



**Implementation of the ABA's Ten Principles in
Assigned-Counsel Systems
National Legal Aid & Defenders Association (NLADA)
American Council of Chief Defenders
Best Practices Committee
Preliminary Report**

The NLADA's Best Practices Committee prepared this report to assist administrators of systems that provide representation to indigent defendants by assigning private attorneys. The committee recognizes the American Bar Association's (ABA) Ten Principles of a Public Defense Delivery System (2002) (*Ten Principles*) as a concise summary of best practices for indigent-defense systems. This report discusses how these principles apply to assigned-counsel systems, primarily by providing specific examples from several systems. The committee gathered information primarily through a survey of NLADA members; the survey covered the topics areas addressed in the ABA Ten Principles in the context of an assigned-counsel system. This report is not an exhaustive study, and it does not provide qualitative comparisons of different assigned counsel systems. By describing the challenges faced in implementing the *Ten Principles* in assigned counsel systems and some of the means that have been used to meet those challenges, we hope that this paper will provide helpful guidance for policymakers and indigent-defense service providers.

Indigent-defense representation is generally provided by public defenders, who receive a salary from a governmental agency, or by an assigned counsel system that provides private attorneys to represent indigent clients. Assigned counsel systems differ significantly in their structure, but each system has one or more of the following elements: 1) case assignments to private attorneys as part of an organization or other system that also employs staff public defenders (mixed system); 2) case assignments to private attorneys on a case-by-case basis made by the court or by an assigned-counsel administrator; 3) contracts between a governmental entity and either an attorney or an organization to provide representation in a certain number of cases or all cases meeting certain criteria. In short, any system is considered to have an assigned-counsel component if it assigns some or all cases to attorneys other than staff public defenders.

This report discusses the Ten Principles in the context of four major topics: 1. Independence; 2. Funding & Structure, Workloads, and Parity; 3. Qualifications, Training, and Accountability; and 4. Prompt Appointment, Attorney-Client Communication, and Continuity of Representation. The committee greatly appreciates the cooperation and the information provided by representatives of the assigned-counsel programs cited in this report. The committee encourages representatives of other programs to share additional examples of practices that adhere to the Ten Principles.

The Appendix provides general information about the programs discussed in the report, including links to their websites.

1. Independence of defense function

Principle 1: Independence of assigned-counsel system

- * **Assigned-counsel systems should have a management structure that is independent of the judicial, executive, and legislative branches of government and that promotes the delivery of skilled and zealous representation to indigent clients.**

All systems¹ providing indigent-defense services inevitably depend on public funding; thus, complete independence from the executive, legislative, and judicial branches of government is impractical (if not impossible). However, the structure of the indigent-defense system can provide a degree of independence from external influence in its operations. For example, an oversight board comprising diverse members provides more independence than direct appointment of the administrator or director by a single judge or political leader. Massachusetts, San Mateo County (California), Alameda County (California), Kern County (California), Erie County (New York), and Wisconsin are examples of jurisdictions in which such a board governs the indigent-defense organization.

In jurisdictions where the judiciary, or other branch of government, retains complete authority to appoint independent attorneys to indigent cases, a less-desirable but alternative solution to independence is for representatives of the defense bar to seek a cooperative role in the composition, administration, and management structure of the assigned-counsel system. In the District of Columbia, the judiciary administers the assigned-counsel system, but recognizes the benefits of consultation and advice by members of the defense bar. To this end, the judiciary created an attorney advisory committee whose primary role is to review applications of new panel attorneys seeking admission to the court's assigned-counsel system and to make recommendations accordingly. Additionally, the committee has coordinated its efforts with the courts on other significant issues pertinent to the functioning of the assigned-counsel system, such as the development of attorney practice standards. In creating an attorney advisory committee, the judiciary invited the participation of all defense-bar stakeholders, including the D.C. Public Defender Service, the Superior Court Trial Lawyers Association, and local law school clinics.

Board Appointed by Bar Association

San Mateo County's Private Defender Program (PDP) is a program that assigns cases exclusively to private attorneys. The San Mateo County Bar Association administers the program. A 14-member board of the bar association oversees the Chief Defender and

¹ "System" as used in this report refers to any mechanism for assigning private attorneys, and the term "organization" refers to an entity established for the specific purpose of providing indigent-defense services.

other PDP staff. PDP oversees appointments of cases to about 115 participating attorneys.

