by Appointed Counsel	1.8	0.6	0.7
Average # of EOT Filed by the State	0.0	1.2	1.1
Average # of Days from Sentence to NOA	137 (10.5)	82	89
Average # of Days from NOA to Clerk Record Filed	40	57	55
Average # of Days from NOA to Reporter Record Filed	115	97	99
Average # of Days from NOA to Brief Filed	179	149	152
Average # of Days from NOA to State Brief Filed		216	216
Average # of Days from NOA to Reply Brief		245	245
Average # of Days from NOA to At Issue	241	217	220
Average # of Days from NOA to Disposition	314	311	311
Number of Oral Arguments	0	3	3