

THE GUARANTEE OF COUNSEL

**Advocacy &
Due Process in
Idaho's Trial Courts**

January 2010

**EVALUATION
OF TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS IN IDAHO**



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Researched & Written by:
National Legal Aid & Defender Association

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

***Gideon v. Wainwright*, 372 U.S. 335 (1963)**

Our Constitution is the founding contract of our collective interests, establishing the core tenets of a free society and protected by a government whose authority and power is vested upon it by its citizens. Of all the powers we give over to our government under this unique social contract, the authority to punish us for our crimes is the greatest and most fearsome. In 1963, the United States Supreme Court recognized in *Gideon v. Wainwright* the need to protect the individual against that power in ensuring due process. Declaring that it is an "obvious truth" that "lawyers in criminal courts are necessities, not luxuries," the Court ruled that states must provide counsel to indigent defendants in felony cases.

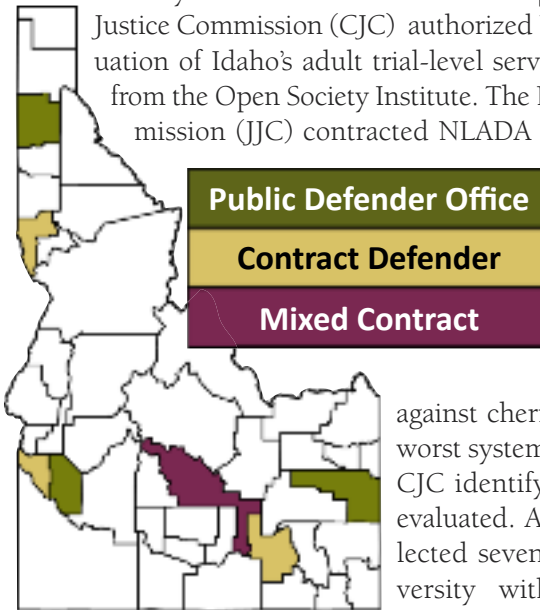
The National Legal Aid & Defender Association (NLADA) finds that the state of Idaho fails to provide the level of representation required by our Constitution for those who cannot afford counsel in its criminal and juvenile courts. By delegating to each county the responsibility to provide counsel at the trial level without any state funding or oversight, Idaho has sewn a patchwork quilt of underfunded, inconsistent systems that vary greatly in defining who qual-

ifies for services and in the level of competency of the services rendered. While there are admirable qualities of some of the county indigent defense services, NLADA finds that none of the public defender systems in the sample counties are constitutionally adequate.

The evidence to support this conclusion begins in Chapter II (page 5 – 18), with a spotlight on representation in Nez Perce County. Nez Perce County has made use of flat-fee contracts for defender services since before the *Argersinger* decision expanding the right to counsel to misdemeanor cases (1972). Flat fee contracting is oriented solely toward cost reduction, in derogation of ethical and constitutional mandates governing the scope and quality of representation — creating a conflict of interest between a lawyer's ethical duty to competently defend each and every client and her financial self-interest to invest the least amount of time possible in each case. The attorney handling misdemeanor and juvenile delinquency representation handles 322 percent of what national standards allow or to put it another way, she is carrying the caseload three attorneys could reasonably be expected to handle. And, this does

Origin of the Study

In June 2007, the National Legal Aid & Defender Association (NLADA) released a comprehensive management audit of the Idaho State Appellate Public Defender. The report noted that many of the workload issues facing the appellate defender office could be remedied with improvements to the various county-based, trial-level indigent defense systems across the state. Subsequently, the Idaho Criminal Justice Commission (CJC) authorized NLADA to conduct an evaluation of Idaho's adult trial-level services, under a limited grant from the Open Society Institute. The Idaho Juvenile Justice Commission (JJC) contracted NLADA in April 2008 to expressly



make juvenile representation an equal focus of the evaluation.

To ensure that a representative sample of counties was studied — and to prevent

against cherry-picking only the best or worst systems — NLADA requested the CJC identify the Idaho counties to be evaluated. A sub-committee of CJC selected seven counties representing diversity with respect to geography, population and services delivery model:

Ada, Blaine, Bonneville, Canyon, Kootenai, Nez Perce, and Power.

not take into account mental commitments and termination of parental rights cases also assigned to her or her time dedicated to her private practice.

Chapter III (page 19 – 42), details the excessive workloads in the other sample counties. The failure to meet basic national standards in these counties underscores the failings of state government under *Gideon*. While a state may delegate obligations imposed by the Constitution “it must do so in a manner that does not abdicate the constitutional duty it owes to the people.” (*Claremont School Dist. v. Governor*, 147 N.H. 499, 513 (N.H. 2002)) In other words, the state has an obligation to ensure that the counties are capable of meeting the obligations and that counties actually do so. If the counties cannot meet the delegated responsibilities, the state — as the original obligor — must step in to

fulfill this obligation. At minimum, the state should therefore have a structure to assess whether counties are meeting *Gideon*. The NLADA assessment shows that the counties are not.

- If it were possible to evaluate the overall health of a jurisdiction's indigent defense system by a single criterion, the establishment of reasonable workload controls might be the most important benchmark of an effective system. Yet none of the studied counties have any workload controls in place, and the workloads in Nez Perce County and four of the remaining counties greatly exceed those allowed under national standards. In Bonneville, Canyon, and Nez Perce counties, attorneys are also allowed to maintain a private caseload of clients, without any monitoring of how many private cases they are handling in addition to their public caseload.
 - » In Bonneville County: A single attorney is assigned to handle more than four full-time attorneys' worth of work – and a caseload that allows only one hour and ten minutes per client. The office's five defenders are covering the number of cases 11 attorneys would be reasonably expected to handle per national norms, and their workload is compounded by the lack of investigative staff. The office has only \$6,000 in its budget for investigators, which is used almost exclusively on major felony cases. If any investigation is conducted in misdemeanor and juvenile cases, it is done by the attorney himself and rarely ever occurs.

Methodology

The concept of using standards to address quality concerns is not unique to the field of indigent defense. In fact, the strong pressures of favoritism, partisanship, and/or profits on public officials underscore the need for standards to assure fundamental quality in all facets of government. For instance, realizing that standards are necessary to both compare bids equitably and to assure quality products, policy-makers long ago ceased taking the lowest bid to build a hospital, school, or a bridge and required winning contractors to meet minimum quality standards of safety. Likewise there must be minimum standards in the provision of counsel to the poor.

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. In the words of the ABA, 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."

The ABA *Ten Principles* are a set of standards that are

interdependent. That is, the health of an indigent defense system cannot be assessed simply by rating a jurisdiction's compliance in each of the ten criteria and dividing the sum to get an average "score." For example, just because a jurisdiction has a place set aside in the courthouse for confidential attorney/client discussions does not make the delivery of indigent defense services any better from a client's perspective if the appointment of counsel comes so late in the process, or if the attorney has too many cases, or if the attorney lacks the training, as to render those conversations ineffective at serving a client's individualized needs.

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. NLADA site teams visited the sample counties beginning August 2007 and concluding February 2009.