The Alameda County Civil Court-Appointed Attorneys Program is a non-profit organization administered by the county bar association. The association's president appoints a committee of attorneys to oversee the program. The Kern County Bar Association Indigent Defense Program is also a non-profit with two committees appointed by the Bar president: Qualifications and Oversight.

Erie County's Assigned Counsel Program assigns cases only to private attorneys. A 21-member Board of Directors oversees the program. The board members are attorneys, and they serve staggered 3-year terms. The appointing authority is the Board of Directors of the Erie County Bar Association, which generally follows the recommendations of the incumbent members of the Assigned Counsel Program's Board. The Administrator is an attorney appointed by the Assigned Counsel Program's Board.

Board Appointed by Governmental Officials

The assigned-counsel program in Massachusetts is governed by a board of 15 directors called the Committee for Public Counsel Services (CPCS). The directors are attorneys appointed for staggered three-year terms by the state Supreme Judicial Court. The Chief and Deputies Chief Counsel are selected by the Committee. CPCS provides all indigent legal services in the state courts in which there is a constitutional, statutory, or case-law based right to counsel: criminal, post-conviction, child welfare, juvenile delinquency, mental health, sex offender registration, sex-offender commitment, and minor seeking abortion. The program has staff attorneys as well as private attorneys providing representation. All cases except child welfare are assigned to attorneys by Committee staff or by Committee contractors, not by judges.

The Wisconsin Office of the State Public Defender (WSPD) is, like Massachusetts, a statewide organization consisting of staff defenders and an assigned-counsel program. WSPD is governed by a 9-member board, appointed by the Governor and confirmed by the state senate. Members serve staggered three-year terms and may be re-appointed. The Board is responsible for selection of the State Public Defender, who in turn appoints the Deputy State Public Defender and division administrators. More than 1,000 private attorneys are certified to accept WSPD appointments through the agency's Assigned Counsel Division.

2. Funding & Structure, Workloads, and Parity

Principle 2: Participation of Private Bar and Defender Staff

Principle 5: Reasonable Workload/Caseload

Principle 8: Parity of Resources with Prosecution and Equal Voice

Three of the *Ten Principles* (listed above) focus on the indigent-defense system's general structure and the level of resources available. By their nature (generally dependent upon external policymakers), these factors are often beyond the day-to-day control of the organization's leadership, but are instructive as benchmarks and as strategic goals for organizational improvement.

Principle 2-Participation of Private Bar and a Defender Office

- * **Assigned counsel systems that operate as part of mixed systems should have separate oversight structures to protect against conflicts of interest.**
- * **Assigned counsel systems should work cooperatively with public defender offices where available, to provide joint training, ensure adequate resources, and provide uniform high-quality representation to all of the jurisdiction's clients.**

Principle 2 calls for a mixed system of indigent-defense services, when the caseload is sufficiently high, with a defender office and private-bar participation. This principle also recommends state funding for all defense services and a statewide structure to ensure uniform quality throughout the state.

A defender office can provide training, certification, and other support to an assigned-counsel program, in addition to assigning experienced and specialized staff to represent clients. An assigned-counsel program can provide broad support among attorneys for indigent defense and can provide the flexibility to assign additional cases to the private bar when the volume of cases increases, in addition to providing counsel in cases involving conflicts of interest.

Whether a jurisdiction has a single system or separate systems providing representation, high-quality representation for all indigent clients should be the paramount goal. Administrators should work cooperatively and strategically to seek resources (both for public defenders and for the private bar) and to share resources when possible (for example, by holding joint training sessions and by making materials accessible electronically).

Mixed System within One Organization

Connecticut, Massachusetts, and Wisconsin are mixed statewide systems operating within a single organization. In these states, the members of the private bar are certified

or otherwise selected by the defender organization, rather than by judges, thus supporting the principle of independence in the determination of who receives case assignments (see section 1., above). The chief administrators of these organizations, overseen by their respective boards, are responsible for seeking sufficient resources for both programs and for ensuring an equitable division of resources to promote quality representation for all clients.

These statewide organizations separate the staff defender program from the assigned-counsel program to avoid ethical conflicts that might otherwise arise between (for example) co-defendants. In each organization, the assigned-counsel program is headed by a director, who is responsible for services to the participating attorneys and for oversight of their performance.

