



*Justice Impaired:*  
*The Impact of the*  
*State of New York's Failure to Effectively*  
*Implement the Right to Counsel*

*FRANKLIN COUNTY*

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***EXECUTIVE SUMMARY***

State fulfillment of its constitutionally-mandated obligation to provide poor defendants with fair and effective representation in criminal trials is little more than a promise in upstate Franklin County. Victimized by an underfunded and fragmented system that violates national legal standards and the state’s professed commitment to equal justice, Franklin County fails to provide effective representation on behalf of the accused in criminal cases and in delinquency, dependency, and termination of parental rights cases in Family Court.

That is the finding of this study, commissioned by the New York State Defenders Association in the aftermath of last year’s report to Chief Judge Judith Kaye by the Commission on the Future of Indigent Defense Services calling for creation of an Independent Public Defense Commission to take over the provision of public defense services. Franklin County’s predicament is similar to systemic shortfalls throughout the state, as identified in the report to Judge Kaye, which called the state’s county-based system “an on-going crisis” in need of overhaul.

Franklin County exemplifies our general observation that leaving the task of funding public defense services to the counties – even in part – endangers a state’s entire ability to dispense justice fairly. Nationwide, the counties most in need of public defense services are often the ones that can least afford it.

Among our Franklin County findings:

- The five lawyers serving in the two public defender’s offices are doing the work of 12 lawyers. We measured their caseload against national standards limiting lawyers to no more than 150 felonies, or 400 misdemeanors, or 60 Family Court cases per year. The public defender in Franklin County had already handled 110 felonies and 156 misdemeanors in the first six months of 2007 alone. The primary public defender was forced to stop accepting new cases in early 2007 because of caseload demands that prevented him from complying with ethical obligations to provide an effective defense.
- Family Court responsibilities contributed greatly to the workload problem, with cases being assigned at the time of our study at a rate that would lead to a 2007 annual Family Court caseload equal to 653% of the maximum allowed under national standards.
- Defendants unable to afford counsel and facing felony charges could expect public defenders to spend an average of just 3.9 hours on their case – whether it is a bad check charge or a complex homicide – compared to the nationally recognized standard of 13.6 hours per case. More time spent on any one case means less time spent on others.
- Financial shortfalls block lawyers representing public defense clients from access to investigators, expert witnesses and other evidentiary necessities for competent

representation, in gross violation of standards calling for "parity between defense counsel and the prosecution with respect to resources."

- Low pay for public defenders, the high workload and the inability to meet ABA standards combine with Franklin's general poverty to make it difficult to attract qualified attorneys to provide public defense services. The previous existing three-level public defense structure had to be revised because of an inability to fill the positions. The current system had been unable to fill the position of conflict defender, who handles co-defendants and other conflict cases, until recently when a lawyer left the primary public defender's office to take the job.
- In the first two months of 2007, the County spent almost two-thirds of its entire annual budget for mandated public defense services.
- On a per capita basis, Franklin County spends \$12.88, or 40 percent below the statewide average, on public defense services.
- Independence of public defense services is undermined by local judicial control of the assigned counsel system – so-called 18B attorneys, as authorized under Article 18B of the County Law – especially in the 19 Town Courts and three Village Courts that are part of the fragmented court system in the county. Through much of its history, the County Legislature relied on the County Judge to oversee public defense in violation of ABA standards calling for public defenders to be as independent of the judiciary as are prosecutors and privately-hired attorneys. The Legislature recently gave hiring authority directly to the public defenders' office.
- Franklin, which borders Canada, has additional demands placed upon its public defense services because of federal investigations leading to prosecution of state crimes, and because of the presence of a Native American Indian reservation within the county with analogous federal-state complications.

Our report calls for ensuring the independence of public defense services from control by the judiciary above the level of judicial supervision to which all lawyers, including prosecutors and privately-hired attorneys, are subject. Our review of scholarship, including studies as far back as 1976, reveals that, in the words of one study, "The mediator between two adversaries cannot be permitted to make policy for one of the adversaries."

While we found much to criticize in Franklin County's provision of public defense services, we laud the professionalism and skill of those who struggle to deliver quality services and the commitment by County Executive James Feeley to overcoming systemic inequities to dispensing justice. The dedication of these individuals only serves to underscore the impossible burden that the State of New York places upon less fortunate counties to ensure equal justice before the law for people of insufficient means.

We make recommendations to Franklin County that should improve public defense services. However, we find that ultimately, implementation of the recommendations of Judge Kaye's commission for creation of an Independent Public Defense Commission

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and state takeover of public defense services is needed to solve Franklin County's public defense crisis and to ensure that the due process interests of all persons in New York State are properly protected regardless of their ability to pay for counsel.

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## Chapter I *Introduction*

*“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”*

- U. S. Supreme Court Justice Hugo Black

*Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963)*

### *The Constitutional Right to Counsel in America*

As world events unfold daily in far off places like Afghanistan, Iraq, and Sudan, the words of U.S. Supreme Court Justice Hugo Black speak to the core values that distinguish the United States from those countries under the repression of dictatorships, theocracies and despots. We are different. Unlike tyrannies, the Constitution of the United States of America promises those accused of crimes the presumption of innocence and equal access to a fair day in court. These core values define the beliefs we as Americans hold in common – whether we are conservative or liberal, white or black, rich or poor.

Celebrated in the closing refrain of our Pledge of Allegiance, the guiding notion of “justice for all” is the cornerstone of the American social contract and our democratic system. We entrust to our government the administration of a judicial system that guarantees equal justice before the law - assuring victims, the accused and the public results that are fair, correct, swift and final.

Justice Black’s words are from the case of *Gideon v. Wainwright* in which the United States Supreme Court ruled that states have a constitutional obligation under the Sixth and Fourteenth Amendments to provide counsel to those accused in felony cases who cannot afford to hire a lawyer. To the Court, the fact that “[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime” makes it an “obvious truth” that “lawyers in criminal courts are necessities, not luxuries.” Accordingly, the right to counsel has been consistently extended to any case that may result in a potential loss of liberty.<sup>1</sup>

### *Expanding Gideon’s Promise: The Right to Counsel in New York’s Family Court*

New York has long accepted the notion that a fundamental part of “liberty” includes the right of parents to raise their children as they see fit. Though the U.S. Supreme Court has yet to expand *Gideon*’s promise to those civil actions in which a child could be potentially removed from the home of her primary care giver (e.g., abuse and neglect

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<sup>1</sup> *Gideon* established the right to counsel for felony trials. Subsequent cases decided under the federal constitution extend that right to: direct appeals - *Douglas v. California*, 372 U.S. 353 (1963); custodial interrogation - *Miranda v. Arizona*, 384 U.S. 436 (1966); juvenile proceedings resulting in confinement - *In Re Gault*, 387 U.S. 1 (1967); preliminary hearings - *Coleman v. Alabama*, 399 U.S. 1 (1970); misdemeanors involving possible imprisonment - *Argersinger v. Hamlin*, 407 U.S. 25 (1972); misdemeanors involving a suspended sentence - *Alabama v Shelton*, 535 U.S. 654 (2002); and, most recently, appeals contesting sentences in cases in which defendant pled guilty - *Halbert v. Michigan*, 545 U.S. 605 (2005) [0]

cases) and those cases in which the state seeks to terminate parental rights permanently, the State of New York has established such a right.<sup>2</sup> Thus, New York policymakers have found the need for counsel to advocate for parents and children in Family Court to be critical as a means of protecting the value of familial integrity.

### ***The Systemic Importance of the Right to Counsel***

The justice system – like any “system” – is a group of interdependent elements forming a complex whole. The actions of any one component necessarily impact each of the other interrelated agencies, either positively or negatively. And, just as an illness in any one area of the body threatens the overall health of the entire complex human structure, the failure of any individual component of the legal system – be it police, prosecution, courts, public defense, department of social services, corrections, or probation - threatens the ability of the entire system to dispense justice both uniformly and effectively.

And, since the overwhelming percentage of criminal cases require public defense lawyers,<sup>3</sup> the failure to adequately fund and effectively administer the right to counsel delivery system will result in too few lawyers handling too many cases in almost every criminal court action. Under this scenario, courts face backlogs of unresolved cases.<sup>4</sup> The growing backlog means that people waiting for their day in court fill local jails at taxpayers' expense. Failing to do the trial right the first time also means endless appeals on the back end – delaying justice to victims and defendants alike – and increasing criminal justice expenditures. And, when an innocent person is sent to jail as a result of public defenders not having the time, tools and training to effectively advocate for their clients, the true perpetrator of the crime remains free to victimize others and put public safety in jeopardy.

Moreover, our American system of justice presumes that law enforcement officials are human, and thus fallible. Despite the overall dedication and professionalism of the hundreds of thousands of citizens employed in the police and prosecution functions in this country, it is simply impossible to always arrest and prosecute the right defendant for the right crime in every single instance. If errorless law enforcement existed, there would be no need for a jury of one's peers to weigh the evidence in a case before an impartial judge. But because American jurisprudence is based on an adversarial court

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<sup>2</sup> In New York, a parent faced with the loss of a child's society is entitled to the assistance of counsel regardless of ability to pay. See, Family Ct. Act, § 262; see also, *In the Matter of Ella B.*, 30 N.Y.2d 352, 356 (1972).

<sup>3</sup> Throughout our country, more than 80% of people charged with crimes are deemed too poor to afford lawyers. See: Harlow, U.S. Department of Justice, Office of Justice Programs, *Defense in Criminal Cases* at 1 (2000); Smith & DeFrances, U.S. Department of Justice, Office of Justice Programs, *Indigent Defense* at 1 (1996). See generally: Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 Harv. J. L. & Pub. Pol. 443, 452 (1997). The actual number of such individuals will increase as the number of poor people in the United States (currently estimated at 37 million) goes up. See A.P., *U.S. Poverty Rate Rises to 12.7 Percent*, N.Y. Times, August 30, 2005, <http://www.nytimes.com/aponline/national/AP-Census-Poverty.html?ei=5094&en=d74b58>. (8/30/2005). Franklin County lacks sufficient data collection systems to confirm whether this national trend holds true for the county too. However, interviews conducted with court personnel suggest that the indigency rate is no lower than 75% and no higher than 85%. It should be noted that the acting Franklin Public Defender and the Assigned Counsel Coordinator both suggested that the rate was closer to 90%.

<sup>4</sup> Public defender caseloads are discussed in depth beginning at page 11. Though Franklin County struggles to keep relevant public defender data, NLADA was able to confirm that the public defender office has only been able to close 61% of the criminal cases assigned to it thus far this year.

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process, competent defense lawyers are necessary to scrutinize and challenge the arresting officers’ tactics, the police investigation, the lawfulness of any searches and seizures, the credibility of the evidence, and the district attorney’s theory of the case to improve the overall quality and effectiveness of law enforcement itself. Arguably, it is because of a strong adversarial process that the United States is in the forefront of cutting edge public safety technologies – like DNA evidence – that help to exonerate the innocent while convicting the guilty.

Having lawyers with the time, tools and training to handle Family Court matters increases the likelihood of negotiated solutions, aiding the goal of achieving permanency earlier for children. Without the guiding hand of competent counsel, most parents may be forced to go it alone at a time when they are, perhaps, most ill-equipped emotionally to make sound legal decisions because of the threat of losing their children, taxing the justice system with a high number of unnecessary continuances and needless litigation. Of course, when adults are brought to Family Court and given a public defender who has no resources and a caseload that dictates that he or she dispose of cases as quickly as possible, the message of the parent’s valuelessness to society continues and escalates -- potentially setting off a spiraling effect which makes it even less likely that the parents will get their children back. Under these conditions, Family Court outcomes become vulnerable to being ‘undone’ later at a *huge* emotional trauma to the child and parents.

#### ***The Current Study***

Despite the importance of the right to counsel to the justice system’s overall health, *Gideon’s* “obvious truth” that lawyers are “necessities, not luxuries” has been obscured or lost at the hands of the State of New York over the past forty-four years. Numerous reports have detailed the failures of the State of New York to adequately fund and effectively implement the constitutional right to counsel in its cities, towns, county and family courts over the years.<sup>5</sup> Rather than add to the already voluminous materials detailing how the state fails to safeguard the right to counsel, this report reaffirms the

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<sup>5</sup> See for example: 1) Commission on the Future of Indigent Defense Services. *Final Report to the Chief Judge of the State of New York*. June 2006; 2) The Spangenberg Group. *Status of Indigent Defense in New York: A Study for Chief Judge Kaye’s Commission on the Future of Indigent Defense Services*. June 2006; 3) N.A.A.C.P., Legal Defense Fund, Inc. *The Status of Indigent Defense in Schuyler County*. 2004; 4) Bonstelle, Sheri and Christine Schlessler. *Adjourning Justice: New York State’s Failure to Support Assigned Counsel Violates the Rights of Families in Child Abuse and Neglect Cases*. Fordham University School of Law, *Fordham Urban Law Journal* April 2001; 5) Mirsky, Chester. *The Political Economy and Indigent Defense: New York City 1917-1998*. New York University School of Law, Annual Survey of American Law. 1997; 6) The Center for Research in Crime and Justice, American University Criminal Courts Technical Assistance Project. *Review of Existing Case Management Practices and Procedures and Recommendations for Improvement for the Oneida Public Defender Office, Utica New York*. Prepared on behalf of the United States Department of Justice, Bureau of Justice Assistance. CCTAP Technical Assistance Report 98-013. August 1999; 7) The New York Legal Aid Society. *The Defense of Indigents in New York City: The View from the Front Line*. August 1985; 8) New York University School of Law. *Criminal Defense of the Poor in New York City*. Michael McConville and Chester Mirsky. 1985; 9) The New York State Defenders Association. *Assigned Counsel Fees in New York State: Time For a Change*. March 1985; 10) The New York State Defenders Association. *Public Defense Services in Ontario County: An Study of the Assigned Counsel System*. August 1985; 11) The New York State Defenders Association. *Public Defense Services in Schenectady County: An Assessment of the Assigned Counsel Program*. March 1984; 12) The Prison Reform Task Force of the New York Society for Ethical Culture. *Inmate Study of 18-B Indigent Defense Counsel (Court Appointed Counsel)*. Prepared on behalf of the Inmate Committee for Judicial and Legislative Reform. May 1977; and, 13) New York City Board of Corrections. *Legal Representation of Indigent Criminal Defendants in New York City*. March 1973.

existent scholarship that the system is in a “state of crisis”<sup>6</sup> and looks instead at the impact the State of New York’s abdication of its constitutional duties under *Gideon* and its progeny has on the people of insufficient means in one rural jurisdiction – Franklin County.