- » In Canyon County: Felony attorneys are carrying workloads at 148.9 percent of national standards. Attorneys handling misdemeanor and juvenile cases averaged 954 cases per year, a workload that is 238.5 percent of national standard maximums.
- » In Ada County: The number of first-degree murder cases is "unprecedented" leaving the office unable to ensure that workloads are limited to a level that enables counsel to provide each client with high quality legal representation. The office received 238 felony cases in a single month in 2007, which projects to approximately 2,856 cases per year, or 952 per lawyer, permitting each lawyer to spend only 2.18 hours on each felony case. The number of misdemeanor cases in Ada County is staggering, with 12,000 cases per judge per year, so that misdemeanor attorneys have 200 to 300 open cases at every moment and probably 700 – 800 cases per year, allowing slightly more than two hours of attorney time per case.
- » In Kootenai County: All attorneys carry a mixed caseload, but the attorneys handling felonies have caseloads that range from 152 percent to 217 percent of national standards, and attorneys handling misdemeanor and juvenile cases have caseloads that range from 163 percent to 213 percent of national standards.
- One Bonneville County judge we spoke with recognized the public defenders' crushing workload, noting: "The public defender shows a lack of preparation in routine hearings — arraignments, probation violations, and pre-trials. I'm convinced he doesn't even see the client before the hearings, because he's sitting in my courtroom explaining the process to the defendant and trying to work out

how they're going to plea — things that should have happened well in advance. Typically a guilty plea is what he's going to recommend, because that's the safest thing to do for your client when you don't have time to investigate.”

- The Canyon County indigent defense system devolved during the course of this study: Despite attorneys either averaging 223 felony representation cases per year — 48.9 percent above the prevailing national caseload standard of 150 felony cases per attorney per year — or 954 mixed-docket misdemeanor, juvenile delinquency, Child Protection Act cases per year (a workload, at best, more than 238 percent of the standard maximum), Canyon County officials terminated the contract of the public defender law firm due to budget constraints. The first request for proposal suggested the lowest bidder would win the new contract. A lawsuit by the original public defender law firm alleged, “The state does nothing to ensure that any particular county has either sufficient funding or adequate policies, programs, guidelines and other essential resources in place to guarantee its indigent defendants are provided effective assistance of counsel as mandated by the United States and Idaho Constitutions.” Facing growing concern over the flat-fee bidding process, the Canyon County administrators quickly terminated the earlier request for proposals for defender services.
- The low level of compensation for public defenders offered by Blaine County creates a disincentive for contract attorneys to zealously advocate for their public clients to the same degree to which they advocate on behalf of their retained clients. NLADA notes that there are few trials, except in the most serious cases, and almost everything is pled out. There is no systemic litigation, such as challenging the denial of the right to a jury trial for a juvenile charged with a serious offense, and there is no independent use of investigators or experts to challenge the testimony of probation officers, mental health doctors, or state child welfare personnel.
- Even in Idaho's most populous county right to counsel services are problematic. Because Ada County is unable to sufficiently limit the workload of its public defenders many have acknowledged being worn out and having to cut corners. Defenders lack adequate support staff and resources, especially in capital cases. The investigation staff is not trained in mitigation work. And the office lacks paralegals and social workers.

One of the most glaring deficiencies is what passes for justice in the magistrate's division of Idaho's district courts where all misdemeanors are heard and where all felony charges begin. Chapter IV (page 43 – 56) details how people of insufficient means are routinely processed through Idaho's magistrate's courts without ever having spoken to an attorney. Local jurisdictions get around their constitutional obligation to provide lawyers in misdemeanor cases in a myriad of ways, including accepting uninformed waivers of counsel, pressuring defendants to “work out a deal” with the prosecutor prior to being given publicly-financed defense counsel, and threatening unfair cost recovery measures. Although misdemeanor convictions or sentences may not generally result in lengthy incarceration, the life consequences of convictions can be severe, including job loss, family breakup, substance abuse, and deportation — all factors that tend to foster recidivism.

Chapter V (pages 57-66) and Chapter VI (pages 67-74) continue the assessment of Idaho counties' public defense systems against the ABA *Ten Principles*. In Chapter V, NLADA focuses on the need to ensure that attorneys have sufficient time and confidential spaces within which to meet with their clients and on the requirement that the same attorney continues to represent the client from the moment of appointment and throughout the life of the case. Confidentiality is necessary both to effectuate the ethical obligation to preserve attorney-client confidences and to fulfill the responsibility of the system to provide a structure in which con-

fidentiality may be preserved – 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. Continuous, or vertical, representation by the same attorney guards against “assembly line justice” that: 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. Due to overwhelming caseloads, Idaho’s most populous county of Ada is forced to employ horizontal representation, where a client is passed from lawyer to lawyer at each stage of the case. And all seven of the counties studied lack time and places to meet privately with clients, so that most attorneys are meeting with their clients primarily, if not only, at the courthouse on the day of a court proceeding, resulting in proceedings having to be continued, lawyers lacking sufficient information to advocate on behalf of their clients, and clients lacking understanding of what is occurring in their case.

The lack of training, supervision, and the ability to assign cases only to attorneys who have sufficient experience and training to competently handle them is the focus of Chapter VI. While attorneys recently graduated from law school or those with only basic skills can effectively handle less complicated cases and those with less serious potential consequences, significant training, mentoring, and supervision are needed to foster the skills of even the most promising young attorney before allowing her to handle more complex cases. Training must be an on-going facet of every public defense system. As the practice of law grows more complex each day, even skilled criminal defense attorneys must undergo training to stay abreast of such continually changing fields as forensic sciences and police eye witness identification procedures, while also learning to recognize signs of mental illness or substance abuse in a client. And continuous and systematic supervision and evaluation must be provided, else attorneys are left to determine on their own what constitutes competent representation and will often fall short of that mark. Public defense attorneys throughout our study lamented the lack of training available to them, variously describing what they received as “sink or swim,” “on-the-job training,” “virtually non-existent,” “you got to do it to learn it,” and “dive in and do it.” Only three of the seven counties have the ability to match the experience of the attorney to the case-type they are being assigned to handle. And none of the counties studied have any formal supervision or evaluation procedures in place. An attorney’s practice model is what he sees from his peers in court. Without any measure of performance expectations, the standard of practice as demonstrated by those who have worked in the system longest is usually what passes for all who come later.

Chapter VII (page 75 – 88) assesses the representation of indigent children in Idaho. Juveniles facing delinquency proceedings are an afterthought to the troubled adult system. Children who come in contact with delinquency courts too often have been neglected by the full range of support structures that normally channel children in appropriate constructive directions. When they are brought to court and given a public defender who has no resources and a caseload that dictates he dispose of cases as quickly as possible, the message of neglect and worthlessness continues, and the risk the juvenile will commit more — and worse — crimes increases. The juvenile system can have the perverse effect of actually decreasing public safety and increasing the chance that more young people will fall into a lifetime of crime and imprisonment. In most instances, juvenile representation is provided by private attorneys under flat fee contracts. In those counties with public defender offices, delinquency cases are most often assigned to the newest and least experienced attorneys. And throughout the state, children are represented by lawyers with crushing workloads, extremely limited access to adequate resources for experts, social workers and investigative support, and a complete lack of specialized training for the assigned task. Idaho’s juvenile defenders lack the time, tools and training to provide effective advocacy for the clients of the juvenile courts.