Mixed System with Separate Organizations

Erie County maintains a mixed staff-private system in the city of Buffalo, the largest municipality in the county. The Buffalo defender office is the primary defender in misdemeanors and lesser felonies, while the Assigned Counsel Program is the conflict provider in those cases and the primary defender in major felonies. In the remainder of the county, the Assigned Counsel Program provides all indigent defense representation.

Sacramento County also has a mixed staff-private system in which the assigned counsel program and the county public defender both handle a large volume of cases. The assigned counsel program receives appointments in cases that would be a conflict for the public defender and in cases that would result in an excessive workload for the public defender.

The District of Columbia is another jurisdiction with both a staff defender program and a system of court appointments to private attorneys. The District of Columbia Public Defender Service (PDS) plays an active role in assisting the private bar and the courts to promote quality representation for all indigent defendants. This role is codified in a statutory directive for PDS to provide technical assistance to the courts in administering the Criminal Justice Act. However, unlike the other jurisdictions discussed in this section, the District Columbia relies upon judges to appoint cases directly to private attorneys.

Principle 5-Reasonable Workload/Caseload

- * **Assigned-counsel systems should measure attorney workload and should ensure that attorneys who accept appointments have adequate time to provide ethical and competent representation.**

Principle 5 (defense counsel's workload is controlled to permit quality representation) is often a challenge for staff public defenders, because indigent-defense organizations are often not provided funding for sufficient staff positions to allow for reasonable caseloads. Assigned-counsel programs may also face this challenge. Excessive workload or

caseload can result from a contract to handle an unreasonable (or unlimited) number of cases, such as a fixed fee paid to a single attorney or firm to handle all of a certain case type in a jurisdiction. Absent such a contract, an excessive caseload may result from an attorney accepting an excessive number of individual case appointments. An additional challenge in an assigned-counsel system is that the participating attorneys often handle private-pay cases, thus reducing the amount of time available to work on the indigent-defense cases.

San Mateo County monitors workload by use of a case-weighting system that considers the relative complexity of case types. In setting individual workload limits, the San Mateo County program also considers the percentage of time that each panel member spends on private cases. Verifying the private workload of each attorney may be difficult. Nonetheless, this workload may greatly affect an attorney's ability to handle a given volume of appointed cases. Therefore, consideration of each attorney's total workload, including private cases, strongly supports the goal of Principle 5.

Other systems focus on the number of appointments made to each attorney, although they do not measure the other workload of the participating private attorneys. Massachusetts and Wisconsin use case-weighting systems to control workload, using the average time that attorneys spend on a specific type of case as a measure. Erie County reviews felony assignments weekly and other assignments monthly to ensure that individual attorney workloads are acceptable. Sacramento County monitors attorney workload using a management system that reviews the caseload of the individual attorney before each new appointment.

A pattern of complaints about an attorney may indicate deficient practices related to an excessive workload. Thus, many assigned-counsel programs not only investigate complaints, but also keep records regarding their nature. Multiple complaints about lack of communication or about missing deadlines may be signs that an attorney is handling too many cases. However, because complaints inevitably occur only after the attorney has been appointed on the case or cases in question, a complaint log should not substitute for other methods of monitoring workload.

Principle 8-Parity of Resources and Equal Voice

Principle 8 calls for parity of resources between the defense and prosecutions and for the indigent-defense organization to be an equal partner in the justice system. This principle addresses compensation of assigned counsel as follows: "Assigned counsel should be paid a reasonable fee in addition to overhead and expenses. Contracts with private attorneys for public defense services should never be based primarily on cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and other litigation support services."

Parity of Resources

- * **Assigned-counsel systems should provide reasonable compensation and access to support services to participating attorneys, so that attorneys can devote adequate time to each case and can retain experts and investigators when appropriate.**

Because prosecutors are salaried employees who receive employee benefits, office space, and other operational necessities from the county or state, it is difficult to compare the fee schedule of an assigned-counsel program with the compensation of prosecutors. Nonetheless, a prerequisite for parity of resources in an assigned-counsel system is a fee schedule that compensates participating attorneys sufficiently so that they can devote adequate time to each case.²

San Mateo County has a fee schedule that combines event-based and hourly methods of compensation. For example, attorneys receive a base fee of \$270 in misdemeanor cases, with additional payment of \$265 per day for out-of-court preparation and \$125 per hour for in-court time during a jury trial. An hourly rate applies in felony cases, ranging from \$125-\$165 in cases that carry a possible sentence of life imprisonment.

