



# Wisconsin State Public Defender

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Nicholas L. Chiarkas  
State Public Defender

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Deputy State Public  
Defender

September 30, 2010

Clerk of Supreme Court  
Attention: Carrie Janto, Deputy Clerk  
P. O. Box 1688  
Madison, WI 53701-1688

**RECEIVED**

SEP 30 2010

CLERK OF SUPREME COURT  
OF WISCONSIN

*Re: In the Matter of the Petition to amend Supreme Court Rule 81.02*  
Rules Petition # 10-03

The Wisconsin State Public Defender (SPD) does not take a position on the petition before the Court. Deborah Smith, the Assigned Counsel Division Director, will appear to provide information and answer questions at the hearing in this matter on October 19, 2010.

The SPD constitutes the State of Wisconsin's primary means to meet its obligations to provide legal counsel to the indigent under *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *In re Gault*, 387 U.S. 1 (1967). A good starting point is what the U.S. Supreme Court said in *Gideon*.

That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. 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. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

372 U.S. at 344.

The right to counsel is a complex matter. Who gets counsel? Who arranges for counsel? Who will be counsel? How will counsel be compensated? What about the other resources necessary for counsel to meet his/her duties to the client? These questions have been answered in different ways in different jurisdictions. Today we have guidance from the American Bar Association, the National Legal Aid and Defender Association, and other groups. We have included the ABA *Ten Principles of a Public Defender Delivery System* as an attachment to our testimony.

Although the part of this petition that most directly affects us relates only to the hourly rate paid to the private bar, we think that it is important to keep that issue in context. The hourly rate is only one piece of the provision of quality legal services to indigent defendants. We agree with the ABA in its report, *Gideon's Broken Promise*. There are model approaches and programs for providing quality indigent defense services in this country, but these models are often not adequately funded. We know that because the Wisconsin State Public Defender is one of those model programs. And we have never been adequately funded.

This is the recent history of the private bar rate.

1992 – The rate was increased from \$45/hr in court, \$35/hr out of court, and \$25/hr travel time to \$50/hr in court, \$40/hr out of court, and \$25/hr travel time.

1995 – The rate was reduced to \$40/ in court or out of court and \$25/hr travel time.

1996 – Wisconsin State Public Defender Board requested a private bar rate increase.

Each biennium since, the Wisconsin State Public Defender Board has requested a private bar rate increase. We have made every argument for the rate increase that our collective intelligence and experience could generate. The agency's budget request has never been included in the Governor's budget bill.

We compete for competent counsel with private-pay clients paying market rates, counties paying the Supreme Court rate, and with the federal courts paying considerably more.

One artifact of the stagnant private bar rate is the distribution of appointed cases. There are about 1,182 lawyers certified to take public defender appointments. In the first six months of calendar 2010, the SPD appointed 25,611 cases to the private bar. The 250 most active lawyers took 62% of those cases. The 500 most active lawyers took 85% of those cases. 154 lawyers took no cases. The remaining 15% of cases were spread out amongst the remaining 528 lawyers.

We suspect that many of the 528 lawyers taking few cases are lawyers who have successfully developed a practice and have a good base of private pay clients. These lawyers, who have demonstrated their experience and skill by developing a paying practice, cannot afford to take more than a very few SPD cases. They are committed to indigent defense, but they are also small business people who must make sound economic decisions when running their practice.

We will continue to seek a solution to this part of the right to counsel problem through legislative means. An increase in the rate for court appointments under SCR 81.02 (1) will not change the hourly rates that the SPD is required to pay under Wis. Stat. s. 977.08 (4m). The problem can not be resolved without an increase in the overall funding to pay the private bar in the state budget.

Sincerely,



Deborah M Smith for  
Nicholas L Chiarkas  
Wisconsin State Public Defender

1003

SPD

**ABA**

TEN

PRINCIPLES

OF A PUBLIC DEFENSE DELIVERY SYSTEM

*February 2002*

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ON LEGAL AID AND INDIGENT DEFENDANTS

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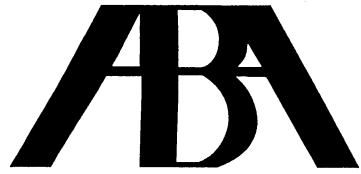
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TEN

PRINCIPLES

OF A PUBLIC DEFENSE DELIVERY SYSTEM

*February 2002*

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

## INTRODUCTION

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

## ACKNOWLEDGMENTS

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

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

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

# ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

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## *Black Letter*

The public defense function, including the selection, funding, and payment of defense counsel, is independent.

Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

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.

Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

Defense counsel's workload is controlled to permit the rendering of quality representation.

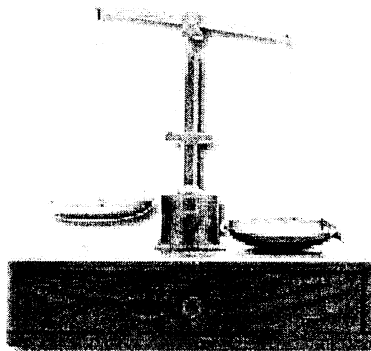
Defense counsel's ability, training, and experience match the complexity of the case.

The same attorney continuously represents the client until completion of the case.

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.

Defense counsel is provided with and required to attend continuing legal education.

Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.



# ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

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*With Commentary*

The public defense function, including the selection, funding, and payment of defense counsel,<sup>1</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>2</sup> To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.<sup>3</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>4</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>5</sup>

Where the caseload is sufficiently high,<sup>6</sup> the public defense delivery system consists of both a defender office<sup>7</sup> and the active participation of the private bar. The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services.<sup>8</sup> The appointment process should never be *ad hoc*,<sup>9</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>10</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>11</sup>

Clients are screened for eligibility,<sup>12</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>13</sup> and usually within 24 hours thereafter.<sup>14</sup>

Defense counsel is provided sufficient time and a confidential space within which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date.<sup>15</sup> Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client.<sup>16</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>17</sup>

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>18</sup> National caseload standards should in no event be exceeded,<sup>19</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>20</sup>



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**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>21</sup>

**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>22</sup> The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

**There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.** There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.<sup>23</sup> Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.<sup>24</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>25</sup> and separately fund expert, investigative, and other litigation support services.<sup>26</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>27</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.

**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>28</sup>

**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>29</sup>

# NOTES

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

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

<sup>5</sup> ABA, *supra* note 2, Standard 5-4.1

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

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

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

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

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

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

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

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

<sup>14</sup> NSC, *supra* note 2, Guideline 1.3.

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

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

<sup>17</sup> ABA Defense Function, *supra* note 15, Standard 4-3.1.

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

<sup>19</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 (1989) [hereinafter “Death Penalty”].

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

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

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

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

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

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

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

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

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

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

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