In conclusion, NLADA believes the inadequacy of the indigent defense systems in Idaho is more a result

of the evolution of a system begun decades ago and not an affirmative attempt on the part of state and local policy-makers to deny anyone's constitutional rights. Indeed, the various county defender systems NLADA observed throughout Idaho mirror much of the history seen in many of her neighboring states for much of the past four decades. However, in neighboring state after state — Wyoming, Oregon, Montana, Nevada and Washington for example — the move from county-based right to counsel systems to statewide oversight, uniformity, and funding has occurred or is occurring as of the writing of this report. Sometimes the change has come under threat of litigation, while some states have simply recognized the old way of doing things cannot be sustained. It is time for the state of Idaho to meet its constitutional duty under *Gideon*, and its progeny.

The National Legal Aid & Defender Association (NLADA) extends our appreciation to a number of people for making this report possible. First and foremost, many thanks to all individuals interviewed in the seven counties we surveyed. We found those we visited to be welcoming, forthright and concerned about the state of the right to counsel in Idaho.

Much of the reception we received is directly attributable to the Idaho Department of Juvenile Corrections, and in particular to Alan Miller, who encouraged the active participation of juvenile justice policymakers and stakeholders.

Likewise, NLADA thanks the Idaho Courts' Administrative Office, and in particular Patty Tobias and John Peay, whose assistance in data collection was extraordinarily helpful.

Finally, we thank the members and staff of the Criminal Justice Commission and Juvenile Justice Commission for their ongoing support for this evaluation. We would like to express specific gratitude to Chief Justice Daniel Eismann for his sustained leadership on behalf of the citizens of Idaho.

NLADA Site Team Members

David J. Carroll

*Director
Research & Evaluation
NLADA*

Phyllis E. Mann

*Director
National Defender Leadership Institute
NLADA*

Jon Mosher

*Research Associate
NLADA*

Robert C. Boruchowitz

*Visiting Clinical Professor &
Director of The Defender Initiative
Seattle University Law School*

Phyllis Subin

*Former Chief Public Defender
State of New Mexico*

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Introduction

The Constitutional Right to Counsel

Our Constitution is the founding contract of our collective interests, establishing the core tenets of a free society and protected by a government whose authority and power is vested upon it by its citizens. Of all the powers we give over to our government under this unique social contract, the authority to punish us for our crimes is the greatest and most fearsome.¹ We entrust to our government the administration of our judicial systems in exchange for its promise to guarantee equal justice before the law — assuring victims, the accused and the general public that resulting verdicts are fair, correct, swift and final.

Our justice systems are far too complex for most lay people to navigate without help — let alone those who too often are in need of public defender services: the undereducated, inarticulate, the mentally ill, the developmentally delayed, and juveniles. In the case of *Gideon v. Wainwright*,² the United States Supreme Court concluded: “reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” Declaring it an “obvious truth” that “lawyers in criminal courts are necessities, not luxuries,” the Court ruled that states must provide counsel to indigent defendants in felony cases.

Since *Gideon*, the Court has consistently afforded the Sixth Amendment right to counsel to all cases in which a person faces the *possibility* of a loss of liberty in a criminal proceeding.³ And, in 1967, the Court recognized in *In re Gault*⁴ that a child’s loss of liberty “is comparable in seriousness to a felony prosecution,” despite the civil nature of the delinquency proceeding. Accordingly, assistance of counsel is a right in all delinquency cases in which the child or her parent cannot afford private counsel.

Understanding Gideon

An oft-overlooked but critical aspect of the U.S. Supreme Court’s landmark ruling in *Gideon v. Wainwright* is that the Sixth Amendment’s guarantee of counsel is obligatory upon *state* governments under the Fourteenth Amendment — not upon county or local governments. So a delegation to the counties of constitutionally-required indigent defense services does not end a state’s obligations. While a state may delegate such responsibilities, “it must do so in a manner that does not abdicate the constitutional duty it owes to the people.”⁵ In other words, the state has an obligation to ensure that the counties are capable of meeting the obligations and that counties actually do so.⁶ If the counties cannot meet the delegated responsibilities, the state — as the original obligor — must step in. The state cannot abdicate itself of all responsibility; if a violation of citizens’ constitutional rights results, the state remains liable. It is for this reason that, despite statutory delegation of the right to counsel obligations to counties, courts in both Montana and Michigan have held that the state is an appropriate defendant in class actions alleging systemic right to counsel violations.⁷

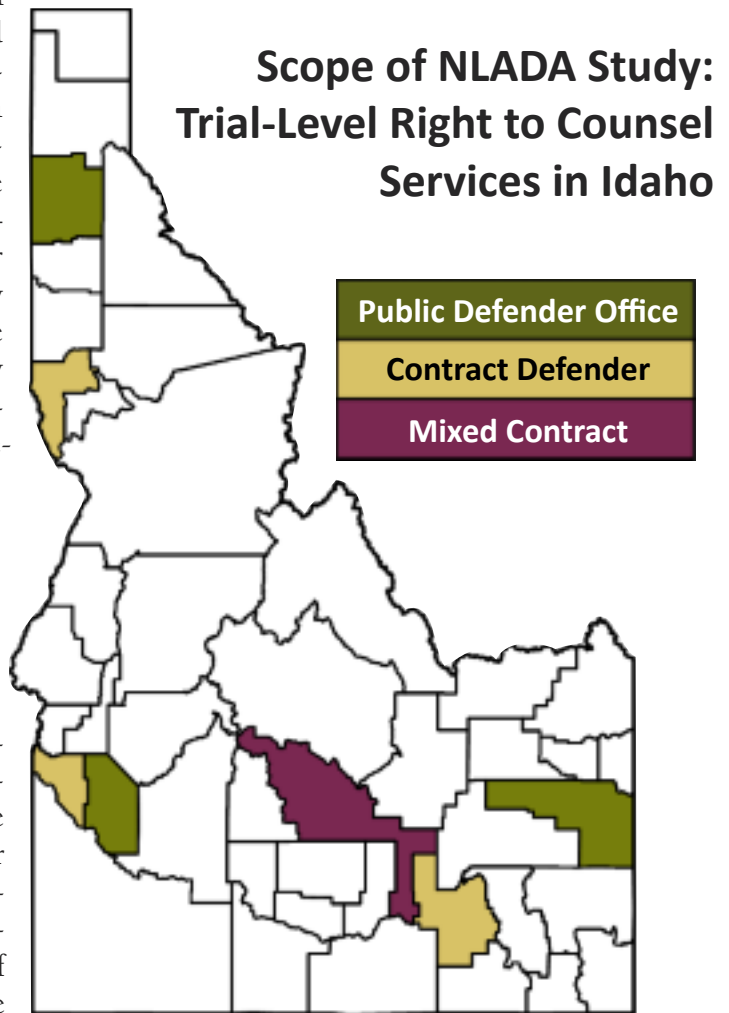
Because counties with poor economic forecasts are hard-pressed to provide adequate services, national standards incorporate this aspect of the *Gideon* decision, emphasizing that state

funding and state oversight are required to ensure uniform quality.⁸ Financially-challenged counties tend to have higher crime rates, a higher percentage of people qualifying for services, and less resources to spend on competent representation than counties of more affluence. Presently, 30 states relieve their counties entirely of the burden of funding trial-level public representation.⁹ Another three states provide the majority of funding for their right to counsel systems.¹⁰

The Current Study

In 1998, the Idaho legislature created the Office of the State Appellate Public Defender (SAPD) — a state-funded, independent governing organization with full-time staff appellate attorneys — to defray the high cost of representing convicted offenders on direct appeal, leaving trial-level services and juvenile representation as a county function. In June 2007, the National Legal Aid & Defender Association (NLADA)¹¹ released a comprehensive management audit of the Idaho State Appellate Public Defender.¹² The report noted that many of the workload issues facing the appellate defender office could be remedied with improvements to the various county-based, trial-level indigent defense systems across the state.