Franklin County is in the northeastern part of New York State, and is home to about 51,000 people who live within the county's 1,600 square miles. It is a community of rural, small towns and villages, with three main population centers: Malone,<sup>7</sup> Saranac Lake and Tupper Lake. The population of Franklin County is relatively stable and has been for much of the last century<sup>8</sup> perhaps reflecting the poor economic outlook for the region. For example, Franklin ranks 61<sup>st</sup> out of New York’s 62 counties in regards to median household income (\$31,517). Nearly 15% of the population of Franklin County lives below the Federal Poverty Guideline. Franklin County projects to spend approximately \$12.88 per person on the right to counsel (\$657,388) which is nearly 40% below the public defense per capita spending rate across the state (\$21.21 per person).<sup>9</sup>



The New York State Defenders Association (NYSDA)<sup>10</sup> retained the services of the National Legal Aid & Defender Association (NLADA) to conduct the Franklin County impact assessment under a generous grant of the Open Society Institute. NLADA is a national, non-profit membership association dedicated to quality legal representation for people of insufficient means. Created in 1911, NLADA has been a leader in supporting equal justice for over ninety years.<sup>11</sup> NLADA has long played a leadership

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<sup>6</sup> The Spangenberg Group. *Status of Indigent Defense in New York: A Study for Chief Judge Kaye’s Commission on the Future of Indigent Defense Services*. June 2006. p. 155.

<sup>7</sup> Malone is the County seat.

<sup>8</sup> United States census data shows that the population of Franklin County in 1900 was 42,853. This means that the county population has only grown 19% in slightly more than one hundred years. Compare this to Schenectady County -- which had a similar population to Franklin in 1900 (46,852) -- but has grown more than 218% in the same time period (up to a population of 149,078 in 2000).

<sup>9</sup> Franklin County statistics can be found on the U.S. Census Bureau website at: <http://quickfacts.census.gov/qfd/states/36/36033.html> . Public defense expenditure per capita rates were calculated based on U.S. Census Bureau population data and information obtained through Franklin County and the New York State Defenders Association.

<sup>10</sup> The New York State Defenders Association is a not-for-profit, membership organization that provides support to New York's public defense community. Founded in 1967, NYSDA’s mission is “to improve the quality and scope of publicly supported legal representation to low income people” in the State of New York." NYSDA has a contractual obligation to "review, assess and analyze the public defense system in the state, identify problem areas and propose solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities." For more information, see: [www.nysda.org](http://www.nysda.org)

<sup>11</sup> NLADA currently supports a number of initiatives, including the American Council of Chief Defenders (ACCD), a leadership forum that brings together the top defender executives nationwide, and the National Defender Leadership Institute (NDLI), an innovative training project to support current managers and develop future leaders. The Defender Division also supports the National Alliance of Sentencing Advocates and Mitigation Specialists which sponsors national trainings and technical assistance services for professionals evaluating and developing appropriate sentencing alternatives for clients of assigned and contract legal counsel as well as public defenders. For more information please see: [www.nlada.org](http://www.nlada.org)

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role in the development of national standards for public defense systems<sup>12</sup> and processes for evaluating a jurisdiction's compliance with those standards.<sup>13</sup>

### *A Summary of the State of New York's Abdication of its Constitutional Responsibilities under Gideon*

Though *Gideon* obligates state governments to provide the resources necessary to provide counsel when appropriately requested,<sup>14</sup> the State of New York has -- for the most part -- simply passed on this responsibility to its counties as an unfunded mandate.<sup>15</sup>

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<sup>12</sup> Guidelines for Legal Defense Systems in the United States (National Study Commission on Defense Services, U.S. Department of Justice, 1976); The Ten Principles of a Public Defense Delivery System (adopted by the ABA, 2002) Standards for the Appointment and Performance of Counsel in Death Penalty Cases (NLADA, 1988; adopted as Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases ABA, 1989), Defender Training and Development Standards (NLADA, 1997); Performance Guidelines for Criminal Defense Representation (NLADA, 1995); Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services (NLADA, 1984; ABA, 1985); Standards for the Administration of Assigned Counsel Systems (NLADA, 1989); Standards and Evaluation Design for Appellate Defender Offices (NLADA, 1980); Evaluation Design for Public Defender Offices (NLADA, 1977); and Indigent Defense Caseloads and Common Sense: An Update (NLADA, 1994).

<sup>13</sup> NLADA's standards-based assessments utilize a modified version of the Pieczenik Evaluation Design for Public Defender Offices, which has been used since 1976 by leading criminal justice organizations, such as the National Defender Institute and the Criminal Courts Technical Assistance Project of the American University Justice Programs Office. The NLADA protocol combines a review of a jurisdiction's budgetary, caseload and organizational information with site visits to observe courtroom practices and/or to interview defense providers and other key criminal justice policy-makers (e.g., judges, prosecutors, county officials). This methodology ensures that a variety of perspectives is solicited and enables NLADA to form as complete and accurate a picture of a public defense system as possible. See, Appendix A for a listing of the NLADA evaluation team members, their qualifications and background.

<sup>14</sup> The onus on state government to fund 100% of public defense services is supported by American Bar Association and National Legal Aid & Defender Association criminal justice standards. See the American Bar Association, *Ten Principles of a Public Defense Delivery System*, Principle 2: "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". See also: Guidelines for Legal Defense Systems in the United States (National Study Commission on Defense Services, U.S. Department of Justice, 1976), *supra* note 100, Guideline 2.4.

Because ABA *Principle 2* relates to state funding, the NLADA assessment of Franklin County against the *Ten Principles* was conducted under the determination that the system fails this critical principle. As such, there will be no further discussion of *Principle 2* in Chapter II.

<sup>15</sup> The New York State Legislature increased assigned counsel hourly rates effective January 1, 2004 to: \$60 (in- and out-of-court) for misdemeanors and lesser violations; \$75 (in- and out-of-court) for felonies, appeals, parole hearings, Family Court, Law Guardian representation, and post-conviction; and, for investigators and/or expert witnesses, courts determine an appropriate rate of compensation (*NY CLS County § 722-b and c*).

In order to relieve some of the pressure faced by the counties in compensating 18-B attorneys under the new rates, the state in 2003 established the Indigent Legal Services Fund (ILSF), an annual appropriation of the state legislature, administered by the Office of the State Comptroller. Supported by court and department of motor vehicle (DMV) fees, the fund is designed to supplement and not supplant a county's local expenditures. The sources of state funds devoted to the ILSF include: a \$35 DMV fee for lifting of license suspension; \$27 of a \$52 fee to be charged by the Office of Court Administration (OCA) for county-based criminal history checks; a \$50 increase in attorney registration fee; and a \$10 increase in mandatory surcharges for parking violations (See: [http://www.nysda.org/03\\_ACLegisIncreaseTip.pdf](http://www.nysda.org/03_ACLegisIncreaseTip.pdf)) Though the funding program was designed to assist counties in paying increased assigned counsel fees, the ILSF distributions can be used to support any public defense system pursuant to Article 18-B, including public defender agencies and legal aid societies.

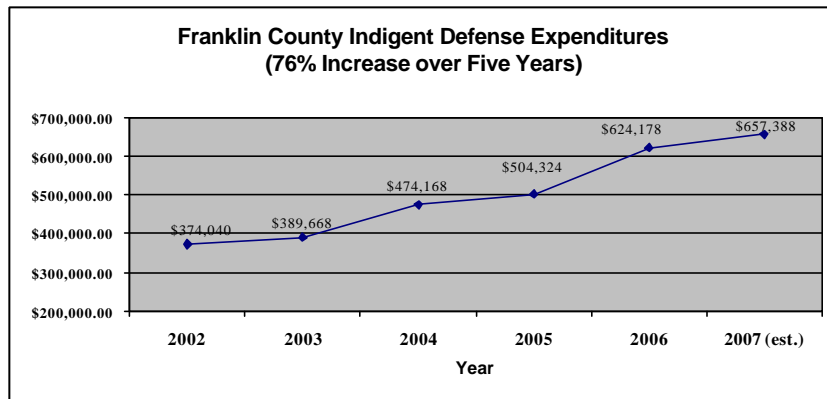
Each county government reports its annual public defense expenditure to the Comptroller, who then adds all counties' expenses together. A county's expenditure is therefore a percentage of the statewide sum. The Comptroller then distributes the total ILSF appropriation by county by this same percentage. (See: <http://nysosc3.osc.state.ny.us/localgov/finreporting/ILSFdistribution06est.pdf>)

Since the fund's inception, New York City has spent about \$150 million each year on public defense, and the rest of the state a combined \$100 million. That means each year the counties outside of New York City can expect to divide among themselves 40% of the total ILSF appropriation. The Comptroller predicts the ILSF amount available as of Dec.

Though delegation of state obligations to local government can lead to innovation, this has proven not to be the case with public defense services in New York’s counties. Instead, the State of New York’s willful denial of *Gideon’s* mandate has produced a myriad of public defense systems that vary greatly in defining who qualifies for services and the competency of the services rendered.<sup>16</sup>

Leaving the task of funding public defense services to the counties – even in part - endangers a state’s entire ability to dispense justice fairly. This is because county governments – like Franklin – rely primarily on property taxes as their main source of revenue.

When property values are depressed because of factors such as high unemployment or high crime rates, poorer counties find themselves in the unenviable position of having to dedicate a far greater percentage of their budget toward



criminal justice matters than more affluent counties. This, in turn, limits the amount of money these poorer counties can dedicate toward education, social services, healthcare, and other critical government functions that could reduce crime rates. The inability to invest in these needed government functions can lead to a spiraling effect in which the lack of such social services increases crime, further depressing real estate prices, which in turn can produce more and more crime -- further devaluing income possibilities from property taxes. And, since less affluent counties also tend to have a higher percentage of their population qualifying for public defense services, *the counties most in need of public defense services are often the ones that least can afford to finance it.*

This dynamic is particularly acute in Franklin County because of its geographic locale and the decisions of former county government officials. Franklin County is situated on an international border containing a Native American Indian reservation. The porous Canadian and reservation borders leave Franklin County open to illegal gun and drug running. The impact of Federal law enforcement and border control agents trying to prevent such illegal actions increases the number of state-level arrests within the county parameters. Additionally, in an effort to revitalize the local economy, Franklin County

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31, 2007 for distribution to counties in 2008 will be about \$72 million, and of that, NYC will receive \$42 million. In 2005, ILSF distributions amounted to an additional 15%-25% for each county’s public defense budget.

ILSF eligibility is not guaranteed from year to year. There are conditions of eligibility attached to the ILSF distributions. To be eligible for funding, the county must demonstrate that the local funds expended did not decrease from the previous year’s level of spending. A county, however, can maintain eligibility after spending decreased by showing that it did not use state funds to supplant local funds, and that the quality of services has been improved in the process. The Comptroller takes the following into consideration when assessing a county’s improvement in quality: availability of training and resources to attorneys, experts and investigators; total caseload; manner in which attorneys are assigned cases; and the provision of timely and confidential access to such attorneys and expert and investigative services. (See: *NY CLS St Fin § 98-b*).

<sup>16</sup> See existent scholarship at footnote 5.

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actively encouraged the building of five correctional facilities within the county limits.<sup>17</sup> Contrary to the desire of past local officials to spur economic development through the expansion of corrections, national research has concluded, “the contention that prisons are a valuable economic tool [in rural America] has not been grounded in any empirical evidence.”<sup>18</sup> Rather, the presence of the correctional facilities causes an increase in criminal cases involving prisoners that must be prosecuted in Franklin County’s criminal courts. Thus, the disparity between rich and poor counties is further compounded in Franklin County since more affluent, non-international border counties that shun the presence of prisons do not have to deal with these additional workload concerns.

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<sup>17</sup> Bare Hill Correctional Facility (medium security, male); Camp Gabriels (minimum security, male); Chateaugay Correctional Facility (medium security, male); Franklin Correctional Facility (medium security, male); and, Upstate Correctional Facility (maximum security, male)

<sup>18</sup> The Sentencing Project, *Big Prisons, Small Towns: Prison Economics in Rural America*, page 19. There are a number of reasons why expanded correctional facilities are actually bad for the local economy. First, correctional facilities have few linkages to the local economy. (Clement, D. *Big House on the Prairie*, Fed Gazette: A Publication of the Federal Reserve Bank of Minneapolis. (January 2000). That is, unlike manufacturing or agricultural industries, corrections offer few “spin-off” industries. Whereas an automobile plant may generate local growth in companies supplying raw materials to be processed, a correctional facility only has the immediate jobs associated with housing people.

Chapter II  
*The Right to Counsel  
In Franklin County*

*A Brief History of Franklin County's Public Defense Delivery System*

Franklin County operates under a county manager system responsible to a county legislature form of government.<sup>19</sup> The position of Franklin County Manager was created in 1986 to assist in the day-to-day administration of county government. The Manager acts on behalf of the Legislature, implementing County policies, and overseeing and coordinating activities of all County Departments. The Manager works with all Standing Committees of the Legislature, acts as Budget Officer, monitors claims against the county, acquires liability insurance, manages risk and exposures, is the Purchasing Agent, acts as liaison to the state and federal government, and generally assumes the duties of chief administrative officer of the county. The County Manager thus recommends budgets and makes day-to-day decisions regarding the public defense delivery system with the county legislature setting specific policies and authorizing expenditures.

In 1965, on the heels of the *Gideon* decision, the New York state legislature enacted Article 18-B of County Law, mandating that each county develop a plan for legal representation for accused persons unable to afford counsel, and that it “shall also provide for investigative, expert and other services necessary for an adequate defense.”<sup>20</sup> This law also applied to representation for eligible adult litigants in Family Court. All counties must have a public defense plan based on at least one of the following three models:<sup>21</sup> a public defender,<sup>22</sup> a legal aid society,<sup>23</sup> or, an assigned counsel system.<sup>24</sup> Any county

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<sup>19</sup> New York functions under a decentralized three-tiered form of state government in which counties are administrative divisions of the state, and townships (and villages) are administrative divisions of a county. Counties and townships exercise state government authority, localized to meet the particular needs of their jurisdiction. (The obvious exemption to this general rule of thumb, for New York, is the City of New York, which operates as a metropolitan municipality. The City contains five coextensive counties, each of which is a distinct borough of city government. In this case, the counties are administrative divisions of the city. Each borough has its own elected President, while electing representatives to the City Council – an umbrella legislative body which, with the mayor as executive, has authority over the entire municipality.)

Each of New York's 62 counties has an oversight body charged with supervision of county government (for simplicity, the New York City government is excluded from this discussion). The most basic form of government for most counties in the state is the constituted board of supervisors – the supervisors of each city, town and village in the county serve as representative members of the board. *NY CLS County § 150*. A county may, however, adopt the county legislature model – officials elected from districts designated by county law. The county board and county legislature forms are otherwise generally interchangeable (for simplicity, both may hereafter be referred to as a “county government”). Every county board has a chairperson who presides over the body's daily functions. Among its powers and duties, the board appoints, supervises and at pleasure removes every administrative officer and employee of the county, except elected officials and their subordinates. *NY CLS County § 150-a*.