Sacramento County has a fee schedule providing hourly rates that range from \$60 per hour for misdemeanors to \$90 per hour for serious felonies. The schedule provides for higher rates in two specific situations. Death penalty cases are paid at the rate of \$150 per hour, and the attorneys with specialized training in DNA issues are paid \$125 per hour in cases presenting the need for that expertise.

In Massachusetts, private attorneys are paid an hourly amount that ranges from \$50-\$100, depending on the case type. After the rates were increased to the current levels in 2005, the program experienced a 40% increase in the number of attorneys participating. This increase confirms that adequate compensation is essential to encourage broad participation from the private bar. Conversely, a low rate of compensation may not be enough to pay the overhead expenses of private attorneys who participate, thereby discouraging consistent participation by experienced attorneys.

Connecticut has a mechanism to review compensation rates bi-annually to ensure that the rates remain reasonable in light of inflation. Although this practice does not guarantee that funding will be available in a given budget cycle to increase the rates, it helps with the issue of compensation by providing a forum for regular review and reconsideration.

² In a defender organization, the allocation of resources to the defense and the prosecution can be measured in large part by comparing items such as salary, staff size (including support staff), technology, and equipment. However, even this type of comparison is incomplete unless readily available ancillary resources are considered, such as law enforcement agencies and crime laboratories that work closely with the prosecution. Another factor that complicates a comparison that is the workload of the prosecution and the indigent-defense system are not identical; for example, the prosecution handles cases of non-indigent defendants and, in many jurisdictions, handles non-criminal charges. Conversely, many indigent-defense systems appoint attorneys in revocation proceedings in which the adversary is department of corrections, rather than the prosecutor's office.

Connecticut, Massachusetts, Wisconsin, San Mateo County, and Sacramento County do not have a maximum amount that an attorney may be paid in a single case. The absence of a per-case cap is important because such a cap provides a disincentive for litigation (for example, the attorney's hours in preparing for a trial may result in the attorney receiving no compensation for the time spent in trial). However, these systems maintain data regarding the billing history of individual attorneys, and they have procedures to ensure that overall program costs are reasonable.

Assigned counsel programs need to review attorney bills sufficiently to safeguard against billing irregularities that could adversely impact the program's credibility. Connecticut, Wisconsin, and Massachusetts use an on-line billing system to review bills and to identify attorneys who consistently submit bills substantially higher than the average for the type of case. A similar system is under development in Erie County. Wisconsin and Erie County generally resolve billing issues directly with the attorney, considering the unique circumstances of each case. Sacramento County uses online billing for cases with invoices up to \$1500. All other bills are individually reviewed by administrative staff and substantively reviewed by the Director or Deputy Director.

Access to qualified experts, investigators, and interpreters is another critical area in which parity of resources is essential. An organization independent of the courts, such as the organizations described in this report, offers the practical advantage that the private attorney can apply for these services without having to reveal details of a possible defense theory. Conversely, in a court-administered system, a private attorney may need to disclose information about the case in support of a request for an expert or investigator.

San Mateo County and Erie County assign private investigators upon request to assist the private attorneys. The investigators are paid \$55 per hour in San Mateo County and \$40 per hour in Erie County. Attorneys may also apply to the Chief Defender or Administrator, respectively, to hire expert witnesses, and these requests are generally granted. The attorneys appointed by these assigned counsel programs have comparable access to these support services as do prosecutors. Other jurisdictions have similar procedures by which private attorneys apply to the assigned-counsel organization to hire experts, investigators, and interpreters.

Because they are independent contractors, assigned counsel are responsible for many resources that are provided to prosecutors by the employing governmental unit. These resources include office space and equipment, secretarial staff, and research materials. An assigned counsel system ordinarily cannot provide these resources directly to its participating attorneys. However, adequate compensation increases the ability of the participating attorneys to maintain resources comparable to those provided in the public sector. Some programs, such as San Mateo County, Sacramento County, and Erie County, provide ancillary services to participating attorneys, such as access to conference rooms and research tools.