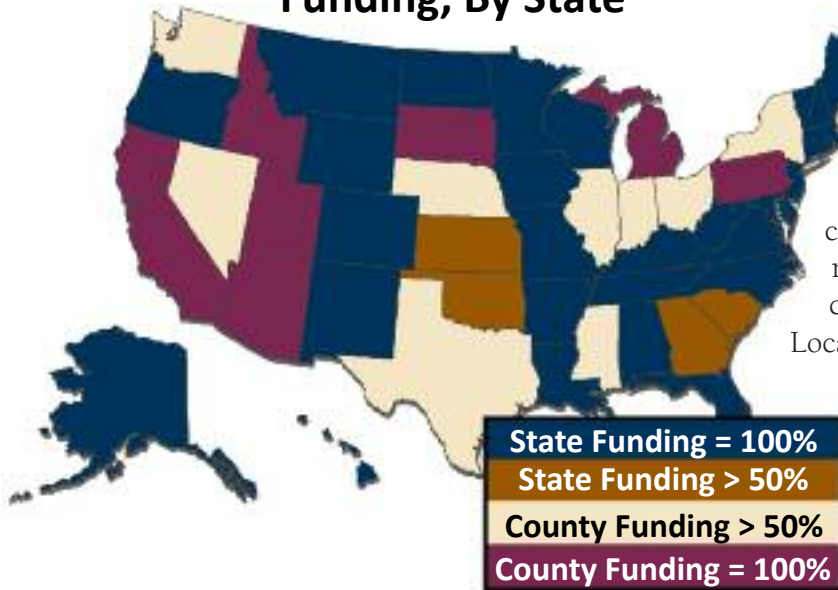
Upon release of the report, the Idaho Criminal Justice Commission (CJC) invited NLADA to present an overview of indigent defense in the United States and our findings. At the conclusion of the meeting, the Commission authorized NLADA to conduct an evaluation of Idaho’s adult trial-level services, under a limited grant from the Open Society Institute. The Idaho Juvenile Justice Commission (JJC) contracted with NLADA in April 2008 to expressly make juvenile representation a equal focus of the evaluation. To ensure that a representative sample of counties was studied — and to prevent against cherry-picking only the best or worst systems — NLADA requested the CJC to identify the Idaho counties to be evaluated. A sub-committee of CJC selected seven counties representing diversity with respect to geography, population and services delivery model: Ada, Blaine, Bonneville, Canyon, Kootenai, Nez Perce, and Power.



Overall Findings

NLADA finds that the state of Idaho fails to provide the level of representation required by our Constitution for those who cannot afford counsel in its criminal and juvenile courts. By delegating to each county the responsibility to provide counsel at the trial level without any state funding or oversight, Idaho has sewn a patchwork quilt of underfunded, inconsistent systems that vary greatly in defining who qualifies for services and in the level of competency of the services rendered. While there are

Trial-Level Indigent Defense Funding, By State



admirable qualities of some of the county indigent defense services, NLADA finds that none of the public defense systems in the sample counties are constitutionally adequate.

One of the most glaring deficiencies is what passes for justice in the magistrate divisions of Idaho’s district courts where all misdemeanors are heard and where all felony charges begin. People of insufficient means are routinely processed through Idaho’s magistrate courts without ever having spoken to an attorney. Local jurisdictions get around their constitutional obligation to provide lawyers in misdemeanor cases in myriad ways, including accepting uninformed waivers of counsel, pressuring defendants to “work out a deal” with the prosecutor prior to being given publicly-financed defense counsel, and threatening unfair cost recovery measures. Although

misdemeanor convictions or sentences may not generally result in lengthy incarceration, the life consequences of convictions can be severe, including job loss, family breakup, substance abuse, and deportation — all factors that tend to foster recidivism.

Juveniles facing delinquency proceedings are even more of an afterthought. Children who come in contact with delinquency courts too often have been neglected by the full range of support structures that normally channel children in appropriate constructive directions. When they are brought to court and given a public defender who has no resources and a caseload that dictates he dispose of cases as quickly as possible, the message of neglect and worthlessness continues, and the risk the juvenile will commit more — and worse — crimes increases. The juvenile system can have the perverse effect of actually *decreasing* public safety and *increasing* the chance that more young people will fall into a lifetime of crime and imprisonment. In most instances, juvenile representation is provided by private attorneys under flat fee contracts that create a conflict of interest between a lawyer’s ethical duty to competently defend each and every client and her financial self-interest to invest the least amount of time possible in each case.

Statewide Oversight of Trial-Level Services



A Point of Clarification

When *Gideon* became the law of the land in 1963, only two states had statewide indigent defense systems.¹³ But, as the types of cases requiring right to counsel and the number of stages at which provision of indigent counsel is required expanded over time, a dramatic increase in the number of cases that require public defense services occurred. At the same time, the introduction of sentencing guidelines, expanded use of scientific evidence, alternative treatment courts, and other crim-

Per-Capita Spending

33.	Tennessee	\$9.30
34.	Alabama	\$9.17
35.	North Dakota	\$8.80
36.	Rhode Island	\$8.67
37.	Kansas	\$8.53
38.	Hawaii	\$8.26
39.	Maine	\$8.20
40.	Pennsylvania	\$8.10
41.	Oklahoma	\$8.02
42.	Idaho	\$7.83
43.	South Carolina	\$7.65
44.	Michigan	\$7.35
45.	Texas	\$7.04
46.	Indiana	\$6.77
47.	Arkansas	\$6.65
48.	Utah	\$5.22
49.	Missouri	\$5.20
50.	Mississippi	\$4.15
	NATIONAL AVERAGE	\$11.86

Comparing indigent defense systems across state lines is difficult, at best, given jurisdictional variances related to: delivery model, population, geographical expanse, prosecutorial charging practices, crime rates, county versus state funding, three strikes laws, and the death penalty (among others). For example, the state of Alaska has the highest cost per capita indigent defense spending (\$40.96) due almost entirely to the fact that public defenders must travel by air for many court appearances. So, whereas a high cost per capita may not necessarily guarantee that a state is providing adequate representation, a low indigent defense cost per capita certainly is an indicator of a system in trouble. Idaho ranks 42nd of the 50 states.

inal law developments increased the amount of work a public defender must do on each case. Though Idaho's localized systems may have been adequate post-*Gideon*, counties have proven ill-equipped to respond to these developments in Sixth Amendment law, the resulting growth in the need for public defense services, and the attendant demand for greater resources.