The state allows county government to yield administrative powers to a county executive – though the board of supervisors will remain the legislative and policy-determining body of the county. *NY CLS Alt Co Gov § 101*. There are four such forms of alternative county government: county administrator, county manager, county director, or county president.

<sup>20</sup> *NY CLS County § 722*.

<sup>21</sup> A list of public defense delivery systems, by county, is provided at [http://www.nysda.org/NYSDA\\_Resources/Public\\_Defense\\_Data/04\\_Public\\_Defense\\_Systems\\_Table\\_Final\\_2004-06-24.pdf](http://www.nysda.org/NYSDA_Resources/Public_Defense_Data/04_Public_Defense_Systems_Table_Final_2004-06-24.pdf)

<sup>22</sup> The county board of supervisors may choose to create an office of public defender (or may contract with another county to create a multi-county defender program). Under this model, the board has complete control of the defense

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using either a public defender agency or legal aid society as its primary public defense delivery system must have a system to handle conflict cases.<sup>25</sup>

In 1989, in response to concerns over the representation afforded to eligible clients in conflict of interest cases,<sup>26</sup> Franklin County established three distinct public defender offices – one to handle Northern Franklin County, one to handle Southern Franklin County, and one to handle all Family Court matters. Though the term “public defender office” identifies the staff as full-time government employees, its use here obscures the fact that each of these former offices was staffed with a single attorney and little support staff.

After this study began, a number of factors combined to have two of the three public defenders submit their resignations in the fall of 2006, including an escalation in criminal cases and opportunities for the public defenders to advance their careers and earn more money in other law endeavors. The crisis precipitated a reevaluation of how services should be provided in Franklin County. The result was the creation of a three tiered right to counsel system: 1) a staffed public defender office for primary representation; 2) a secondary public defender office to handle conflicts, such as co-defendants; and 3) a tertiary assigned counsel system in which any other conflicts would be assigned to members of the private bar willing to take cases for the statutorily set hourly rate. Each of the three components handles cases throughout the county in both criminal and family court matters.

Franklin County struggled to implement its new vision. Recruitment and retention of lawyers to a depressed part of upstate New York slowed the pace of implementation. At the time of NLADA’s first site visit, the primary public defender office was not fully staffed and construction of appropriate office space was still to be completed. A single public defender was responsible for all the primary cases. Likewise, though the position of conflict defender was approved by the legislature in October 2006, the County was unable to fill the chief conflict defender position until March of 2007 when a recent hire of the primary public defender left the office to start the conflict defender office. Another attorney applicant turned down an offer from the County to work in the public defender office on the eve of his agreed upon starting date.

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function. The board has the authority to designate an attorney-at-law as public defender, including authority over length of term and rate of compensation. The public defender must receive approval from the board to hire staff for her office – assistant attorneys, clerks, investigators, stenographers and other employees as she may deem necessary. The board also has control over compensation for all employees of the office of Public Defender. Article 18-A of County Law, *NY CLS County § 716*

<sup>23</sup> The county may choose to contract with a legal aid society or bureau. These are private not-for-profit institutions. The most historic of these societies, The Legal Aid Society of New York, was founded in 1876. Today, there are ten other non-profits handling cases in nine counties outside of New York City.

<sup>24</sup> The county may choose an assigned counsel model of 18-B attorneys, as they are called in New York. A formal panel based with the local/county bar association, subject to approval of a state administrator, the rotation and coordination of these private attorneys is performed by a paid administrator. In the circumstance of two counties – Hamilton and Fulton – 18-B lawyers are allowed to represent clients in both counties.

<sup>25</sup> *NY CLS County § 722*.

<sup>26</sup> Franklin County has historically had a small local bar. The county was finding it more and more difficult to find attorneys willing to handle conflict of interest cases at prevailing hourly rates.

The continuing inability of a county like Franklin to attract and retain employees for the authorized unfilled positions precipitated yet another defense crisis. In the early part of 2007, the primary public defender was working at maximum capacity and had to refuse to accept new cases. With the conflict defender office also not fully staffed, this forced a large number of cases to the tertiary assigned counsel system. Franklin County spent nearly two thirds of its 2007 public defense budget within the first quarter of its fiscal year and predicts going over budget by 63% by year's end. Adding to the problem, the primary public defender resigned in June.

To its credit, Franklin County advertised aggressively outside of the county borders in an effort to attract qualified candidates throughout this crisis and was, eventually, successful in filling the positions with apparently qualified candidates. On August 13, 2007, Franklin County – for the first time – filled the full complement of positions authorized by the county administration, including: a full-time assigned counsel coordinator; three public defender attorneys in the primary office with a paralegal; and two public defender attorneys in the conflict office and an office manager.

However, Franklin County has been unsuccessful at attracting a lawyer to fill the assigned counsel coordinator position. They have, in turn, staffed the position with a non-attorney in contravention of the prevailing standards required by New York's Office of Court Administration. Just last year, then-Chief Administrative Judge Jonathan Lippman notified the Cortland County Bar Association that an assigned counsel plan submitted for that county had been rejected because the public defender would serve as the assigned counsel administrator. Lippman noted that "We have long required that the administrator of a plan *should be an attorney* other than a judge, a county attorney, a public defender or legal aid official." (emphasis added.) This tracks the language of a 1965 Judicial Conference Memo setting forth "general determinations" about assigned counsel plan requirements.<sup>27</sup> The failure to hire an attorney in this position, in essence means that the assigned counsel coordinator-- though dedicated and professional --is more of an administrative assistant who screens clients for eligibility and perfunctorily assigns cases to the public defender, conflict defender or private bar without exacting substantive quality control and/or supervision over the performance of private bar attorneys handling assigned cases.<sup>28</sup>

### ***Assessing Franklin County Against National Public Defense Standards***

The concept of using standards to assess uniform quality is not unique to the field of public defense. In fact, the strong pressures on public officials of favoritism, partisanship, and/or self-interest underscore the need for standards to assure fundamental quality in all facets of government and all components of the justice system. For instance, realizing that standards are necessary to both compare bids equitably and to assure quality products, policy-makers long ago standardized requests for proposals and ceased taking the lowest bid to build a hospital, school or a bridge and required winning contractors to meet minimum quality standards of safety. Ensuring the rights of the

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<sup>27</sup> Memorandum to County Supervisors from the Judicial Conference for the State of New York. November 16, 1965.

<sup>28</sup> Franklin County Manager James Feeley notes that despite needing an attorney to supervise the tertiary system, the title "Assigned Counsel Coordinator" is a certified and approved New York State Civil Service title that is held by many paraprofessionals in the state in many different counties

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individual against the undue taking of his or her liberty by the state merits no less consideration.

The use of national standards of justice in this way also reflects the demands of the United States Supreme Court in *Wiggins v. Smith*, 539 US 510 (2003) and *Rompilla v. Beard* 545 US 374 (2005). In *Wiggins*, the Court recognized that national standards, including those promulgated by the American Bar Association (ABA), should serve as guideposts for assessing ineffective assistance of counsel claims. The ABA standards define competency, not only in the sense of the attorney’s personal abilities and qualifications, but also in the systemic sense that the attorney practices in an environment that provides her with the time, resources, independence, supervision and training to effectively carry out her charge to adequately represent her clients. *Rompilla* echoes those sentiments, noting that the ABA standards describe the obligations of defense counsel “in terms no one could misunderstand.”<sup>29</sup>

The American Bar Association’s *Ten Principles of a Public Defense Delivery System* present the most widely accepted and used version of national standards for public defense. Adopted in February 2002, the ABA *Ten Principles* distill the existing voluminous ABA standards for public defense systems to their most basic elements, which officials and policymakers can readily review and apply. In the words of the ABA Standing Committee on Legal Aid and Indigent Defendants, the *Ten Principles* “constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney.”<sup>30</sup>

Below, we assess Franklin County against the ABA *Ten Principles*. For ease of analyzing the jurisdiction-specific issues in Franklin County, the discussion does not proceed in the numeric sequence in which the principles were promulgated.

### ***How Many Cases Are Too Many? (ABA Principle 5)***

Because public defense lawyers do not generate their own workload, an adequate public defense program must have binding caseload standards for the system to function. Public defender workload is driven by decisions made by other governmental agencies

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<sup>29</sup> Citation to national public defense standards in court decisions is not limited to capital cases. See, for example: 1) *United States v. Russell*, 221 F.3d 615 (4<sup>th</sup> Cir. 2000) [Defendant was convicted of prisoner possession of heroin; claimed ineffective assistance of counsel; the court relied, in part on the ABA Standards to assess the defendant’s claim]; 2) *United States v. Blaylock*, 20 F.3d 1458 (9<sup>th</sup> Cir. 1993) [Defendant convicted of being a felon in possession of a weapon; filed appeal arguing, in part, ineffective assistance of counsel Court stated: “In addition, under the *Strickland* test, a court deciding whether an attorney’s performance fell below reasonable professional standards can look to the ABA standards for guidance. *Strickland*, 466 U.S. at 688.” And, “While *Strickland* explicitly states that ABA standards “are only guides,” *Strickland*, 466 U.S. at 688, the standards support the conclusion that, accepting Blaylock’s allegations as true, defense counsel’s conduct fell below reasonable standards. Based on both the ABA standards and the law of the other circuits, we hold that an attorney’s failure to communicate the government’s plea offer to his client constitutes unreasonable conduct under prevailing professional standards.”]; 3) *United States v. Loughery*, 908 F.2d 1014 (D.C. Cir. 1990) [Defendant pleaded guilty to conspiracy to violate the Arms Control Export Act. The court followed the standard set forth in *Strickland* and looked to the ABA Standards as a guide for evaluating whether defense counsel was ineffective.]

<sup>30</sup> American Bar Association. *Ten Principles of a Public Defense System*, from the introduction. at: [http://72.14.207.104/search?q=cache:li1\\_aP9C2sJ:www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf+ABA+Ten+Principles&hl=en&gl=us&ct=clnk&cd=1](http://72.14.207.104/search?q=cache:li1_aP9C2sJ:www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf+ABA+Ten+Principles&hl=en&gl=us&ct=clnk&cd=1). The *Ten Principles* are attached as Appendix A.

beyond the control of the public defense system itself. The legislature may create new crimes or increase funding for new police positions that lead to increased arrests. And, while district attorneys can control their own caseload by dismissing marginal cases, diverting cases out of the formal criminal justice setting, or offering better plea deals, etc., public defense attorneys are assigned their caseload by the court and are ethically bound to provide the same uniform-level of service to each of their clients.

Regulating an attorney's workload is perhaps the simplest, most common and direct safeguard against overloaded public defense attorneys and deficient defense representation for low-income people facing criminal charges. The National Advisory Commission (NAC) on Criminal Justice Standards and Goals first developed numerical caseload limits in 1973 under the auspices of the U.S. Department of Justice, which, with modifications in some jurisdictions, have been widely adopted and proven quite durable in the intervening three decades.<sup>31</sup> NAC Standard 13.12 on Courts states: "The caseload of a public defender attorney should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25."<sup>32</sup> What this means is that an attorney who handles only felony cases should handle no more than 150 such cases in a single year *and nothing else*. The ABA's *Ten Principles* support these national standards with their instruction that caseloads should "under no circumstances exceed" these numerical limits.<sup>33</sup>

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<sup>31</sup> See *Indigent Defense Caseloads and Common Sense: An Update* (NLADA, 1992), surveying state and local replication and adaptation of the NAC caseload limits.

<sup>32</sup> National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, *Courts* (Washington, D.C., 1973), p. 276, Standard 13.12. The National Advisory Commission accepted the numerical standards arrived at by the NLADA Defender Committee "with the caveat that particular local conditions – such as travel time – may mean that lower limits are essential to adequate provision of defense services in any specific jurisdiction." *Id.* at 277. Because many factors affect when a caseload becomes excessive, other standards do not set numerical standards. See, e.g. *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State* (NYSDA, 2004), Standard IV.B. ABA Principle 5 notes in commentary that national numerical standards should in no event be exceeded and that "workload" – caseload adjusted by factors including case complexity, availability of support services, and defense counsel's other duties – is a better measurement.

<sup>33</sup> The NAC workload standards have been refined, but not supplanted, by a growing body of methodology and experience in many jurisdictions for assessing "workload" rather than simply the number of cases, by assigning different "weights" to different types of cases, proceedings and dispositions. See *Case Weighting Systems: A Handbook for Budget Preparation* (NLADA, 1985); *Keeping Defender Workloads Manageable*, Bureau of Justice Assistance, U.S. Department of Justice, Indigent Defense Series #4 (Spangenberg Group, 2001) ([www.ncjrs.org/pdffiles1/bja/185632.pdf](http://www.ncjrs.org/pdffiles1/bja/185632.pdf)).

Workload limits have been reinforced in recent years by a growing number of systemic challenges to underfunded public defense systems, where courts do not wait for the conclusion of a case, but rule before trial that a defender's caseloads will inevitably preclude the furnishing of adequate defense representation. See, e.g., *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981), cert. den. 454 U.S. 1142 (1982); *State v. Robinson*, 123 N.H. 665, 465 A.2d 1214 (1983) *Corenevsky v. Superior Court*, 36 Cal.3d 307, 682 P.2d 360 (1984); *State v. Smith*, 140 Ariz. 355, 681 P.2d 1374 (1984); *State v. Hanger*, 146 Ariz. 473, 706 P.2d 1240 (1985); *People v. Knight*, 194 Cal. App. 337, 239 Cal. Rptr. 413 (1987); *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987); *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), cert. den. 495 U.S. 957 (1989); *Hatten v. State*, 561 So.2d 562 (Fla. 1990); *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit*, 561 So.2d 1130 (Fla. 1990); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990); *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991); *City of Mount Vernon v. Weston*, 68 Wash. App. 411, 844 P.2d 438 (1993); *State v. Peart*, 621 So.2d 780 (La. 1993); *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996). Many other cases have been resolved by way of settlement.