Equal Voice

- * **Assigned-counsel systems should have a voice in efforts to improve the justice system, such as designating representatives to serve on work groups within the justice system and to provide information to policymakers.**

Although the “equal partner” phrase in Principle 8 could be read as merely restating the principle of equal resources, the commentary indicates a broader interpretation: that “[p]ublic defense should participate as an equal partner in improving the justice system.”

In addition to providing high-quality representation to their clients, indigent-defense systems have the potential to improve the quality of the justice system through participation in work groups at both the state and county level. Ongoing communication with policymakers can build relationships of trust that help in the continuing challenge of obtaining resources. Representatives of assigned-counsel systems, through their communication and their participation in work groups, can enhance the credibility of their programs, can advocate for resources, and can influence criminal-justice policy.

Although the specific strategies for improving the justice system inevitably vary by jurisdiction and over time, two helpful factors are professional relationships and the reputation for providing reliable information. Individual defense attorneys (whether staff defenders or private bar) can work collaboratively with other justice professionals on treatment courts and other initiatives. This type of collaboration requires participants with adversarial roles in individual cases to work together professionally and cooperatively to improve the justice system.

In an assigned-counsel system, one barrier to having the system’s voice heard is that within the local court system, it may be impractical to designate one of the participating private attorneys as the defender system’s representative.³ However, the local defense bar may work through the bar association or may form an organization to provide input and to share information on justice issues. Furthermore, on a statewide or countywide level, the administrator of an assigned counsel program (or a designee) can provide indigent defendants with a voice on issues affecting criminal justice.

³ An attorney who volunteers for a courthouse work group, for example, would likely be participating in his or her personal capacity and not as a representative of the defender system.

3. Qualifications, Training, and Accountability

Principle 6-Attorney Qualifications for Case Assignments

Principle 9-Training and Continuing Legal Education

Principle 10-Supervision and Review of Performance

- * **Assigned-counsel systems should have procedures to review the qualifications of attorneys who wish to accept appointments, to train attorneys, and to review attorney performance.**

Three of the Ten Principles (listed above) focus on ensuring that the participating attorneys have the necessary skills to defend their clients effectively. These principles are discussed in this section. To implement these principles, an assigned-counsel system should review attorneys' qualifications before approving them to receive appointments, should ensure that participating attorneys receive ongoing training, and should regularly review attorney performance.

Principle 6-Attorney Qualifications for Case Assignments

Principle 6 (matching case appointments to attorney qualifications) is addressed in assigned-counsel programs through initial certification of attorneys, continuing training and education (addressed more specifically under Principle 9, below), and review of performance (addressed more specifically under Principle 10, below). Several programs use a certification system to ensure that attorneys have the requisite knowledge and experience for the types of cases assigned to them.

Wisconsin has administrative rules governing certification criteria for different case types, with stricter criteria for homicides, other aggravated felonies, and specialized areas such as sex-offender commitments and termination-of-parental-rights proceedings. The State Public Defender may remove attorneys from certification lists for cause. Similarly, in Connecticut, Massachusetts, Erie County, and Sacramento County, all private attorneys must meet specified training and/or trial experience requirements to be certified for assignment to different types of cases. For the most-serious cases, Massachusetts requires recertification every 5 years. Erie County conducts a recertification review at least once every 4 years for attorneys on its felony panel. Sacramento County also conducts periodic reviews of certification.

Principle 9-Training and Continuing Legal Education

Principle 9, regarding continuing legal education, also promotes appropriate attorney qualifications for case assignments. Assigned-counsel programs may implement this principle in two ways. First, the program may require specific training in criminal law and other specialized areas in which the program provides representation. For example, Massachusetts has specialized training requirements for private attorneys who have not tried a case to a jury within the preceding year (or 5 cases within the preceding 5 years).

Connecticut, Massachusetts, Wisconsin, and Erie County require a minimum number of annual training hours in criminal law or another relevant area of law.

Second, the program may provide training directly, through either live programs or online resources. Wisconsin has an annual Trial Skills Academy, an annual two-day conference, certification programs in specialty areas such as juvenile cases and revocations, and online resources (such as training outlines and case digests). Massachusetts provides an annual training conference, specialized training for every practice area, and county-based training events presented by local attorneys on the assigned-counsel panel.