Therefore, NLADA believes the inadequacy of the indigent defense systems in Idaho is more a result of the evolution of a system begun decades ago and not an affirmative attempt on the part of state and local policy-makers to deny anyone's constitutional rights. Indeed, the various county defender systems NLADA observed throughout Idaho mirror much of the history seen in many of her neighboring states for much of the past four decades. However, in neighboring state after state — Wyoming, Oregon, Montana, Nevada and Washington for example — the move from county-based right to counsel systems to statewide oversight, uniformity, and funding has occurred or is occurring as of the writing of this report. Sometimes the change has come under threat of litigation, while some states have simply recognized the old way of doing things cannot be sustained. NLADA has included sidebars throughout this report detailing the changes that have transpired in Idaho's neighboring states to emphasize that Idaho's failings are similar in kind to these states and to give hope that Idaho, too, can resolve the right to counsel problems detailed in this report.

Lack of Independence & Its Impact on Caseloads in Nez Perce County

In delivering all county services, elected officials have a fundamental obligation to protect the interests of and meet the needs of their constituents and to identify the most effective and efficient method of delivering those services. By statute, Idaho’s elected county commissioners have direct authority over the delivery of right to counsel services in their local jurisdictions and have discretion to fund the system at a level they deem “reasonable.”¹⁴ There are many ways to deliver public defense services — staffed public defender office, panel of private assigned counsel, contracts for direct services, or any combination of the three — and each county government in Idaho must decide the delivery model that best fits their particular needs.

National norms concur with this need for local flexibility and do not dictate a specific method of providing counsel in order to guarantee the adequate delivery of defense representation to the poor. Instead, experience shows that two primary factors determine the quality of indigent defense services: (1) the degree and sufficiency of state funding and structure;¹⁵ and (2) compliance with nationally recognized standards for the delivery of indigent defense services. As discussed in the previous chapter, Idaho does not meet the first of these two prongs. We therefore turn to an assessment against national standards.

Understanding Idaho’s County Indigent Defense Systems in the Context of National Standards

The concept of using standards to address quality concerns is not unique to the field of indigent defense. In fact, the strong pressures of favoritism, partisanship, and fiscal realities on public officials underscore the need for standards to assure fundamental quality in all facets of government. For instance, realizing that standards are necessary to both compare bids equitably and to assure quality products, policy-makers long ago ceased taking the lowest bid to build a hospital, school, or a bridge and now require winning contractors to meet minimum quality standards of safety. Likewise there must be minimum standards in the provision of counsel to the poor.

The use of national standards of justice in this way 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.”¹⁶

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.

CHAPTER III

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.”¹⁷

The ABA *Ten Principles* are a set of standards that are interdependent. That is, the health of an indigent defense system cannot be assessed simply by rating a jurisdiction’s compliance in each of the ten criteria and dividing the sum to get an average “score.” For example, just because a jurisdiction has a place set aside in the courthouse for confidential attorney/client discussions does not make the delivery of indigent defense services any better from a client’s perspective if the appointment of counsel comes so late in the process, or if the attorney has too many cases, or if the attorney lacks the training, as to render those conversations ineffective at serving a client’s individualized needs.

The Nexus between Independence & Reasonable Caseloads

If it were possible to evaluate the overall health of a jurisdiction’s indigent defense system by a single criterion, the establishment of reasonable workload controls¹⁸ might be the most important benchmark of an effective system. An adequate indigent defense program must have binding workload standards for the system to function, because public defenders do not generate their own work. Public defender workload is determined, at the outset, by a convergence of decisions made by other governmental agencies and beyond the control of the indigent defense providers. The legislature may criminalize additional behaviors or increase funding for new police positions that lead to increased arrests. And, as opposed to district attorneys who can control their own caseload by dismissing marginal cases, diverting cases out of the formal criminal justice setting, or offering better plea deals, 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.

Workload controls ensure that public defenders are able to spend a reasonable amount of time fulfilling the parameters of adequate attorney performance,¹⁹ including: meeting and interviewing a client; preparing and filing necessary motions;²⁰ receiving and reviewing the response to motions; conducting factual investigation, including locating and interviewing witnesses, locating and obtaining documents, locating and examining physical evidence; performing legal research; conducting motion hearings; engaging in plea negotiations with the state; conducting status conferences with the judge and prosecutor; preparing for and conducting trials; and sentencing preparation in cases where there is a guilty plea or conviction after trial.

Restricting the number of cases an attorney can reasonably handle has benefits beyond the impact on an individual client’s life. For example, the overwhelming percentage of criminal cases in this country requires public defenders.²¹ Therefore, the failure to adequately control workload will result in too few lawyers handling too many cases in almost every criminal court jurisdiction — leading to a burgeoning backlog of unresolved cases. The growing backlog means people waiting for their day in court fill local jails at taxpayers’ expense. Forcing public defenders to handle too many cases often leads to lapses in necessary legal preparations. Failing to do the trial right the first time results in endless appeals on the back end — delaying justice to victims and defendants alike — and ever-increasing criminal justice expenditures. And, when an innocent person is sent to jail as a result of public defenders not having the time, tools, or training to effectively advocate for their clients, the true perpetrator of the crime remains free to victimize others and put public safety in jeopardy.

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. With modifications in some jurisdictions, those caseload limits have been widely adopted and proven quite durable in the intervening three decades.²² 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.”²³ 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.

ABA’s *Principle #5* states unequivocally that defense counsel’s workload must be “controlled to permit the rendering of quality representation” and that “counsel is obligated to decline appointments” when caseload limitations are breached. *Principle 5* supports the NAC standards with their instruction that caseloads should “under no circumstances exceed” these numerical limits.²⁴

In May 2006, the ABA’s Standing Committee on Ethics and Professional Responsibility further reinforced this imperative with its *Formal Opinion 06-441*. The ABA ethics opinion observes: “[a]ll lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently.”²⁵ Both the trial advocate and the supervising attorney with managerial control over an advocate’s workload are equally bound by the ethical responsibility to refuse any new clients if the trial advocate’s ability to provide competent and diligent representation to each and every one of her clients would be compromised by the additional work. Should the problem of an excessive workload not be resolved by refusing to accept new clients, *Formal Opinion 06-441* requires the attorney to move “to withdraw as counsel *in existing cases* to the extent necessary to bring the workload down to a manageable level, while at all times attempting to limit the prejudice to any client from whose case the lawyer has withdrawn.”²⁶ In August 2009, the ABA again affirmed the NAC standards when the House of Delegates approved *Eight Guidelines of Public Defense Related to Excessive Workload* and its statement “[n]ational caseload standards should in no event be exceeded.”²⁷

Given that the American Bar Association — through promulgation of standards and adoption of ethics opinions — has so ardently required caseload control for indigent defense systems, why do public defenders across the country continue to accept new assignments that force them to triage professional services to their clients because of work overload? In most instances, the answer is that the act of challenging the court or county administration over high caseloads would result in the termination of a public defender’s employment.