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Franklin County has no caseload standards for public defense attorneys.<sup>34</sup> Not surprisingly, the public defender and conflict defender offices are forced to carry cases far in excess of these standards. The effect can be most clearly seen in the first six months of the current calendar year. Table I (below) shows the number of assignments per provider for January through June of 2007.<sup>35</sup>

**Table I  
Criminal Assignments: January-June 2007\***

	Franklin County Provider			TOTAL
	Primary Public Defender	Conflict Defender*	18-B Assigned Counsel	
Misdemeanor	<b>156</b>	<b>72</b>	<b>82</b>	<b>310</b>
Felony	<b>110</b>	<b>39</b>	<b>59</b>	<b>208</b>
Total	<b>266</b>	<b>111</b>	<b>141</b>	<b>518</b>

\* The Conflict Defender did not start until March of 2007

These figures indicate that the primary public defender handled 78% of the misdemeanor work allowable for a single attorney in one year during *just* the first half of the year alone.<sup>36</sup> At this rate, if the primary public defender was handling only misdemeanor cases, then he will handle 1 ½ times as many misdemeanors as allowed under national standards. But this was not the only work done by this attorney. The primary public defender also completed the felony workload of 1.46 attorneys *at the same time*, handling in just half of a year 147% of the felony work allowable for a single attorney in an entire year. This means that the primary public defender office, operating primarily with a single attorney, has already handled 225% of the criminal defense workload allowable under the national standards, and at this rate can be expected by the end of 2007 to carry a workload of 450% of the maximum allowed under national standards. The work overload of the conflict defender is not much better. Starting in March of 2007, the office – again operating primarily with a single attorney – has already handled 44% of the allowable workload for a year, under national standards, in just *three* months. This means they can anticipate carrying an annual criminal defense workload in 2007 of 176% of the maximum allowed.

But, the caseload breeches are more serious than these numbers suggest. The national caseload standards were constructed assuming that an attorney works on public defense criminal cases *and nothing else*. As discussed earlier, New York affords the right

<sup>34</sup> Not only does Franklin have no caseload standards, it has struggled throughout its history with case overload. Former Public Defender Alex Lesyk was actually recognized by the NYS State Bar in 1994 for his struggles to deal with a caseload of over 500. When he left the position in 2006, a news story quoted him: "Although I was treated very well by the Franklin County Legislature, I just couldn't work that hard anymore," said former Franklin County Public Defender of 15 years Alexander Lesyk, now a St. Lawrence County prosecutor. "I remember one particular year in 1994 when we opened up 900 cases in one year and it was still a part-time job." Jacob Resnick, "Indigent defense in crisis," *Adirondack Daily Enterprise* (9/6/06).[0]

<sup>35</sup> For the purpose of this analysis, NLADA secured a copy of the assigned counsel administrator’s statistical database.

<sup>36</sup> NLADA calculated this figure as follows: (156 msdr./400 msdr. standard) x 2 = 0.78 or 78% of a single full-time equivalent employee.

to counsel in many family court cases. Though the national caseload standards are silent on the number of family court cases that are allowable,<sup>37</sup> several states have conducted case-weighting studies to set family court caseload standards. For example, the *Washington Defender Association Standards for Public Defense*, Standard Three: Juvenile Dependency Cases states that an attorney should not handle more than 60 such cases per year *and nothing else*. The relatively lower number of cases that can be adequately handled flows from the fact that dependency, neglect and termination cases can be drawn out and very complex, requiring court appearances scheduled throughout a child’s life until he or she reaches a majority age.

Table II shows the additional family court work handled by each Franklin County provider in the first six months of the year.

**Table II**  
**Criminal & Family Court Assignments: January-June 2007\***

	Franklin County Provider			TOTAL
	Primary Public Defender	Conflict Defender*	18-B Assigned Counsel	
Misdemeanor	<b>156</b>	<b>72</b>	<b>82</b>	<b>310</b>
Felony	<b>110</b>	<b>39</b>	<b>59</b>	<b>208</b>
Family Court	<b>103</b>	<b>98</b>	<b>68</b>	<b>269</b>
<b>Total</b>	<b>369</b>	<b>209</b>	<b>209</b>	<b>787</b>

\* The Conflict Defender did not start until March of 2007

This family court workload, results in the fact that the primary public defender handled nearly 171% of a single attorney’s allowable workload for a single year in *just six months time*. At this rate, the family court workload alone would project an annual family court workload in 2007 of 343% of the maximum allowed. The conflict defender handled 163% of a single attorney’s allowable family court workload for a year in *three months time*. At this rate, they can anticipate an annual family court workload in 2007 of 653% of the maximum allowed under national standards.<sup>38</sup>

Projecting the Franklin County public defense caseload for 2007 indicates that the county needs to hire a staff of 12 public defense attorneys to handle the caseload appropriately while it currently operates with only five.<sup>39</sup> Even these projections do not

<sup>37</sup> Except in the case of juvenile delinquency cases (200 cases per year).

<sup>38</sup> In non-delinquency Family Court proceedings, public defenders advocate for clients against one of two attorneys from the Department of Social Services – increasing the workload of public defenders into an area in which the District Attorney has no corresponding workload demands. Under the Family Court Act, the district attorney has the authority to participate in the hearings. At the moment, the District Attorney’s Office merely observes to see if a basis exists for the filing of criminal charges.

<sup>39</sup> This calculation is based on multiplying the first six month assignments by two to get a projected workload for the year. Subtract ten percent to account for conflict cases needing to go to the private bar. Then, divide each case type by the appropriate standard and add the resulting numbers. Felonies: (208 x 2) x 0.9 = 374.4; 374.4/150 = 2.496 FTE. Misdemeanors: (310 x 2) x 0.9 = 558; 558/400 = 1.395 FTE. Family Court: (269 x 2) x 0.9 = 484; 484/60 = 8.07 FTE. 2.496 + 1.395 + 8.07 = 11.96 full time equivalent attorneys (FTE).

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factor in the fact that the pressure of family court representation is, perhaps, greater in Franklin County than in most counties in the state. In 2006, Franklin County had a foster care population of 6.4 per 1,000 children in the county – the sixth highest of the 58 upstate counties, and 37% above the statewide average and 107% above the upstate county average.<sup>40</sup> NLADA heard many reasons for this high percentage of children in foster care, including, the county's impoverished status and that the Department of Social Services is quick to remove children from the home for the slightest appearance of an unkempt house. Regardless of the underlying factors for why there are so many children in foster care, it is a fact that the unique factors of Franklin County require a greater work effort on the part of attorneys representing parents in abuse and neglect case because of the historical likelihood that children will be removed from the home.<sup>41</sup>

As troublesome as an excessive workload is on an attorney who must handle more than double the number of cases recommended by national workload standards, the true outcome measure of work overload is the tangible effect it has on clients. Specifically, how much time can a public defender dedicate on average to each client when working under such excessive workloads? If one assumes that a public defense attorney works 2,040 hours per year,<sup>42</sup> then one can determine the average number of hours the average felony case takes from assignment to disposition, for example, by dividing in the national felony caseload standard (150 cases per year) into the average attorney work year. In this instance, national workload standards suggest that, on average, 13.6 hours of attorney time is needed per the average felony case ( $2,040/150 = 13.6$ ).

In Franklin County the workload – especially that imposed by Family Court practice – means that on average a public defender can spend approximately only 3.9

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<sup>40</sup> Foster care statistics were obtained from the public information officer of the New York State Office of Children and Family Services (OCFS). See: <http://www.ocfs.state.ny.us/main/>. As of December 31, 2006, Franklin County has 86 children in foster care or a foster care placement rate of 6.4% per 1000 children. The Statewide average for 2006 was 4.7% and the upstate average was 3.1%. Only Herkimer (6.4%), Oneida (6.8%), Greene (7.3%), Cortland (9.8%) and Columbia (9.9%) had higher percentages in upstate New York.

<sup>41</sup> The Public Defender's Office also handles all the parole appeals. In 2006, the office was assigned 276 parole appeals. The former public defender is still the attorney of record on these cases and it is reported that many of the appeals were never perfected. The Acting public defender has now developed a system for handling all the parole appeals. The office holds all assignments to the 15<sup>th</sup> of each month, and all appeals up to the 15<sup>th</sup> are filed at the same time. All assignments from the 15<sup>th</sup> to the 30<sup>th</sup> are filed on the 1<sup>st</sup> of the next month.

<sup>42</sup> It is necessary for any workload analysis to establish some baseline for a work year. For employees defined as non-exempt under the Fair Labor Standards Act who are compensated for each hour worked, the establishment of a baseline work year is quite simple. If an employee is paid to work a 35-hour workweek, the baseline work year is 1,820 hours (or 35 hours times 52 weeks). For exempt employees who are paid to fulfill the parameters of their job regardless of hours worked, the establishment of a work year is more problematic. An exempt employee may work 35 hours one week, and 55 hours the next. NLADA measures workload using a 40-hour workweek for exempt employees for two reasons. First, a 40-hour work week has become the *maximum* workweek standard used by other national agencies for determining workload capacities of criminal justice exempt employees (See: National Center for State Courts, *Updated Judicial Weighted Caseload Model*, November 1999; The American Prosecutors Research Institute, *Tennessee District Attorneys General Weighted Caseload Study*, April 1999; U.S Department of Justice, Office of Juvenile Justice and Delinquency Programs, *Workload Measurement for Juvenile Justice System Personnel: Practice and Needs*, November 1999); The Spangenberg Group, *Tennessee Public Defender Case-Weighting Study*; April 1999.) Second, discussions with Mr. Don Fisk and Mr. Arthur Young of the U.S. Department of Labor, Bureau of Labor Statistics suggest that using a 40-hour work week for measuring workload of other local and state government exempt employees is the best method of approximating staffing needs. Therefore we have calculated the available number of work hours for an attorney at 40 hours per week for 51 weeks of the year (allocating one week of paid vacation), yielding 2040 hours per year.

hours per felony case; that means 3.9 hours regardless of whether the case involves a bad check or the most complex homicide.<sup>43</sup>

. For those readers unfamiliar with criminal defense practice, below is a partial list of duties ethically required of an attorney to complete on the average felony case in that time frame:

On cases that are disposed by a plea bargain:<sup>44</sup>

- Meeting and interviewing the client;
- Preparing and filing necessary initial motions (e.g. bail reduction motions; motion for preliminary examination; motion for discovery; motion for bill of particulars; motion for initial investigative report; etc.)
- Receiving and reviewing the state's response to initial motions;
- Conducting any necessary factual investigation, including locating and interviewing witnesses, locating and obtaining documents, locating and examining physical evidence; among others;
- Performing any necessary legal research;
- Preparing and filing case-specific motions (e.g. motions to quash; motions to suppress; etc.)
- Conducting any necessary motion hearings;
- Engaging in plea negotiations with the state;
- Conducting any necessary status conferences with the judge and state;

Additional duties for cases that go to trial:

- Preparing for trial (e.g., develop a theory of the case, prepare for examination of witnesses, including any expert witnesses, conduct jury screening, draft opening and closing statements, requested jury instructions, etc.)
- Meeting with client to prepare for trial;
- Preparing to examine and cross-examine witnesses
- Analyzing potential and final jury instructions
- Conducting the trial;

Duties for sentencing for pleas or trials:

- Gathering favorable information;
- Preparing sentencing witnesses and documents for presentation to court;
- Reviewing the presentence report and interviewing probation officer;
- Drafting and submitting sentencing memorandum or letter;

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<sup>43</sup> The failure of Franklin County to require attorney time tracking makes this calculation an approximation. NLADA established that felony cases make up 26.43% of the total public defender workload. Dedicating 26.43% of a 2,040 hour work year to felony cases alone means that public defenders spend approximately 540 hours per year on felony cases. Projecting a felony caseload of 416 felonies per year that was primarily handled by only three attorneys for the majority of the year, results in 3.9 hours being spent per felony case [540 hrs./ (416 cases/3 attorneys) = 3.9 hrs./felony case]. NLADA readily admits that attorneys may exert a greater number of hours to felonies than misdemeanors and Family Court cases – thus raising the number of hours slightly – but this only underscores the fact that misdemeanor and Family Court clients are being triaged at an even greater rate than presented earlier.

<sup>44</sup> The following is just a partial list of ethical duties required under national performance guidelines. The black letter Performance Guidelines for Criminal Defense Representation (NLADA, 1995) is available on-line at: [www.nlada.org/Defender/Defender\\_standards/Performance\\_Guidelines](http://www.nlada.org/Defender/Defender_standards/Performance_Guidelines).

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- Advocating for the client's best interests at sentencing.

As this list makes evident, no attorney can even think about performing all of these tasks while struggling under the burden of the Franklin County workload. Moreover, as bad as it is to have five attorney positions to handle the work of more than 12 attorneys, the situation is actually far worse. Another factor to take into account when judging the workload of public defenders is the extent to which they have access to adequate support staff (investigators, social workers, paralegals, legal secretaries, and office managers).<sup>45</sup> Investigators, for example, have specialized experience and training to make them more effective than attorneys at critical case-preparation tasks such as finding and interviewing witnesses, assessing crimes scenes, and gathering and evaluating evidence. Without investigators, these tasks would have to be conducted, at greater cost, and probably less effectively, by an attorney. Moreover, such investigation places the attorney at risk of needing to withdraw from the client's representation because if the client's defense required that the information gleaned from the investigation be presented in court, the attorney could not continue as both counsel and witness.<sup>46</sup> Similarly, social workers have the training and experience to assist attorneys in fulfilling their ethical obligations with respect to sentencing, by assessing the client's problems and needs (e.g., mental illness, substance abuse, domestic problems, educational or job-skills deficits), relating them to available community-based services and resources, and preparing a dispositional plan that meets the client's needs and the requirements and expectations of the court, the prosecutor and the law.<sup>47</sup>

Because public defense attorney workloads are inextricably linked to the availability of these complementary professional services, some states impose further restrictions on their public defense caseload standards. For example, public defenders in Indiana that do not maintain state-sponsored attorney to support staff ratios cannot carry more than 120 felony cases per year (down from the standard of 150 felonies per year for full-time public defenders with appropriate support staff).<sup>48</sup> To the extent that any investigations or social work is being done on behalf of public defense clients in Franklin County, it is being handled exclusively by the attorneys themselves.

Moreover, despite their proven resiliency, NLADA does not recommend that a defender office or jurisdiction adopt the national workload standards without taking into account local factors that may lower the number of cases an attorney can reasonably be

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<sup>45</sup> The Guidelines for Legal Defense Systems in the United States issued by the National Study Commission on Defense Services direct that "defender offices should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every three staff attorneys in an office." [National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States, 1976*, 4.1, Task Allocation in the Trial Function: Specialists and Supporting Services.]

<sup>46</sup> NY CLS Jud Appx Code Prof Resp DR 5-102.

<sup>47</sup> Such services have multiple advantages: as with investigators, social workers are not only better trained to perform these tasks than attorneys, but more cost-effective; preparation of an effective community-based sentencing plan reduces reliance on jail, and its attendant costs; defense-based social workers are, by virtue of the relationship of trust engendered by the attorney-client relationship, more likely to obtain candid information upon which to predicate an effective dispositional plan; and the completion of an appropriate community-based sentencing plan can restore the client to a productive life, reduce the risk of future crime, and increase public safety.