Erie County's Assigned Counsel Program provides ongoing training from basic to advanced levels. For example, the program provides 15-20 certified continuing legal education presentations annually, attended by both public defenders and private attorneys. The program thoroughly screens all participating private attorneys and certifies them for specific case types commensurate with their levels of skill and experience. The program also follows a periodic recertification process to review performance. All programs are recorded and made available to all participating attorneys. The program has a formal curriculum for inexperienced attorneys before they are approved to receive case assignments.

Sacramento County requires 40 hours of training, provided by the assigned-counsel program, before a private attorney is eligible for case assignments. Thereafter, the program requires periodic training and discontinues appointments to attorneys who fail to comply with this requirement. Kern County also requires specialized training in criminal law. The program either provides the training or sends attorneys to designated seminars.

In addition to providing formal training, several organizations provide valuable information online for the private bar, such as training materials, case summaries, and resource directories. For example, the District of Columbia Public Defender Service has a directory on its website that includes local treatment courts, rehabilitative programs, sentencing resources, vocational programs, and potential employees. By making this information readily available, a defender organization shares with the private bar the expertise that stems from specialization. Private bar attorneys, who typically handle fewer criminal cases as part of a mixed practice, can locate information on a website regarding programs and resources that are potentially beneficial to their clients.

Some organizations provide specific programs to assist new attorneys. In Erie County, new attorneys are mentored and supervised by a full-time training attorney for a period of approximately 8-10 months before receiving final approval to receive assignments. Connecticut assigns (and compensates) an experienced private attorney to mentor a new attorney during his or her first year of accepting appointments. Sacramento County follows a thorough screening process before private attorneys are accepted as provisional panel members. New attorneys are reevaluated after 1 year to determine if they will be granted full membership status. Requests for upgrades to a higher panel classification require an additional evaluation.

Principle 10-Supervision and Review of Performance

By definition, an assigned-counsel system relies on the services of private attorneys (not employed directly by the indigent-defense organization). Thus, the model of direct employer-employee supervision must be modified to comply with applicable laws and ethical rules. For example, client confidentiality may preclude direct discussion of specific actions on behalf of an identified client, absent client consent to disclosure. File reviews may also raise confidentiality issues because, even when client names are redacted, the client may be identifiable by virtue of other information already known to the attorney conducting the file review. Nonetheless, assigned-counsel programs should provide sufficient oversight to promote high-quality representation, and the examples below describe some methods to review the performance of private attorneys.

The mentoring programs described above (p. 10) provide feedback regarding the progress of new attorneys, which in turn informs the decision about their future eligibility to receive appointments.

Massachusetts contracts with experienced local attorneys to conduct formal and regular performance reviews of private attorneys' criminal and delinquency cases. Over 600 such reviews are performed every year. Attorney performance is evaluated consistent with published Performance Standards that address each practice area. Attorneys are required to maintain case files for at least six years in case the attorney is selected for a billing audit. The completeness of attorney files is also examined in performance reviews.

San Mateo County's Chief Defender and staff annually evaluate each private attorney accepting appointments through the county's Private Defender Program. These reviews encompass advocacy skills, professionalism, and client relationships.

Although less systematic than formal performance reviews, other methods to review performance include feedback from attorneys and judges, investigation of complaints, and client-satisfaction surveys. Sacramento County and Wisconsin rely on these methods to identify and respond to concerns about performance of private attorneys (the satisfaction surveys are used to assess the overall assigned-counsel program, not the individual attorneys). Sacramento County utilizes a peer review committee to investigate and respond to concerns and complaints; often, minor issues are handled through informal mentoring of attorneys. Clients in Massachusetts are notified that their attorneys are assigned through the Committee for Public Counsel Services (CPCS) and given contact information for CPCS, so that clients can make complaints if dissatisfied with the representation provided. CPCS investigates complaints about assigned counsel, whether received from clients, judges, or others.

Erie County utilizes a combination of formal and informal methods to oversee attorney performance. Clients are given contact information for the Administrator, who receives and investigates all complaints. A client-satisfaction questionnaire is sent on a weekly basis to a random sample of clients whose cases have recently been completed. Felony

attorneys are evaluated regularly, and the program is planning to expand such reviews to include attorneys on the misdemeanor and Family Court panels.

4. Prompt Appointment, Attorney-Client Communication, and Continuity of Representation

Principle 3-Prompt Appointment of Counsel

Principle 4-Sufficient Time and Confidential Meeting Space

Principle 7-Continuous Representation by the Same Attorney

Three of the Ten Principles (listed above) focus on the defender system's ability to promote an effective attorney-client relationship through specific attributes of its case assignments and the local conditions for appointed attorneys to communicate with their clients.