This is why all pertinent national standards call for the independence of the defense function. The first of the ABA’s *Ten Principles* explicitly limits judicial oversight and calls for the establishment of an independent oversight board whose members are appointed by diverse authorities, so no single official or political party has unchecked power over the public defense function. 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.”²⁸ Courts should have no greater oversight role over lawyers representing poor defendants than they do for attorneys representing paying clients. The courts should also have no greater oversight of public defense practitioners than they do over prosecutors. 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.”²⁹

The lack of independence negatively affects public defense systems in a variety of ways, depending on the type of system. For public defender offices, independence is necessary to address the concerns associated with vest-

ABA 5th Principle

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

ing the hiring and firing of the chief executive with an official whose interests at times will invariably be at odds with the principles of “zealous advocacy,” which defenders are ethically bound to provide. For example, in the

ABA 1st Principle

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.

case of the judiciary there is a tension between the ever present pressure to “move cases” along on the docket and the dictates of “zealous advocacy” that include adequate time to investigate and otherwise prepare for trial. If a judicial authority is also the appointing authority for the public defender, the court can remove the chief executive if it is not satisfied with the agency’s performance in case processing and simply appoint an executive more apt to do the court’s bidding.

In assigned counsel systems, 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. Defense attorneys (especially those who have practiced in front of the same judiciary for long periods of time) instinctively understand their personal income is tied to “keeping the judge happy” rather than zealously advocating for their clients. And, in jurisdictions that place a high emphasis on the celerity of case processing, defense attorneys simply understand they are not to do anything that will slow down the pace of disposing of cases or else risk the pay that a judge has been able to secure for them. Over time, the defense attorney is indoctrinated into the culture of the judge’s courtroom, triaging the responsibilities all lawyers owe their clients.

In contract systems, 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. This creates a direct financial conflict of interest between the attorney and the client, in the sense that work or services beyond the bare minimum effectively reduce the attorneys’ take-home compensation. Attorneys learn the filing of motions increases the life of cases, reduces the attorney’s profit, and incurs the judge’s displeasure — which in turn may lead to out-right termination of a contract. Without regard to the necessary parameters of ethical representation, the attorney’s caseload creeps higher and higher,³⁰ yet the attorney is in no position to refuse the dictates of the judge.

Flat fee contracting is oriented solely toward cost reduction, in derogation of ethical and constitutional mandates governing the scope and quality of representation.³¹ Fixed annual contract rates for an unlimited number of cases create a conflict of interest between attorney and client, in violation of well-settled ethical proscriptions compiled in the *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, written by NLADA and adopted by the ABA in 1985. Guideline III-13, entitled “Conflicts of Interest,” prohibits contracts under which payment of expenses for necessary services such as investigation, expert witnesses, and transcripts would “decrease the Contractor’s income or compensation to attorneys or other personnel,” because this situation creates a conflict of interest between attorney and client.³² For attorneys wanting to practice criminal law in these jurisdictions, refusing to take every case for a single flat fee effectively precludes them from practicing their chosen vocation in the area where they live.

While the vast majority of judges strive to do justice in all cases, political pressures, administrative priorities such as the need to move dockets, or publicity generated by particularly notorious crimes can make it difficult

for even the most well-meaning judges to maintain their neutrality. The importance of keeping the judiciary out of the day to day management of the public defense system was made clear by the U.S. Supreme Court in the first right to counsel case in 1932 — *Powell v. Alabama*. Bemoaning the involvement of the state court judge in arranging the defense of the Scottsboro Boys, the Court remarked: “[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.”³³

The same standards that call for independence from undue judicial interference also recognize that political interference is equally deleterious to a public defender system. 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.

To help jurisdictions in the establishment of such independent boards or commissions, NLADA has promulgated guidelines. 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.” None of the counties we visited had such a local board or commission and many employed flat fee contracts as detailed below.

Not All Contract Systems are Deficient: The Oregon Story

For those who only know the flat fee contract systems prevalent in Idaho, a very different contract system exists in Oregon. The Oregon Public Defender Services Commission has total authority to establish and maintain a public defense system that ensures the quality, effectiveness, efficiency and accountability of defense services consistent with national standards, including adopting rules regulating professional qualification standards for appointed counsel and procedures for the contracting of public defense services. All indigent defense services at the trial level are decentralized, with 100 percent of the funding provided by the state through a series of contracts with private attorneys, consortia of private attorneys, or private non-profit defender agencies.

The contracts are the enforcement mechanism to ensure that state standards are met. For instance, a non-profit public defender agency is required by contract to maintain an appropriate and reasonable number of full-time attorneys and support staff to perform its contract obligations. If a defender agency cannot meet this requirement, or to the extent that the agency lawyers are found to be handling a substantial private caseload, the contract will not be renewed.

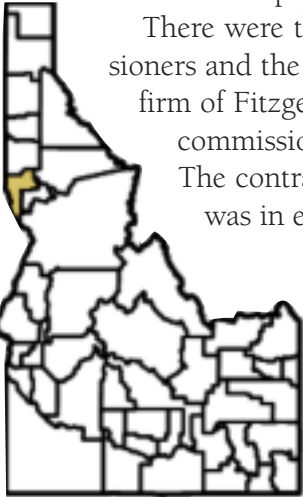
Oregon also enforces strict workload standards in their contracts. For instance, a typical contract with a 501c3 non-profit public defender sets a precise total number of cases to be handled by the contractor during the contract term, with specific numbers of cases allocated among numerous categories of cases, each of which generally require different amounts of work. Thus, instead of the common per-attorney-per-year formulation of numerical caseload limits, the Oregon system reflects overall numerical caseload limits for all staff in the office combined. And, instead of pure caseload limits, the allocation of case numbers among different categories of cases according to the number of hours commonly required for each type of case essentially constitutes a case “weighting” system, i.e., measuring “workload” rather than caseload and allowing more sophisticated planning for the office's actual work and staffing needs.

Every six months, there is a budget review process with state funding officials, in which extra funding may be negotiated for extra work performed — for example, for cases which required more than the usual amount of time for type of services (e.g. “three-strikes” cases). In effect, the contract public defender office monitors its intake and can project the degree of compliance with its estimated workload on a week-by-week basis. It notifies the court promptly if workloads are being exceeded and additional appointments must be declined. If, for example, the office meets its workload level on Wednesday, the balance of all new assignments for that week must go to the private bar attorneys contracted to handle the overflow cases. This flexibility allows the office to consistently maintain a uniform quality of service and manageable workloads even during periods of lower-than-normal staff levels due to turnover, sickness or other authorized leave.