<sup>48</sup> Indiana Public Defense Commission, "Standards for Indigent Defense Services in Non-Capital Cases" (1995, last amended 2006). <http://www.in.gov/judiciary/pdc/docs/standards/indigent-defense-non-cap.pdf>.

expected to handle in a year.<sup>49</sup> The national workload standards do not take into consideration the variations in practice between public defense practices and procedures in rural, urban and suburban jurisdictions. In many rural areas of the country, like Franklin County, public defenders must travel considerable distances to meet with incarcerated clients, staff various courts, and investigate crime scenes. These factors decrease the number of cases any one public defender can handle in a rural area compared to a colleague practicing in an urban area in which the court, jail, and public defender office may all be situated within a single city block.

The workload of public defenders in jurisdictions such as Franklin is further exacerbated by New York's unique court structure. Town and Village Courts – otherwise known as Justice Courts – are located in towns and villages throughout New York State and hear both criminal and civil matters.<sup>50</sup> These courts are authorized to handle the prosecution of misdemeanors and violations committed within the geographic boundaries of the town or village. Justice Courts also conduct arraignments and preliminary hearings in felony matters. In Franklin County alone, there are 19 Town Courts and three Village Courts.<sup>51</sup>

The sheer number of justice courts in Franklin County that must be served by its public defense system strongly suggests that the number of cases an attorney can adequately handle needs to be substantially adjusted *downward* from the national benchmarks. A map of Franklin County indicating the location of every court in the county can be found on page 19. It takes approximately an hour or more driving time *one way* to reach six of the village and justice courts from the public defender's office in Malone.<sup>52</sup> And, since the public defender needs to conduct court in the justice courts at least once a month, a significant number of hours must by necessity be logged just to get to the courts -- time that might otherwise be spent on out of court-related or client-related activities.

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<sup>49</sup> NLADA, *Indigent Defense and Commonsense: An Update*, (Washington, DC 1992), p. 7.

<sup>50</sup> By statute, the Supreme Court is the trial court with broadest powers. But outside of New York City and its suburban counties, the Supreme Court functions primarily as a civil court. Therefore it is the County Courts in upstate New York with broadest powers in criminal matters. See generally: <http://www.nycourts.gov/litigants/courtguides/CtUsersOutsideNYC02.pdf> County Court has jurisdiction over felony matters and shares authority with the local city and justice courts to handle trials in misdemeanor cases and other minor offenses and violations. City Courts outside New York City exist in 61 cities and have criminal jurisdiction over misdemeanors and lesser offenses. City Court judges act as arraigning magistrates and conduct preliminary hearings in felony cases.

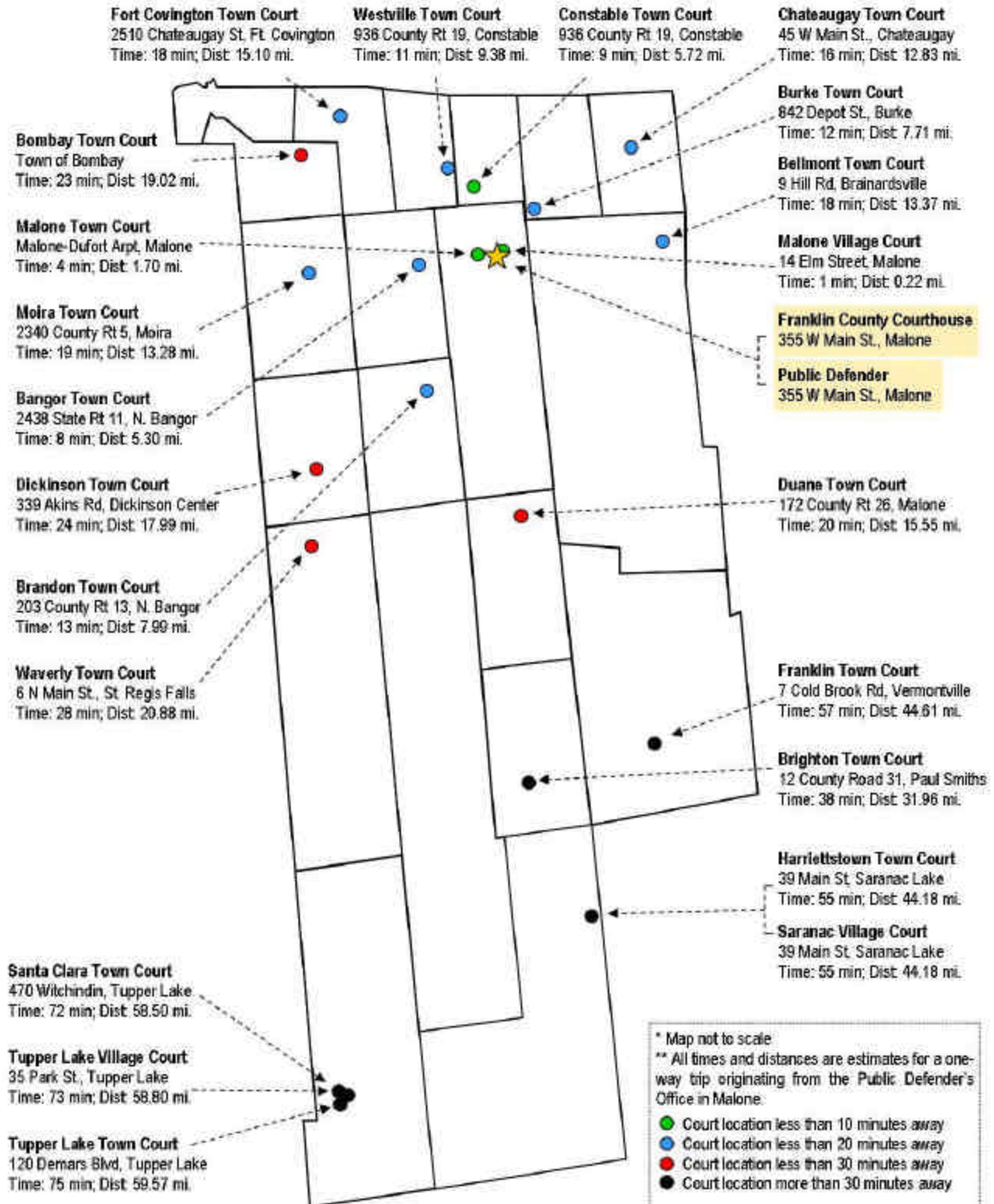
<sup>51</sup> Town Courts: Bangor, Belmont, Bombay, Brandon, Brighton, Burke, Chanteaugay, Constable, Dickenson, Duane, Fort Covington, Franklin, Harriestown, Malone, Moira, Santa Clara, Tupper Lake, Waverly, and Westville. Village Courts: Village of Malone, Saranac Lake and Tupper Lake.

The justice court system is a source of political debate in New York. The *New York Times*, in September 2006, published a series of articles focusing on significant problems, such as how justice courts are not courts of records and appeals are functionally impossible. The *Times* reports that a significant number of justice court judges – about 75% – are not attorneys, and have insufficient knowledge of the law they are sworn to uphold and a poor understanding of the Constitutional rights of the defendant. Franklin County's justice courts were highlighted in the article. See: "Broken Bench," *New York Times* (NY), September 25-27, 2006. <http://select.nytimes.com/gst/abstract.html?res=FB0C11FF34550C768EDDA00894DE404482>.

<sup>52</sup> Driving times are calculated using posted speed limits in favorable weather. Since much of the public defender driving time is through the Adirondack Mountains these driving times may be sufficiently *increased* due to inclement weather especially during winter months.

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**FRANKLIN COUNTY JUSTICE COURT LOCATIONS**



The inadequacy of state oversight for these lower courts has created further public defender workload concerns. With little or no accountability, Justice Court judges have great discretion to decide who gets counsel and the quality of the services rendered -- suggesting that the quality of justice one receives may be more dependent on a person's income level and the village or town in which the crime is alleged to have occurred than on the factual merits of the case. Public defenders should staff every justice court to assure that everyone entitled to the right to counsel is afforded a lawyer to counsel them. The high caseload prevents such staffing of justice courts in Franklin County.

***Ensuring Consistent Quality Representation: The Case for Attorney Qualification, Training & Supervision Standards (Principles 6, 9 & 10)***

All national standards require attorneys representing public defense clients in criminal proceedings to have the appropriate experience to handle a case competently, including ABA *Principle 6*.<sup>53</sup> Policy-makers should not assume that a newly admitted attorney is skilled to handle any type of case or that an experienced real estate lawyer would have the requisite skill to adequately defend a person accused of a serious sexual assault. ABA *Principle 6* acknowledges that attorneys with basic skills can effectively handle less complicated cases and those with less serious potential consequences. However, significant training, mentoring and supervision are needed to foster the budding skills of even the most promising young attorney before allowing her to handle more complex cases.<sup>54</sup>

ABA *Principle 9*<sup>55</sup> requires systematic training for all attorneys. New-attorney training is essential to cover matters such as how to interview a client, the level of investigation, legal research and other preparation necessary for a competent defense, trial tactics, relevant case law, and ethical obligations. Effective training includes a thorough introduction to the workings of the public defense system, the district attorney's office, the court system, and the probation and sheriff's departments as well as any other corrections components. A competent training program also recognizes that most law schools fail to equip graduates with the expertise necessary to prepare for and conduct even the simplest trial. Such programs spend substantial time teaching new lawyers basic

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<sup>53</sup> Principle 6 of the ABA *Ten Principles* demands that "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," *Ten Principles of a Public Defense Delivery System* (ABA 2002) at p. 3. See also *Performance Guidelines for Criminal Defense Representation* (NLADA 1995), Guidelines 1.2, 1.3(a); *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (ABA 1989), Guideline 5.1.

<sup>54</sup> For most public defender offices across the country, the training and practical experience gained by attorneys working on less serious criminal cases permits them, over time, to acquire the skills necessary to handle more serious cases. Consequently, public defender offices across the country generally assign misdemeanor charges, minor offenses and preliminary stages of a prosecution to newer attorneys. Over time--often measured in years--attorneys in these offices acquire the skills that support handling more challenging cases.

<sup>55</sup> *Principle 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.* NAC, *supra* note 100, Standards 13.15, 13.16; NSC, *supra* note 100, Guidelines 2.4(4), 5.6-5.8; ABA, *supra* note 100, Standards 5-1.5; Model Act, § 10(e); Contracting, *supra* note 100, Guideline III-17; Assigned Counsel, *supra* note 100, 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 100, Standard 2.1 (A).

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trial skills, making use of role playing and other mock exercises to teach direct and cross-examination, opening statements and closing argument, voir dire, client interviewing, plea bargaining, motions practice, and the wide range of practical skills needed to effectively represent a client.

*Principle 9* also indicates that training should be continually provided to all staff of a public defender agency. Skills need to be refined and expanded, and knowledge needs to be updated as laws change and practices in related fields evolve. As the practice of law grows more complex, even the most skilled attorney practicing criminal law must undergo continual training to stay abreast of such changing fields as forensic sciences, including DNA technology, and police eyewitness identification procedures, and methods for recognizing signs of mental illness or substance abuse in a client.<sup>56</sup>

While such training is critical to a proper defense, attorneys must not be limited to theoretical knowledge. Defense practitioners also must gain practical trial experience by serving as co-counsel in a mentoring situation on a number of serious crimes, and/or having competently completed a number of trials on less serious cases, *before* accepting appointments on serious felonies. And, the authority to decide whether or not an attorney has garnered the requisite experience and training to begin handling serious cases as first chair should be given to an experienced criminal defense lawyer who can review past case files and continue to supervise, or serve as co-counsel, as the newly qualified attorney begins defending her initial serious felony cases – as demanded by ABA *Principle 10*.<sup>57</sup>

NLADA was impressed with the dedication of the heads of Franklin County’s primary and conflict offices. However, the fact that they are qualified attorneys – the acting public defender has extensive self-reported background in defender work in Massachusetts and the conflict defender started out as a Legal Aid lawyer in Syracuse – belies the fact that in the past the County’s only qualification for the job was that an attorney be admitted to the New York State Bar. For example, one assistant public defender was working for six months as a law intern and handling a full complement of work under general supervision even before officially becoming a lawyer. No state or county law or guideline requires that the public defender and conflict defender offices be staffed with competent counsel.

Moreover, except for approval and funding to attend an annual New York State Defenders Association training to get required continuing legal education credit, the Franklin County public defenders get no training.<sup>58</sup> NLADA is impressed with the acting

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<sup>56</sup> Commentary to the ABA *Standards for Providing Defense Services* views attorney training as a “cost-saving device” because of the “cost of retrials based on trial errors by defense counsel or on counsel’s ineffectiveness.” The Preface to the NLADA *Defender Training and Development Standards* states that quality training makes staff members “more productive, efficient and effective.” [www.nlada.org/Defender/Defender\\_Standards/Defender\\_Training\\_Standards](http://www.nlada.org/Defender/Defender_Standards/Defender_Training_Standards).

<sup>57</sup> *Principle 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.* NSC, *supra* note 100, Guidelines 5.4, 5.5; Contracting, *supra* note 100, Guidelines III-16; Assigned Counsel, *supra* note 100, Standard 4.4; ABA Counsel for Private Parties, *supra* note 100, 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.

<sup>58</sup> Mandatory CLE credits received from outside entities, even those such as NYSDA that specialize in training relevant to public defense lawyers, cannot substitute for training designed to acquaint new attorneys with the particular practices

public defender's plans to provide a basic introductory course for any future new attorneys and applauds his idea to set aside Friday afternoons for on-going training, but the simple fact is that the office's overwhelming workloads will make the plan virtually impossible to implement on an on-going basis and comes eight months after NLADA first raised the deficiency with county officials.

Finally, with both the acting public defender and the conflict defender maintaining a full workload, the offices will be hard pressed to perform any meaningful supervision of younger attorneys. Though we agree with the decision to place the full discretion for hiring and firing attorneys with the heads of the two offices, the fact remains that for the majority of Franklin County's history, the Legislature was forced to rely exclusively on the County Court Judge to assess the performance of its public defenders because they lacked the knowledge to do it themselves.

***Protecting Independence: (ABA Principle 1)***

Having judges maintain a role in the supervision of public defense services can easily create the appearance of partiality -- creating the false perception that judges are not neutral. Policy-makers should guarantee to the public that critical decisions regarding whether a case should go to trial, whether motions should be filed on a defendant's behalf, or whether certain witnesses should be cross-examined are based solely on the factual merits of the case and *not* on a public defender's desire to please the judge in order to maintain his or her job. When the public fears that the court process is unfair, people tend to be less cooperative with law enforcement, less likely to appear as witnesses and for jury duty and, in general, tend to be more cynical about the capacity of government to treat all members of the community in a fair and evenhanded manner.