Principle 3-Prompt Appointment of Counsel

- * **Assigned-counsel systems should provide for prompt determination of eligibility and appointment of counsel, to ensure that clients receive legal representative throughout the entire proceeding and to ensure that attorneys have adequate time to prepare for each phase of the proceeding.**

Principle 3 recognizes the importance of providing counsel promptly to an indigent client. A wealthy person is generally able to retain an attorney promptly, so equal justice for an indigent person depends on adherence to Principle 3. This principle can be challenging in an assigned-counsel program, because the private attorney ultimately assigned to the case is often not present at the client's first court appearance.

In Connecticut, staff of the Division of Public Defender Services complete financial forms by interviewing applicants before their initial court hearing. A staff attorney presents the financial information to the court, which immediately determines eligibility for appointed counsel. Generally, a qualified private attorney is available in court to accept an appointment if the case is one that will not be assigned to a staff public defender.

In Wisconsin, another mixed staff-private system, the State Public Defender (SPD) is the appointing authority for cases in which applicants qualify for its services. SPD staff go to the county jails throughout the state to conduct the financial screening before the defendant's initial court hearing (in juvenile cases and mental-commitment cases, this financial screening is not required). SPD staff attorneys provide representation at the initial appearance to seek release on bail, even in cases that will later be assigned to the private bar. The appointments to private bar generally occur within two days of the eligibility screening, and priority in the appointment process is given to cases with imminent hearings. Colorado and the District of Columbia are other jurisdictions in

which the indigent-defense provider determines eligibility⁴ and can promptly appoint attorneys for clients held in custody.

In most other programs, eligibility screening occurs at or after the initial court hearing. Two programs that are examples of prompt appointment at this hearing are San Mateo County and Kern County, which assign a private attorney to every arraignment calendar. This procedure allows the client to have contact with an attorney at the initial hearing. The same procedure for eligibility screening is followed in Massachusetts. In murder cases, Massachusetts assigns an attorney as soon as possible following an arrest, subject to a subsequent indigency determination by the court.

Principle 4-Sufficient Time and Confidential Meeting Space

- * **Assigned-counsel systems should require attorneys to communicate regularly and confidentially with their clients and should work with other justice officials to provide adequate meeting time and space in courthouses, jails, and prisons.**

Principle 4 is closely related both to an attorney's overall workload (Principle 5) and to prompt appointment (Principle 3). An attorney who is appointed promptly and who has a reasonable workload is most likely to have time available to meet with a client before the next court hearing.

Access to a confidential meeting space to meet with an incarcerated client can be a challenge, depending on the availability of meeting rooms at the courthouse or jail. The San Mateo County attorneys have access to confidential meeting rooms at the county courthouse and jail. Other jurisdictions report differences among their facilities, including some jails that limit face-to-face contact and some courthouses that do not have sufficient conference rooms. Although it may be beyond the capability of an indigent-defense system to compel the courthouse or jail to provide enough confidential meeting rooms throughout the day to accommodate all attorney-client meetings, the defender system can train attorneys on the importance of maintaining confidentiality and of communicating sufficiently with their clients.

Massachusetts, San Mateo County, and Wisconsin all have performance standards that inform private attorneys of the need to communicate properly and promptly with their clients. Sacramento County requires attorneys to meet with in-custody clients within 48 hours of accepting an assignment. Massachusetts requires counsel to meet with a new client in custody at the place of confinement within 3 days. Massachusetts, Alameda County, Erie County, Kern County, and Sacramento County require that private attorneys

⁴ Although Principle 3 advocates for prompt determination of eligibility for appointed counsel, it does not specify the organization that should perform the financial screening. If the indigent-defense provider conducts the screening, its staff should be sensitive to the distinction between the administrative screening function and the advocacy role. For example, although attorney-client communications are generally confidential, an exception may exist for financial information provided in an application to have an attorney appointed. *Cf.* Wis. Stat. § 977.06(2)(b) (criminal liability for an intentional false statement in application for public defender).

have an office accessible to the clients in the county where the attorneys accept appointments. San Mateo County and Erie County have conference facilities available at their offices for that purpose.