Nez Perce County

In detailing the issues with the right to counsel in Idaho, NLADA spotlights Nez Perce County. Though Nez Perce County is the state's 12th smallest in terms of land area (849.08 sq. miles), it ranks ninth out of 44 counties in the population — 37,410 as of the 2000 U.S. Census, the majority of whom reside in the county seat of Lewiston (pop. 30,904). Behind Coeur d'Alene to the north, Lewiston is the second largest population center in the Idaho panhandle. Nez Perce is by no means poor; its \$37,059 median household income is quite comfortable by Idaho standards.³⁴ Even the poverty rate (11.8 percent) and high school graduation rate (85.5 percent) place the county in the middle of the pack, statewide. It is therefore a good representative sample county.

Nez Perce County has made use of flat-fee contracts for defender services since before the *Argersinger* decision. From approximately 1968 to 2004, the county commissioners had one fixed fee contract for the primary public defenders and one fixed fee contract for conflict cases.³⁵ In 2004, the county began considering whether there were other and perhaps less expensive means of providing defense representation to the poor and decided to reopen the bidding process in 2005.³⁶



There were three responses to the county's RFP, all reviewed by the county's three elected commissioners and the civil prosecutor (a staff attorney employed by the elected county prosecutor). The law firm of Fitzgerald & Van Idour (F&V) received the contract with Nez Perce County, and the county commissioners gave over to F&V the responsibility for selecting and paying conflict attorneys.³⁷ The contract at the time of our visit was made effective on October 1, 2005 and with extensions was in effect through September 30, 2009.

The decisions about the manner by which to provide public defense, the amount to spend for public defense, and who will be responsible for providing public defense are impacted by the lack of independence. There is no independent board to objectively assess and compare the cost and quality of providing public defense by contract, by appointed counsel or by a full-time staffed public defender office. The inclusion of the civil prosecutor (an employee of the elected county prosecutor) in the selection process creates a direct conflict of interest — the lawyer who will represent indigent clients is being chosen at the direction of the prosecutor of those same indigent clients.

The judiciary is wholly uninvolved in the selection and appointment of the public defenders or conflict defenders or their budget, and thus the district and magistrate judges felt free to speak about their views of the system. There was near unanimous agreement that there is not a single thing about the public defense system in their county that they believe is worth replicating anywhere else. The judges would all like to see a full-time public defender office established in Nez Perce County. But without an independent board or agency to serve as a buffer between the public defense attorneys and the county commission, any alteration of the current system including the awarding of future contracts will be difficult at best.

The county does not have any binding (or even advisory) caseload standards for the public defense attorneys. The contract between the county and F&V does not contain any workload prohibitions. Fitzgerald and Van Idour decide, without any county oversight, whether and how many attorneys to employ in their own law firm in order to provide primary public defense services, i.e., to provide an attorney for every indigent defendant in the county unless there is a conflict in the law firm representing a given defendant. They have chosen to hire one associate to assist them and they are responsible for paying her in whatever amount they deem appropriate. All three attorneys maintain private caseloads of paying civil and criminal clients. The only limitation imposed by the county contract is that they may not represent private clients in cases in Nez Perce County and that they must dedicate "a majority" of their time to public defense cases. The county does not require them to report the number of private pay cases they handle nor the number of hours they devote to those private cases in a given month. Thus the county does not have any means to determine whether the lawyers are complying with the ma-

jority time requirement of the contract.

Nez Perce County does not keep track of the total number of cases or defendants who receive appointed counsel each year. The county also does not know how many of those cases are handled by F&V and how many are handled by the conflict attorneys with whom F&V sub-contract. The contract between F&V and the county requires the law firm and the conflict attorneys to submit monthly reports. For each case an attorney works on during the month, they must list: the original charge; the final disposition, if any; the total hours spent on the case; the expenses charged to the county on the case; and, the amount due to be paid by the client to the county for reimbursement for public defense services, as ordered by the court. But these reports are for cases “worked on,” so if a case carries over from one month to the next and the next as almost every case does, it is counted again and again by the county. Nor does the county know how many cases are felonies, misdemeanors, juvenile delinquency, treatment courts or anything else.³⁸ The only thing the county can determine from the monthly reports it requires is the number of hours worked by each attorney on public defense cases each month. The county does not have any method to measure the overall quantity of service it is receiving in exchange for the total annual fee it pays.

The Nez Perce County commissioners do not provide any guidance to F&V about how to define a conflict or how many conflict defenders are needed, and the county does not require F&V to report any information about how they make those decisions. F&V decide whether they believe they have a conflict in a case. If they determine the law firm has a conflict, then they send the client’s file to the next of the conflict attorneys they have hired and unilaterally file a “notice of substitution of counsel” with the court.³⁹ On the one hand, F&V may be continuing to represent clients with whom they have a conflict they did not identify — to the detriment of the client but saving F&V from the cost of hiring more conflict attorneys. On the other hand, F&V may be classifying cases as conflict which are not — in order to shift more of the caseload onto the conflict attorneys and allow F&V to spend more of their time on private pay cases.⁴⁰ Or perhaps they are doing everything exactly right. Because the county does not provide any criteria for determining conflicts and does not exercise any oversight of F&V’s conflict decisions, there is no way to know.

The annual contract amount at the time of our visit of \$440,000 represents an increase of \$182,000 to F&V in exchange for them taking over responsibility for selection, payment, and assignment of cases to conflict attorneys. F&V determine how many conflict attorneys to retain and negotiate with them for the best possible price. Presently, out of their annual fixed fee contract, they pay three attorneys⁴¹ \$3,081 per month each (for a total of \$110,916 annually) to handle all of the conflict “cases we assign” to them. Again, the county does not have in place any mechanism to know how many cases are handled by each of the three conflict attorneys, nor the types of cases (felony, misdemeanor, juvenile, etc.) that are sent to them. And like the F&V attorneys, all of the conflict attorneys maintain private paying client caseloads, about which the county does not acquire any information. It is impossible for the Nez Perce taxpayers to quantify the services they are receiving in exchange for their tax dollars.

Where one firm is responsible for self-identifying conflict cases, as well as for subcontracting and paying for representation in those cases, it is inevitable that the primary contractor will weigh the firm’s financial concerns against the interests of its clients. The judges we spoke with expressed concern that the rate of pay to the conflict counsel may not be adequate to assure they will devote appropriate attention to their appointed cases. One of the judges gave an example where the public defender had been appointed on a murder case. Shortly before trial, a conflict arose. The judge did not feel he could appoint one of the conflict attorneys to handle this level of case for the amount they are paid under the subcontract with F&V, so he contacted another attorney that he knew personally and made arrangements for that attorney to take the case at the rate of \$72.50 per hour. The judges pointed out that, under the old system where the primary defenders’ pay was not diminished when cases went to conflict counsel, the public defenders were “trying to get rid of cases.” Or, as one county commissioner presented it: “Maybe F&V won’t want to conflict out of cases as much, because they’ll want to keep more money. So this way it’s better for the county.” Under the existing system, no matter how much the overall caseload of

NATIONAL LEGAL AID & DEFENDER ASSOCIATION

the criminal justice system may fluctuate, the county knows that the cost of representing indigent defendants will remain constant. And F&V is left to deal with the fact that every additional client they are required to represent means they make less and less money – it is clients and taxpayers whose interests are the most likely to be harmed in such a system.