For this reason and others, all national standards call for the removal of all undue judicial influence on public defense systems. As stated in the U.S. Department of Justice, Office of Justice Programs' report, *Improving Criminal Justice Through Expanded Strategies and Innovative Collaborations: A Report of the National Symposium on Indigent Defense*: "The ethical imperative of providing quality representation to clients should not be compromised by outside interference or political attacks."<sup>59</sup> Courts should have no greater oversight role over lawyers representing public defense clients than they do for prosecutors or for attorneys representing paying clients. As far back as 1976, the National Study Commission on Defense Services concluded that: "The mediator between two adversaries cannot be permitted to make policy for one of the adversaries."<sup>60</sup>

The same standards that call for independence from undue judicial interference also recognize that political interference is equally deleterious to a public defender system. The first of the ABA's *Ten Principles* addresses the importance of independence in public defense representation. The Principle provides that:

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in a specific jurisdiction and assist veteran attorneys regarding developments specifically related to practice in the specific program and jurisdiction.

<sup>59</sup> NCJ 181344, February 1999, at 10.

<sup>60</sup> NSC Report, at 220, citing National Advisory Commission on Criminal Justice Standards and Goals (1973), commentary to Standard 13.9.

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*The public defense function, including the selection, funding, and payment of defense counsel, 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. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. 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.<sup>61</sup>*

Public defense delivery programs that fail to guarantee professional independence for public defenders, assigned counsel or contract attorneys are fatally flawed. These programs compromise the integrity of the attorney-client relationship and work to the detriment of public defense clients by providing them with counsel whose professional judgment may be influenced by concerns that are, at best, irrelevant to clients' adequate representation.

Many states resolve the issue of independence by placing the authority for oversight of the state’s public defense system with a statewide public defense commission.<sup>62</sup> NLADA guidelines recommend that the duties of the independent commission include the selection of a chief administrator, monitoring of quality of services rendered, serving as a liaison between the legislature and the defender service, and ensuring the independence of the defender system.<sup>63</sup> And, even in states without statewide oversight – as here in New York – the same standards call for an independent

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<sup>61</sup> National standards address the need for independence in the context of all three basic models for delivering public defense services in the United States. Where private lawyers are assigned, the concern is with unilateral judicial power to select lawyers to be appointed to individual cases, and to reduce or deny the lawyer’s compensation. Where contracts with nonprofit public defense organizations or law offices are used, the concern focuses primarily on flat-fee contracts which pay a single lump sum for a block of cases regardless of how much work the attorney does, creating a direct financial conflict of interest with the client, in the sense that work or services beyond the bare minimum effectively reduces the attorney’s take-home compensation. Where a public defender system is used, the concern is with vesting the power to hire and fire the chief public defender in a single government official, such as the jurisdiction’s chief executive or chief judge, a concern compounded when that official must run for popular election.

<sup>62</sup> Of the thirty states that currently have statewide public defense systems, fifteen (or 50%) have a single state agency vested with the responsibility of overseeing all trial-level and appellate defender services -- both primary and conflicts -- including the payment of assigned counsel (CT, KY, IA, MD, MA, MT, NC, ND, NH, NM, OR, WI, WV, VA and VT). Except for New Mexico, Vermont and West Virginia, each of these state agencies is overseen by an autonomous commission. These commissions are housed in either the executive or judicial branch for budget purposes. Yet, even in those states in which the commissions are in the judicial branch of government, the public defense system operates outside of the state court system and the judiciary takes no part in the day-to-day administration of the system. Funding in these states is a separate line item from the rest of the judiciary budget. Kentucky, Iowa, Maryland, Montana, North Dakota, and Wisconsin house their commissions in the executive branch of government. Connecticut, Massachusetts, North Carolina, New Hampshire, Oregon and Virginia house the commission in the judicial branch. The public defender agencies in New Mexico, Vermont and West Virginia are not overseen by independent commissions. In all three states, the public defense system is a department of the executive branch of government.

<sup>63</sup> NLADA Guidelines for Legal Defense Services, Standard 2.10, *supra* n. 14.

commission on the local level to insulate the office from the power of the bench and from local political influences. Franklin County has no such board insulating defense attorneys. The acting public defender readily admits that such oversight is necessary for the efficient administration of his duties. He is supported in this by his county, which recently passed a resolution calling for a statewide independent public defense commission and statewide defender system<sup>64</sup>

***Fostering an Effective & Efficient Attorney/Client Relationship: (Principles 3, 4 & 7)***

Requirements of prompt appointment of counsel are based on the constitutional requirement that the right to counsel attaches at “critical stages” that occur before trial, such as custodial interrogations,<sup>65</sup> lineups,<sup>66</sup> and preliminary hearings.<sup>67</sup> In 1991, the U.S. Supreme Court ruled that one critical stage – the probable cause determination, often conducted at arraignment – is constitutionally required to be conducted within 48 hours of arrest.<sup>68</sup> The Court of Appeals has held that in New York City, individuals must be arraigned within 24 hours of arrest.<sup>69</sup> Such promptness is equally important elsewhere in New York’s statutory scheme; valid legal challenges that could result in dismissal of a case<sup>70</sup> should not be delayed for lack of counsel to identify and raise them at the first opportunity.

Most standards take requirements regarding early assignment of counsel beyond the constitutional minimum requirement, to be triggered by detention or request, even though formal charges may not have been filed, in order to encourage early interviews, investigation, and resolution of cases, and avoid discrimination between the outcomes of cases involving public defense clients and those clients who pay for their attorneys.<sup>71</sup>

The third of the ABA’s *Ten Principles* addresses the obligation of public defense systems to provide for prompt financial eligibility screening of defendants, toward the goal of early appointment of counsel.<sup>72</sup> Standardized procedures for client eligibility screening serve the interest of uniformity and equality of treatment of defendants with limited resources. Situations in which individual courts and jurisdictions are free to define financial eligibility as they see fit – e.g., ranging from “absolutely destitute” to “inability to obtain adequate representation without substantial hardship,” with factors

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<sup>64</sup> Franklin County Legislature, Resolution No. 146, adopted June 21, 2007.

<sup>65</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>66</sup> *Kirby v. Illinois*, 406 U.S. 682 (1972).

<sup>67</sup> *Coleman v. Alabama*, 399 U.S. 1 (1970).

<sup>68</sup> *County of Riverside v. McGlaughlin*, 500 U.S. 44 (1991).

<sup>69</sup> *People ex rel. Maxian v. Brown*, 77 N.Y.2d 422 (1991).

<sup>70</sup> See e.g., Criminal Procedure Law § 140.45 [Court to make a facial sufficiency/reasonable cause assessment of the accusatory instrument at arraignment/]

<sup>71</sup> ABA *Defense Services*, commentary to Standard 5-6.1, at 78-79.

<sup>72</sup> ABA Principle 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. Counsel should be furnished upon arrest, detention or request, and usually within 24 hours thereafter.”

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such as employment or ability to post bond considered disqualifying in some jurisdictions but not in others – have long been decried. The National Study Commission on Defense Services found in 1976 that such practices constitute a violation of both due process and equal protection.<sup>73</sup>

Once a client has been deemed eligible for services and an attorney is appointed, *Principle 4* demands that the attorney be provided sufficient time and a confidential space to meet with the client.<sup>74</sup> As the Principle itself states, the purpose is “to ensure confidential communications” between attorney and client. This effectuates the individual attorney’s professional ethical obligation to preserve attorney-client confidences,<sup>75</sup> the breach of which is punishable by disciplinary action. It also effectuates the responsibility of the jurisdiction and the public defense system to provide a structure in which confidentiality may be preserved<sup>76</sup> – an ethical duty that is perhaps nowhere more important than in public defense of persons charged with crimes, where liberty and even life are at stake, and client mistrust of public defenders as paid agents of the state is high.<sup>77</sup>

The trust that is fostered in those early stages would not mean much if the client never saw the same attorney again. For this reason, ABA *Principle 7* demands that the same attorney continue to represent the client – whenever possible – throughout the life of the case.<sup>78</sup> Though it may seem intuitive to have an attorney work a case from beginning to end, many jurisdictions employ an assembly-line approach to justice in which a different attorney handles each separate part of a client’s case (i.e., arraignment, pre-trial conferences, trial, etc.). Standards on this subject note that the reasons for public defender offices to employ the assembly line model are usually related to saving money and time. Lawyers need only sit in one place all day long, receiving a stream of clients and files and then passing them on to another lawyer for the next stage, in the manner of an “assembly line.”<sup>79</sup> But standards uniformly and explicitly reject this approach to

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<sup>73</sup> NSC commentary at 72-74.

<sup>74</sup> ***ABA Principle 4: Defense counsel is provided sufficient time and a confidential space with which to meet with the client.*** *Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses and other places where defendants must confer with counsel.*

<sup>75</sup> ABA *Model Rules of Professional Conduct*, Rule 1.6; *Model Code of Professional Responsibility*, DR 4-101; ABA *Defense Function*, Standard 4-3.1; NLADA *Performance Guidelines*, 2.2. State Performance Standards” New York’s “Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State” (NYSDA 2004); “New York State Bar Association Standards for Providing Mandated Representation” (NYSBA 2005); and “Client-Centered Representation Standards” (NYSDA Client Advisory Board 2005).

<sup>76</sup> NSC, Guideline 5.10

<sup>77</sup> *Id.*, and commentary at p. 460.

<sup>78</sup> ***ABA Principle 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. The attorney assigned for the direct appeal should represent the client throughout the direct appeal.*

<sup>79</sup> NSC at 470.

representation,<sup>80</sup> for very clear reasons: it inhibits the establishment of an attorney-client relationship, fosters in attorneys a lack of accountability and responsibility for the outcome of a case, increases the likelihood of omissions of necessary work as the case passes between attorneys, is not cost-effective, and is demoralizing to clients as they are re-interviewed by a parade of staff starting from scratch.<sup>81</sup>

When a person is arrested in Franklin County, he or she will be brought *immediately* by the arresting officer to the Justice Court in the area where the arrest occurred. At whatever time of the day or night, the arrestee will be brought before the Justice<sup>82</sup> who will arraign the suspect, set bail and advise the person of their right to counsel. This is the initial appearance, and there will not be any prosecutor or defense attorney involved in the process.

Despite a March 2005 Administrative Court Order under the Uniform Rules for Courts Exercising Criminal Jurisdiction that requires all courts to immediately assign *and* promptly notify counsel for defendants who are remanded or unable to post bail,<sup>83</sup> Franklin County's Town and Village Courts have struggled to do so. At the time of the first NLADA site visit it was clear that some Justice Court judges still failed to notify the public defender office or bypassed the office altogether and appointed local counsel directly. By our second site visit in the summer of 2007, most of that appears to have been rectified through coordinated attempts by Franklin County management, the acting Public Defender and the Assigned Counsel Coordinator to alert Justice Court judges to proper procedure.<sup>84</sup>

Three to four times a week, the assigned counsel coordinator goes to the local jail to screen in custody defendants for eligibility. The *Guidelines for Legal Defense Systems in the United States* issued by the National Study Commission on Defense Services state that, "[e]ffective representation should be provided to anyone who is unable, without substantial financial hardship to himself or to his dependents, to obtain such representation."<sup>85</sup> "Substantial hardship" is also the standard promulgated by the ABA.<sup>86</sup>

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<sup>80</sup> *ABA Defense Services*, commentary to Standard 5-6.2, at 83.

<sup>81</sup> *NSC* at 462-470, citing *Wallace v. Kern* (slip op., E.D.N.Y. May 10, 1973), at 30 [reported at 392 F. Supp. 834, rev'd on other grounds, 481 F.2d 621]; *Moore v. U.S.* (432 F.2d 730, 736 (3rd Cir. 1970)); and *U.S. ex rel Thomas v. Zelker*, 332 F.Supp. 595, 599 (S.D.N.Y. 1971).

<sup>82</sup> It is not unusual for the officer and arrestee to appear before the Justice in his or her living room, although some Justices will meet the officer at the place where court is held.

<sup>83</sup> Memorandum from Deputy Chief Administrative Judge, Jan Plumadore, to all Town and Village Court Justices & Clerks regarding OCA Forms Implementing 22 NYCRR §200.26 – Assignment of Counsel at Arraignment. April 28, 2005. "On March 25, 2005, Chief Administrative Judge Lippman signed an Administrative Order adding a new section 200.26 ('the rule') to Subpart C of Part 200 of the Uniform Rules for Courts Exercising Criminal Jurisdiction. The rule, which took effect immediately, creates an obligation on Town and Village Courts, with respect to defendants who appear for arraignment and are remanded (i.e., ordered held without bail) or unable to immediately post bail with the Court, to make an initial determination as to the defendant's eligibility for assigned counsel. Where it appears that a defendant is financially unable to obtain counsel, the Court, under subdivision (c) of the rule, must immediately assign counsel and promptly notify both assigned counsel and the local pretrial services (if any), by telephone and in writing or by fax, of the Court's assignment and issuance of the bail or remand order."

<sup>84</sup> This demonstrates another example of the County having to provide training and oversight to Justice Courts because the state fails to do so.

<sup>85</sup> Guideline 1.5.

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Franklin County follows these eligibility standards, giving the Assigned Counsel Coordinator discretion to determine “substantial hardship” on a case-by-case basis. Perhaps because of the high poverty of Franklin County the vast majority of clients who want a public defense attorney receive one. Year to date, only 35 applicants had been denied over the past year.

This high percentage of people receiving counsel does not reflect the county's historical precedent. Franklin County is, like all counties, required to file a UCS 195 form with the Office of Court Administration. Their form(s) for 2006 indicate that 153 individuals were not represented after request or had their representation discontinued. The form provides spaces for breaking that number down by reason for denial/discontinuance of representation, but as to the four reasons selected on the Franklin county form(s), including "Not indigent," only a check mark, not a numerical breakdown, was supplied. There is no way to determine from the form(s) how many were rejected for each of the four reasons, including "Not indigent."<sup>87</sup>

Defendants who are released on their own recognizance or under supervision or have posted bail are told to meet the Assigned Counsel Coordinator to be screened to see if they qualify for free counsel. Once the client is approved, the Assigned Counsel Coordinator checks for conflicts in the case and assigns the client to one of the two institutional providers or to a private assigned counsel attorney. Franklin County lacks a sufficient case-tracking system by which to properly screen for conflicts, so the assigned counsel coordinator basically checks for obvious conflicts – like co-defendants. Further conflicts – such as eye-witnesses or victims being former clients – precipitate further scrutiny by the primary public defender office. If the probability of a conflict actually arising is high, the office errs on the side of caution and assigns the case to the Conflict Defender. If, however, the probability of a conflict is merely speculative, the case remains in the office and the case is revisited periodically to reassess the probability of a conflict.