Telephone communications with incarcerated clients can be a challenging issue for indigent-defense providers, regardless of the structure of the defender system. Face-to-face meetings with clients are ordinarily preferable, but often workload and travel requirements make a telephone conversation more convenient. Two concerns with these telephone calls are confidentiality and cost. Confidentiality may be compromised either by a recording system or by the physical proximity of others (for example, correctional officers or inmates) to the client during the telephone call.

Cost concerns may be significant if the clients are required to place collect telephone calls. Administrators of indigent defense providers should seek dedicated, toll-free, and confidential telephone communication with incarcerated clients. However, the absence of a free telephone line does not excuse a failure to communicate adequately with a client; therefore, administrators should recognize that attorneys may need to accept some collect calls to ensure adequate attorney-client communication. The cost of these calls should be reimbursable as a reasonable and necessary expense incurred during the representation.

Principle 7-Continuous Representation by the Same Attorney

- * **Assigned-counsel systems should appoint attorneys to provide vertical representation throughout the proceeding at the trial-level and should have the ability to appoint separately for the purpose of post-dispositional proceedings.**

Principle 7 recognizes that quality representation is ordinarily furthered by continuous representation by the same attorney throughout trial-court proceedings (for example, in a criminal case, from initial appointment through dismissal, imposition of sentence, or other disposition). Similarly, Principle 7 calls for continuous representation throughout a direct appeal (although the appellate attorney does not need to be the same attorney who represented the client in the trial court). In Massachusetts, new counsel is required on appeal (unless the client requests otherwise) to assure adequate consideration of ineffectiveness claims. Several organizations have separate qualification standards for post-conviction representation, such that the trial attorney may not be eligible to provide such representation.

Most assigned-counsel programs appoint attorneys in conformity with this principle of continuous or vertical representation. However, there can be tension between this principle and the principle of attorney qualifications (for example, an attorney assigned to handle bail hearings may be qualified to handle most cases, but may not have the necessary experience to handle cases of the highest severity). In some programs, such as San Mateo County, Kern County, Connecticut, and Massachusetts, continuous representation ordinarily begins at the first court appearance. These programs have a

private attorney assigned to the arraignment court (or readily available), and, unless there is a conflict of interest, an issue of attorney qualifications, or another compelling circumstance requiring a change of attorney, this attorney provides representation throughout the trial-level proceedings.

In other programs, there is tension between the principle of vertical representation and the principal of providing counsel promptly. The attorney who represents the client at the initial hearing may not be the attorney subsequently appointed. However, a private attorney is appointed shortly after the initial hearing, and this attorney's representation continues throughout the trial-level proceedings. This system, although compromising the principle of vertical representation at the initial hearing, is preferable to a system in which the defendant has no representation at the initial hearing.

APPENDIX

The following assigned counsel programs are discussed in this report, and their administrators are available to provide additional information regarding the operations and organization of their respective programs.

Name of Program	State or County	Staff & Private?	Website
Alameda Co. CCAAP ¹	County	No	acbanet.org
Erie Co. ACP ²	County	No ³	assigned.org
Massachusetts CPCS ⁴	State	Yes	publiccounsel.net
Sacramento Co CCD ⁵	County	No ⁶	ppaccd.saccounty.net
San Mateo Co. PDP ⁷	County	No	smcba.org
Wisconsin SPD ⁸	State	Yes	wisspd.org
Kern County BA IDP ⁹	County	No ¹⁰	KCBA-IDP.org
Connecticut DPDS ¹¹	State	Yes	ocpd.state.ct.us
District of Columbia PDS ¹²	District of Columbia	No	pdsdc.org

¹ Civil Court-Appointed Attorneys Program

² Assigned Counsel Program

³ The county has a staff defender organization in addition to the assigned counsel program.

⁴ Committee for Public Counsel Services

⁵ Conflict Criminal Defenders

⁶ The county has a staff defender organization in addition to the assigned counsel program.

⁷ Private Defender Program

⁸ State Public Defender

⁹ Bar Association Indigent Defense Program

¹⁰ The county has a staff defender organization in addition to the assigned counsel program.

¹¹ Division of Public Defender Services

¹² Public Defender Service. As noted on p. 2, above, in the District of Columbia, the judges appoint cases directly to private attorneys. PDS, in addition to providing representation through its staff defender, participates in an advisory committee that seeks to enhance the quality of private-bar representation to indigent clients.