The close working relationship of the assigned counsel coordinator and the public defender serves to enlighten a systemic issue with Franklin County's delivery of right to counsel services. The assigned counsel coordinator is housed in the office of the primary public defender. The placement of the assigned counsel coordinator there was, from our perspective, made for efficiency reasons. Clients, for instance, often went to the public defender office anyway, thus saving them time and confusion over being sent elsewhere for screening. Moreover, since the assigned counsel coordinator's screening and case assignment responsibilities do not amount to a full-time position, his placement in the office lends himself to perform other paraprofessional tasks for the public defender that would otherwise have to be done by the attorney (like serving subpoenas). Franklin County's system therefore can be more equated with those public defender offices across

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<sup>86</sup> *ABA Standards for Criminal Justice: Providing Defense Services* 5-7.1 states: “Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship.”

<sup>87</sup> Franklin County's use of the "substantial hardship" measure may still be flawed if there is no ability to appeal from the assigned counsel coordinator's determination, as it is the court that must ultimately decide. New York's Court of Appeals has ruled that courts must “make a sufficient inquiry into the defendant's ability to engage a lawyer.” *People v. McKiernan*, 84 NY2d 915 (1994). If no one is being turned away at the moment, the systemic flaw would remain.

the country that are tasked with the screening and conflict-check function rather than those with truly independent assigned counsel coordinator offices.

NLADA reviewed case files and found that clients are promptly being interviewed. Indeed, NLADA representatives were impressed that each client was being photographed to aid the attorneys in remembering their clients' faces when they met with them again in a busy court setting. Of course, such a practice could not be implemented were it not for the effort of the County to ensure professional work space for both the public defender and conflict defender. NLADA found no instance in which a client was forced to switch from one attorney to another without due cause.

All of this speaks volumes to the determination of County officials to meet those ABA *Principles* within their purview given their constrained budget.

### ***Creating a Level Playing Field: Prosecutor & Defender Parity (ABA Principle 8)***

Despite the best efforts of Franklin County officials to provide constitutionally-required representation of people unable to afford an attorney, Franklin County's inability to meet the ABA's 10 Principles is most apparent in the realm of prosecutor and defender parity.

ABA *Principle 8* requires parity between the resources of the public defender and those of the prosecutor, including "parity of workload, salaries and other resources."<sup>88</sup> One of the reasons why *Gideon* determined that defense lawyers were "necessities" rather than "luxuries" was the simple acknowledgement that states "quite properly spend vast sums of money" to establish a "machinery" to prosecute offenders. This "machinery" – including federal, state and local law enforcement (FBI, state police, sheriffs, local police), federal and state crime labs, state retained experts, etc. – can overwhelm a defendant unless she is equipped with analogous resources. Without such resources, the defense is unable to play its appropriate roles of testing the accuracy of the prosecution evidence, exposing unreliable evidence, and serving as a check against prosecutorial or police overreaching.

In 1972, Chief Justice Warren Burger in his concurring opinion in *Argersinger* even went so far as to state that "society's goal should be that the system for providing counsel and facilities for the defense should be as good as the system that society provides for the prosecution."<sup>89</sup> A poor county like Franklin is ill-equipped to make up

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<sup>88</sup> Principle 8 of the American Bar Association's *Ten Principles* states, "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." See also National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976), Guidelines 2.6, 3.4, 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); American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992), Standards 5-2.4, 5-3.1, 5-3.2, 5-3.3, 5-4.1, and 5-4.3; National Legal Aid & Defender Association *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984), Guidelines III-6, III-8, III-9, III-10, and III-12; *Standards for the Administration of Assigned Counsel Systems* (NLADA 1989), Standard 4.7.1 and 4.7.3; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980) (*Performance*); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979), Standard 2.1(B)(iv); and American Bar Association Standards for Criminal Justice, *Defense Function* (3rd ed. 1993), Standard 4-1.2(d). Cf. National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973), Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

<sup>89</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 43 (1972).

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for the imbalance in resources created by state and federal contributions to local law enforcement.

At its most basic, the concept of parity requires salary parity between public defenders and prosecutors. The Justice Department's 1999 report, *Improving Criminal Justice* concludes that: "Salary parity between prosecutors and defenders at all experience levels is an important means of reducing staff turnover and avoiding related recruitment/training costs and disruptions to the office and case processing. Concomitant with salary parity is the need to maintain comparable staffing and workloads – the innately linked notions of 'equal pay' for 'equal work.' The concept of parity includes all related resource allocations, including support, investigative and expert services, physical facilities such as a law library, computers and proximity to the courthouse, as well as institutional issues such as access to federal grant programs and student loan forgiveness options."<sup>90</sup>

But New York State has made even the modest goal of salary parity impossible for local governments such as Franklin County to achieve. The Franklin County District Attorney has an annual salary of \$119,000 while the primary public defender and conflict defender make between \$60,000-65,000. On first glance it appears that Franklin County fosters such pay inequities. However, the state subsidizes the district attorneys salary such that the county is only responsible for approximately \$65,000 of the total. So in that sense, the County provides salary parity while the state throws the balance out of whack. To be clear, NLADA does not begrudge district attorneys such salaries. Indeed, we believe the responsibilities of the job merit such compensation. So do the responsibilities of public defense lawyers.

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<sup>90</sup> Footnote 58, *supra*, at x.

### Chapter III *Conclusion*

The rights of the poor criminal defendants are being violated in Franklin County criminal and family courts in direct contravention of the United States and New York Constitutions -- despite the professionalism and dedication of many criminal justice stakeholders at the county level. County Manager James Feeley is to be commended for his intimate knowledge of right to counsel issues and his commitment to overcoming systemic inequities. This dedication only serves to underscore the untenable position the State of New York puts its less fortunate counties in when it comes to delivering on the promise of equal justice before the law for people of insufficient means.

The actions -- or more appropriately -- the inactions of the State of New York to live up to its constitutional obligations to provide an adequate right to counsel system unfairly punishes poorer counties like Franklin that must direct a far greater portion of their limited tax-payer based dollars to the justice system rather than investing those dollars in governmental programs -- like social services, education and job training -- that could positively impact the percentage of their citizenry living in poverty.

It is the State of New York that bears the constitutional responsibility to fund appropriate public defense services and it should do so. In the meantime, officials of Franklin County appear to understand and appreciate the importance of these services to protecting its residents and the integrity of its criminal justice system. However, in order to provide quality public defense representation, Franklin County will need to take even greater steps than it has already taken to improve public defense, at costs that it will be hard-pressed to bear. Following are NLADA's recommendations

### **Franklin County Recommendations**

1. *To ensure constitutionally-adequate representation, Franklin County must staff the public defender office and conflict defender office appropriately to meet national and state-recognized workload standards. This requires the primary office to be staffed with eight attorneys and the conflict defender to be staffed with four attorneys.*

If it were possible to evaluate the overall health of a jurisdiction's indigent defense system by a single criterion, the establishment of reasonable caseload control may arguably be the most important benchmark of any effective system. Franklin County has no such controls. Annual budgets for appropriate staffing levels should be determined by dividing projected caseloads by the National standards.

2. *To ensure constitutionally-adequate representation, Franklin County must staff the public defender office and conflict defender office appropriately to meet nationally-recognized attorney to support staff standards. This requires the primary office to be staffed with two investigators, a social worker, and a paralegal. The conflict office needs an investigator, a social worker, and a paralegal.*

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Both the ABA and NLADA standards recognize that support services are a vital part of adequate representation. Standard 5-4.1 of the ABA Standards for Criminal Justice, Providing Defense Services, directs that: “The legal representation plan should provide for investigative, 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.” ABA Defense Function Standard 4-8.1 requires the defense at time of sentencing to “be prepared to suggest a program of rehabilitation based on defense counsel’s exploration of employment, educational and other opportunities made available by community services.” And NLADA Performance Guidelines for Criminal Defense Representation require counsel to obtain information as early as possible relating to matters such as the client’s mental health, education, medical needs, and other background and personal history, in preparation for sentencing or negotiated disposition.<sup>91</sup>

#### *3. The Chief Public Defender and Conflict Defender must be given reduced caseloads to effectively administer their offices and supervise, monitor, evaluate and train their staffs.*

. In the nationwide public defender community, there continues to be disparate approaches to the issue of supervisor caseloads. Those that favor supervisors doing some casework believe that the legal abilities of experienced managers benefit clients, set a good organizational example and keep the managers close to the practice. Those that disfavor the practice believe that handling cases diminishes manager oversight and distracts managers from implementing policy.

In a small county such as Franklin, it is prudent for the heads of the public defender office to handle a limited caseload to allow them to perform the needed supervisory and training function. Where there is unanimity in the field is that a lack of supervision leaves attorneys to determine on their own what constitutes competent representation and they will often fall short of that mark. An effective performance plan requires a process for monitoring compliance with standards and should include: a) clear plan objectives;<sup>92</sup> b) specific performance guidelines;<sup>93</sup> c) specific tools and processes for assessing how people are performing relative to those expectations and what training or other support they need to meet performance expectations;<sup>94</sup> d) the assessment of client satisfaction,<sup>95</sup>

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<sup>91</sup> [Guidelines 2.2(b)(2), 4.1(b)(2)(c), 8.3.]

<sup>92</sup> These can vary greatly both in kind and number but they commonly include such things as: fostering and supporting professional development; giving people clear guidance about what is expected of them; and supporting accountability. Moreover, effective performance plans are tied to and support the fulfillment of the agency’s mission and vision. Critically, effective plans emphasize a goal of promoting employees’ performance success.

<sup>93</sup> People need to know what is expected of them in order to work to fulfill those expectations. Performance expectations should include for example, attitudinal expectations and administrative responsibilities as well as substantive knowledge and skills.

<sup>94</sup> People whose positions require them to conduct performance evaluations must be trained and evaluated as part of their performance plan so that evaluations are done fairly and consistently.

and, e) specific processes for providing training, supervision and other resources that are necessary to support performance success. None of this can be accomplished if the heads of the public defense offices are juggling their own cases.

4. *To ensure constitutionally-adequate representation, Franklin County must institute a quality-assurance plan for the tertiary assigned counsel system. This may include contracting with a private attorney to monitor performance of assigned counsel attorneys, or, hiring an assigned counsel coordinator that is an attorney and making the position independent from the public defender office..*

The current Franklin County assigned counsel coordinator position does not serve the dual purposes of ensuring quality of representation of the tertiary conflict system and effectively screening for eligibility. The problems regarding eligibility screening are often best served through the creation of a Pre-Trial Services agency. Pre-Trial Services are independent agencies tasked with, among other things, public defender eligibility screening, determining whether or not an arrestee should be detained or released on his or her own recognizance prior to initial court appearances, and presenting judges with independent assessments on bail recommendations. Recognizing that cost would be a factor in creating such a unit, Franklin County should consider keeping the screening function in the primary defender office (though screenings should be conducted daily) and simply contracting with a local attorney to assess “quality” through a formal evaluation program developed and based on the written performance guidelines.

5. *Franklin County’s public defense system must institutionalize a computerized case-tracking system to allow for a more robust analysis of the efficiency and effectiveness of the system and to sufficiently inquire into a defendant’s ability to retain a private lawyer and identifies appropriate conflicts for the primary, conflict and tertiary defender components.*

The Franklin County manager and the public defender chiefs are significantly handicapped without quantitative data derived from fiscal, administrative and law practice areas to support day-to-day decision-making. On-going data reporting has the two-fold benefit of maintaining a year-round focus on the budget and of supporting the use of quantitative approaches to support management decision-making. The latter has come to be known in the management literature as “evidence-based” practices or management by outcomes. Of course, this requires that data be collected, aggregated and analyzed in a consistent fashion for a limited number of strategically determined activities – something that has been absent from Franklin County operations for some time. There are many different types of public defender case-tracking software commercially available and many others developed through open-source platforms that could be tailored to criminal practice in upstate New York. The majority of these systems

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<sup>95</sup> See, e.g., NYSDA Board (2000). [http://www.nysda.org/00\\_ClientCenteredResolutionAdopted.pdf](http://www.nysda.org/00_ClientCenteredResolutionAdopted.pdf). See also, Marcus T. Boccaccini and Stanley L. Brodsky, " 25 Law & Psychol. Rev. 81 (2001) ["Research has continually shown that perceptions of fair treatment, and not just case outcome, matter greatly to clients." (citing, among others, Geoffrey P. Alpert & Donald A. Hicks, *Prisoners' Attitudes Toward Components of the Legal and Judicial Systems*, 14 *Criminology* 461, 473-76 (1977).]

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have conflict check systems to more readily identify potential conflicts earlier in the life of a case. In this regard, it should be noted that the Franklin County Manager filed the 2008 Tentative Budget on Monday, October 1<sup>st</sup>, with sufficient resources to secure a data management system from the New York State Defenders Association.

6. *All Franklin County Criminal Justice stakeholders and County policy-makers should advocate within their respective professional membership associations and at the legislature for the creation of a state funded statewide public defense commission with full regulatory authority to promulgate, monitor and enforce binding standards over the entire public defense system.*

The most effective way to insulate the defense function from undue political and judicial interference and to ensure that adequate standards are met uniformly across the state is to give a statewide public defense commission the regulatory authority to promulgate and enforce standards uniformly throughout the jurisdiction. National standards call for the creation of independent oversight commissions in each state.<sup>96</sup> Over the past twenty years there has been a slow but steady trend to the creation of statewide public defense commissions across the United States. Whereas in 1983, 33 states had no commission whatsoever, only 17 – including New York -- remain that have made no move to a commission format at all (a decrease of 48%).

A New York statewide public defender commission should be statutorily required to promulgate standards in, at minimum, the following areas: attorney performance standards, workload standards, support staff to lawyer ratios, training requirements, standards supporting the continuous representation of clients, attorney qualification standards, client contact standards, and compensation of public defense providers.

The day-to-day business of the commission should be administered by a State Chief Public Defender and have a centralized staff including, but not limited to: a financial officer and staff; a management information officer and staff; a training director and staff; a family court director and staff; and, an ombudsman and staff to monitor

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<sup>96</sup> See generally, ABA *Ten Principles* #1. NLADA has promulgated guidelines to assist jurisdictions in establishing independent oversight boards at either the state or local level. NLADA’s *Guidelines for Legal Defense Services* (Guideline 2.10) states:

“A special Defender Commission should be established for every defender system, whether public or private. The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented.

Commission members should be selected under the following criteria: The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director.

- a. The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics.
- b. No single branch of government should have a majority of votes on the Commission.
- c. Organizations concerned with the problems of the client community should be represented on the Commission.
- d. A majority of the Commission should consist of practicing attorneys.

The Commission should not include judges, prosecutors, or law enforcement officials.”

compliance with standards. The new commission should also be staffed to serve as a central repository for the collection, analysis and dissemination of public defense data. Without data, decision-makers are left to form policy based on anecdotal information, and the formation of public attitudes is left to speculation, intuition, presumption and bias.

7. *All Franklin County Criminal Justice stakeholders and County policy-makers should advocate within their respective professional membership associations and at the legislature for the State to adequately fund 100% of all public defense services.*

NLADA understands that much of the recommendations above are difficult, if not outright impossible, to implement without potentially bankrupting the County. Though we are sympathetic as to the tough position Franklin County policy-makers find themselves in vis-à-vis other important demands on their resources, the Constitution simply does not allow for justice to be rationed to the poor due to insufficient funds. New York unfairly, and in our opinion unlawfully, places the burden to fund public defense at the county level.

There the duty remains unless and until the burden of that duty is shifted to the state statutorily or through court action. Therefore, Franklin County's policymakers are in the unenviable "between a rock and a hard place" position of having to either fund public defender services at an adequate level (thus threaten its fiscal health) or face expensive systemic class action lawsuits or other costly court action to ensure a meaningful right to counsel for the poor (thus, also threatening its fiscal health). Though NLADA does not engage in direct litigation over these issues, other national organizations have brought litigation over the failure of states and counties to provide a constitutional level of public defense services. The American Civil Liberties Union (ACLU) has sued the state of Connecticut, counties in the state of Montana, Allegheny County, Pennsylvania (Pittsburgh), Grant County, Washington, and recently filed suit in Michigan against several of its counties.<sup>97</sup> The National Association of Criminal Defense Lawyers (NACDL) sued the state of Louisiana, and is planning litigation in Pennsylvania.<sup>98</sup>

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<sup>97</sup> The ACLU successfully sued the State of Connecticut in *Rivera v. Rowland*. The settlement agreement significantly increased the staff of the state's public defender system, the rates of compensation paid to special public defenders doubled, and the public defender system substantially enhanced the training, supervision and monitoring of its attorneys. For more information see: [www.aclu.org/crimjustice/gen/10138prs19990707.html?s\\_src=RSS](http://www.aclu.org/crimjustice/gen/10138prs19990707.html?s_src=RSS). This was the second successful ACLU lawsuit. Prior to *Rivera*, The ACLU sued Allegheny County, Pennsylvania (Pittsburgh) reaching similar reform in the settlement decree for *Doyle v. Allegheny County Salary Board*. In Montana, the ACLU lawsuit *White v. Martz* was postponed to allow the Attorney general to advocate for sweeping legislative reforms. For more information, see: "ACLU Files Class-Action Lawsuit Against Montana's Indigent Defense Program." ACLU Press Release (Feb. 14, 2002) at [www.aclu.org/crimjustice/indigent/10127prs20020214.html](http://www.aclu.org/crimjustice/indigent/10127prs20020214.html). Washington: See generally: [www.aclu.org/rightsofthepoor/indigent/24078prs20060202.html](http://www.aclu.org/rightsofthepoor/indigent/24078prs20060202.html).

<sup>98</sup> In 2004, NACDL filed a class action lawsuit against the State of Louisiana alleging systemic denial of counsel in Calcasieu Parish (*Anderson v. Louisiana*). For more information see: "Justice Failing in Calcasieu Parish: Lawsuit Seeks Systemic Reform and Relief for Defendants Deprived of Constitutional Rights." NACDL News Release (2004) at [www.nacdl.org/public.nsf/DefenseUpdates/Calcasieu](http://www.nacdl.org/public.nsf/DefenseUpdates/Calcasieu). See also: "Virginia and National Criminal Defense Lawyers Associations Delay Filing of Federal Suit Enjoining Court-Appointed Lawyer 'Fee Caps': Legislative Move Stalls Federal Suit." NACDL News Release (Feb. 1, 2006) at [www.nacdl.org/public.nsf/newsreleases/2006mn003?OpenDocument](http://www.nacdl.org/public.nsf/newsreleases/2006mn003?OpenDocument).

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Private law firms have brought suit in jurisdictions in Massachusetts, Mississippi, and New York City, to name a few.<sup>99</sup>

It would behoove all Franklin County policymakers and criminal justice stakeholders to advocate for a state take over of the public defense function to alleviate the risks to the Counties financial future.

#### **Final Comments**

There is one primary reason why the State of New York has yet to effectively and efficiently implement its constitutional mandate under *Gideon*: The constituency most directly impacted by the failure of government to ensure equal access to justice is the one most limited to affect public discourse. By definition, people of insufficient means have limited resources to gain access to forums that promote public awareness of their concerns. It is easy for state policy-makers to paint the funding of public defense services as “giving money to criminals” or “a waste of tax-payer’s money” without the people most affected by their actions being able to effectively respond. This does a disservice to public defense clients, and to the public, for in the end the state’s failure to invest money in defender services neither increases public safety nor conserves tax-payer resources.

Without state financial assistance, Franklin County struggles daily to appropriately staff the numerous town and village courts with public defenders that possess the time, tools and training to adequately ensure the rights of poor people facing a potential loss of liberty at the hands of the state. Without legal advocates for the poor in each and every justice court, the potential for inappropriate or coerced misdemeanor convictions grows. Although misdemeanor sentences may not generally result in lengthy incarceration, the life consequences of wrongful convictions can be severe, including job loss, family breakup, substance abuse and deportation – all factors that tend to foster recidivism and lead to further court actions at greater tax-payers’ expense.

The State Legislature must enact and fund an appropriate public defender system to ensure that due process interests of all persons in New York State are properly protected regardless of their ability to pay for counsel. The State can no longer engage in a course of conduct whereby the burden of providing adequate counsel is shifted to the counties and the quality of representation is premised purely on economic factors. The time has come for the State of New York to move from deliberation to action in the name of providing justice for all.

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<sup>99</sup> Massachusetts: *Lavallee, et al., v. Justices in the Hampden Superior Court, et al.*, 442 Mass. 228, SJC-09268. See: [www.masslawyersweekly.com/signup/gtwFulltext.cfm?page=ma/opin/sup/1013904.htm](http://www.masslawyersweekly.com/signup/gtwFulltext.cfm?page=ma/opin/sup/1013904.htm) New York City and State were sued in 2000 for claims relating to the low rate of compensation paid to assigned counsel who represent minors and persons unable to afford counsel in both family and criminal actions in *New York County Lawyers' Association v. State*, 763 N.Y.S.2d 397, 414 (N.Y. Sup. Ct. 2003). The action was supported through pro bono legal assistance provided by the law firm of Davis Polk & Wardwell. The trial judge ultimately ruled for the plaintiffs, entered an injunction against the City and State and ordered that assigned counsel compensation rates be raised. Mississippi: Quitman County, an impoverished Delta community, sued Mississippi in 1999, alleging that the state law requiring local governments to pay for public defense was a violation of the U.S. Constitution and the Mississippi Constitution. The state supreme court rejected the county’s contention, however, and refused to find unconstitutional the state’s failure to provide any funding for public defense. In fairly unsympathetic language, the court’s majority said that if the county was concerned about public defense, it could have budgeted more for it.

## Appendix A

### “Ten Principles of a Public Defense Delivery System”

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1. ***The public defense function, including the selection, funding, and payment of defense counsel,<sup>100</sup> 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.<sup>101</sup> To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.<sup>102</sup> Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.<sup>103</sup> 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.<sup>104</sup>***
2. ***Where the caseload is sufficiently high,<sup>105</sup> the public defense delivery system consists of both a defender office<sup>106</sup> and the active participation of the private***

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<sup>100</sup> “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.

<sup>101</sup> 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* (3<sup>rd</sup> 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).

<sup>102</sup> NSC, *supra* note 100, Guidelines 2.10-2.13; ABA, *supra* note 100, Standard 5-1.3(b); Assigned Counsel, *supra* note 100, Standards 3.2.1, 2; Contracting, *supra* note 100, 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.

<sup>103</sup> Judicial independence is “the most essential character of a free society” (American Bar Association Standing Committee on Judicial Independence, 1997).

<sup>104</sup> ABA, *supra* note 100, Standard 5-4.1

<sup>105</sup> “Sufficiently high” is described in detail in NAC Standard 13.5 and ABA Standard 5-1.2. The phrase can generally 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 is enough to support meaningful involvement of the private bar.

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*bar. The private bar participation may include part time defenders, a controlled assigned counsel plan, or contracts for services.<sup>107</sup> The appointment process should never be ad hoc,<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup>*

- 3. Clients are screened for eligibility,<sup>111</sup> 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,<sup>112</sup> and usually within 24 hours thereafter.<sup>113</sup>**
  
- 4. Defense counsel is provided sufficient time and a confidential space with which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date.<sup>114</sup> Counsel should have confidential access to the client for the full exchange of legal, procedural and factual information between counsel and client.<sup>115</sup> To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses and other places where defendants must confer with counsel.<sup>116</sup>**

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<sup>106</sup> NAC, *supra note 100*, Standard 13.5; ABA, Standard 5-1.2; ABA Counsel for Private Parties, *supra note 100*, 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.

<sup>107</sup> ABA, *supra note 100*, Standard 5-1.2(a) and (b); NSC, *supra note 100*, Guideline 2.3; ABA, *supra note 100*, Standard 5-2.1.

<sup>108</sup> NSC, *supra note 100*, Guideline 2.3; ABA, *supra note 100*, Standard 5-2.1.

<sup>109</sup> ABA, *supra note 100*, Standard 5-2.1 and commentary; Assigned Counsel, *supra note 100*, 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).

<sup>110</sup> NSC, *supra note 100*, Guideline 2.4; Model Act, *supra note 100*, § 10; ABA, *supra note 100*, Standard 5-1.2(c); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (provision of indigent defense services is obligation of state).

<sup>111</sup> For screening approaches, see NSC, *supra note 100*, Guideline 1.6 and ABA, *supra note 100*, Standard 5-7.3.

<sup>112</sup> NAC, *supra note 100*, Standard 13.3; ABA, *supra note 100*, Standard 5-6.1; Model Act, *supra note 100*, § 3; NSC, *supra note 100*, Guidelines 1.2-1.4; ABA Counsel for Private Parties, *supra note 100*, Standard 2.4 (A).

<sup>113</sup> NSC, *supra note 100*, Guideline 1.3.

<sup>114</sup> American Bar Association Standards for Criminal Justice, *Defense Function* (3<sup>rd</sup> ed. 1993) [hereinafter “ABA Defense Function”], Standard 43.2; *Performance Guidelines for Criminal Defense Representation* (NLADA 1995) [hereinafter “Performance Guidelines”], Guidelines 2.1-4.1; ABA Counsel for Private Parties, *supra note 100*, Standard 4.2.

<sup>115</sup> NSC, *supra note 100*, Guideline 5.10; ABA Defense Function, *supra note 113*, Standards 42.3, 43.1, 43.2; Performance Guidelines, *supra note 113*, Guideline 2.2.

<sup>116</sup> ABA Defense Function, *supra note 113*, Standard 4-3.1.

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.<sup>117</sup> National caseload standards should in no event be exceeded,<sup>118</sup> 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.<sup>119</sup>
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.<sup>120</sup>
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.<sup>121</sup> 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

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<sup>117</sup> NSC, *supra* note 100, Guideline 5.1, 5.3; ABA, *supra* note 100, Standards 5-5.3; ABA Defense Function, *supra* note 15, Standard 4-1.3(e); NAC, *supra* note 100, Standard 13.12; Contracting, *supra* note 100, Guidelines III-6, III-12; Assigned Counsel, *supra* note 100, Standards 4.1.4.1.2; ABA Counsel for Private Parties, *supra* note 100, Standard 2.2 (B) (iv).

<sup>118</sup> 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* (NLADA, 1988; ABA, 1989) [hereinafter "Death Penalty"].

<sup>119</sup> ABA, *supra* note 100, Standard 5-5.3; NSC, *supra* note 100, Guideline 5.1; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980), Standard 1-F.

<sup>120</sup> Performance Guidelines, *supra* note 15, Guidelines 1.2, 1.3(a); Death Penalty, *supra* note 117, Guideline 5.1.

<sup>121</sup> NSC, *supra* note 100, Guidelines 5.11, 5.12; ABA, *supra* note 100, Standard 5-6.2; NAC, *supra* note 100, Standard 13.1; Assigned Counsel, *supra* note 100, Standard 2.6; Contracting, *supra* note 100, Guidelines III-12, III-23; ABA Counsel for Private Parties, *supra* note 100, Standard 2.4 (B) (i).

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*and public defense.<sup>122</sup> Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.<sup>123</sup> 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,<sup>124</sup> and separately fund expert, investigative and other litigation support services.<sup>125</sup> 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.<sup>126</sup> 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.<sup>127</sup>*

**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.<sup>128</sup>*

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<sup>122</sup> NSC, *supra note 100*, Guideline 3.4; ABA, *supra note 100*, Standards 5-4.1, 5-4.3; Contracting, *supra note 100*, Guideline III-10; Assigned Counsel, *supra note 100*, Standard 4.7.1; Appellate; *supra note 1000*, ABA Counsel for Private Parties, *supra note 100*, Standard 2.1 (B) (iv). See NSC, 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, Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

<sup>123</sup> ABA, *supra note 100*, Standard 5-2.4; Assigned Counsel, *supra note 100*, Standard 4.7.3.

<sup>124</sup> NSC, *supra note 100*, Guideline 2.6; ABA, *supra note 100*, Standards 5-3.1, 5-3.2, 5-3.3; Contracting, *supra note 100*, Guidelines III-6, III-12, and *passim*.

<sup>125</sup> ABA, *supra note 100*, Standard 5-3.3(b)(x); Contracting, *supra note 100*, Guidelines III-8, III-9.

<sup>126</sup> ABA Defense Function, *supra note 15*, Standard 4-1.2(d).

<sup>127</sup> NAC, *supra note 100*, Standards 13.15, 13.16; NSC, *supra note 100*, Guidelines 2.4(4), 5.6-5.8; ABA, *supra note 100*, Standards 5-1.5; Model Act, § 10(e); Contracting, *supra note 100*, Guideline III-17; Assigned Counsel, *supra note 100*, 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 100*, Standard 2.1 (A).

<sup>128</sup> NSC, *supra note 100*, Guidelines 5.4, 5.5; Contracting, *supra note 100*, Guidelines III-16; Assigned Counsel, *supra note 100*, Standard 4.4; ABA Counsel for Private Parties, *supra note 100*, 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.