The county does not have any performance standards other than the defenders' contractual obligation to follow the Idaho Rules of Professional Conduct. There is no measure against which the representation provided by the public defenders and conflict defenders is judged. No one in Nez Perce County is responsible for ensuring that the public defense system attorneys have the continuing ability to provide constitutionally effective assistance of counsel, much less to confirm that they are actually doing so. There is no means by which the public defenders can be held accountable for the quality of their services rendered.

The absence of independence and accountability does not of necessity mean that the Nez Perce public defense attorneys are doing a bad job for their clients. What it does mean is they are subject to a significant number of improper influences, both internal and external. It also means that the county does not have in place any ongoing measure of either the quantity or quality of the services provided. There is quite a lot of information, however, that reveals how difficult it is for these public defenders to fulfill the constitutional requirements of providing the right to counsel for indigent defendants.

In real terms, Nez Perce County pays two attorneys an annual single flat fee of \$440,000 to be *the public defender* for every indigent defendant in the county, including “any and all proceedings and matters criminal or civil,” guardianships, conservatorships, mental commitments, drug/treatment courts, juvenile delinquency, Child Protection Act matters, and appeals from magistrate to district court, as well as the defense of capital (death penalty) cases. The county leaves it solely in their hands to figure out how to do that. And before the firm actually represents the first client or earns a single dollar, they must *first* bear all of the costs of establishing the public defense system in the county.

In order to provide representation to clients, a lawyer must have a place to meet with those clients and the tools with which to represent them. Under the contract with the county, F&V are required to provide (and therefore pay for) all of the fixed overhead expenses of operating a public defender office, including:

- Rent - F&V is required to maintain an office space in Lewiston (the county seat), which serves as a place to work, maintain client files, and meet with clients;
- Utilities - this includes the costs of phone, fax, internet, electric, water, etc.;
- Infrastructure - the firm has to provide for its own desks, chairs, bookshelves, photocopiers and computers;
- Supplies - paper, pens, pencils, paperclips, etc.;
- Legal research - this can be books in a law library or on-line services such as Westlaw/Lexis-Nexis/Lois;
- Postage & delivery;
- Secretarial support - this includes salaries, plus payroll taxes and benefits;
- Malpractice insurance;⁴²
- State license and bar dues for each attorney; and
- Continuing Legal Education (CLE) — including registration for seminars and travel expenses to and from the conference location.

All of the above fixed expenses are necessary simply for the public defender office to remain operational from day-to-day and year-to-year.⁴³ Put another way, these costs must be paid *before the lawyers represent a single client*.

NLADA did not receive information sufficient to calculate the total monthly or annual cost of these fixed expenses. The overhead cost of practicing law varies widely, from urban to rural jurisdictions, from state to state,

depending on the size of the law firm and the legal area of practice. Typically lawyers estimate that their overhead runs 50 to 60 percent of their total receipts. Taking a very conservative approach, if F&V's overhead costs are only 40 percent of their receipts, then that would be \$131,633 per year. This would leave \$197,451 out of the flat-fee contract paid by the county, after providing conflict attorneys and fixed asset overhead.

F&V have determined that it is necessary to hire an associate attorney in order to have a sufficient number of attorneys — three — to provide primary representation. They did not provide to NLADA information about this associate's salary, payroll taxes, or benefits. For the sake of estimating, if each of the three F&V attorneys were equally compensated, there would be \$65,817 available to pay the salary, payroll taxes, and employee benefits for each of these attorneys. In addition to the salary paid to an employee, the employer must also pay matching FICA and Medicare taxes on behalf of that employee, so that total payroll cost to the employer is typically estimated at 107 percent of the employee's salary. This would leave a salary for each of these three attorneys of \$61,511 per year. Again, this cost is incurred before a single client has been represented in court.

But there are certain expenses related to actually representing a client, for which F&V is responsible, and this further reduces the amount available to pay the salaries of the F&V attorneys. For each actual client, F&V must provide investigation, experts, copies, long-distance phone charges, etc., and the cost of each of these items must be paid. Under the contract, the county will only reimburse F&V for certain "direct expenses."⁴⁴ F&V is not automatically reimbursed under the contract for the firm's travel expenses, telephone, long distance charges, postage or photocopying expenses, but depending upon the justification offered may be paid after obtaining a court order.

The contract also allows F&V to be reimbursed for "extraordinary expenses," if justified to a court, with notice to the county and opportunity to be heard, so long as the expenses are "not recurring on a regular basis and necessarily incurred in representing a client." The contract specifically names experts and expert witnesses as "extraordinary expenses," and requires a showing that state resources under Section 19-861(c) are "inadequate or impractical to use."⁴⁵ In fiscal year 2006-2007, Nez Perce County budgeted a total of \$18,000 for witness fees and \$10,000 for direct expenses for all of the primary and conflict indigent defense cases in the county. Fitzgerald and Van Idour advised NLADA that they pay 95 percent of the investigative costs for their clients' cases out of their own funds, rather than seeking reimbursement from the court, because "the county has let us know they don't want us asking a lot."⁴⁶

Nez Perce County: The Typical Weekly Criminal Court Schedule

	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
AM	Felony jury trials	Misdemeanor pretrial conferences	Mental Health Court	Misdemeanor jury & bench trials	Misdemeanor jury trials; Juvenile court
PM	Misdemeanor show cause hearings; Family Reunification Court	Misdemeanor sentencings; Juvenile diversion failures; Drug Court	DUI Court (every other week); Misdemeanor show cause evidentiary hearings		

We were not informed as to when felony or misdemeanor arraignments and motions hearings are held.

How “Public Defender” is an Undefined Term

Today in our country there are three basic forms of delivery system:

- **Public Defender.** An agency of the county or state, staffed with attorneys and support staff, all as fulltime government employees working together in a single office building. Larger offices will have social workers and investigators on-staff. Wisconsin operates under such a model, with a central administrative office in Madison, and fully staffed branch offices located throughout the state to provide representation in local trial courts.
- **Contract.** The county or state issues a contract to an office (often a private non-profit corporation), an individual attorney, or a group of attorneys to handle a certain number of cases, type of cases, or cases arising out of a specified court, in a given year. In exchange the county or state will pay the office or attorney(s) the agreed rate. Oregon uses contracts with a mixture of local non-profit law firms and private attorneys to provide representation at the county level. All contracts are administered by an independent oversight commission and funded out of an annual general appropriation by the state. The Oregon contracts include strict caseload controls, training and support of a superior quality, and provide additional funding for all case-related expenses such as investigators and experts.
- **Assigned Counsel.** Individual attorneys have agreed to have their names placed on a list from which judges or an assigned counsel administrator may appoint them as needed on a case-by-case basis, and they are typically paid either by the hour or by the case. The state of Massachusetts maintains such a model for delivering public defense services, with funding and administration centralized under an independent commission in Boston and direct attorney supervision handled locally. In the Massachusetts model, private attorneys are paid an hourly rate that increases with case complexity, and the attorneys’ entire caseloads – both public and private clients – are closely monitored to ensure compliance with national standards across the state.

No one of these delivery models is inherently better than another. Almost every jurisdiction – state or county – uses a combination of any of the three to provide primary, conflict, and multi-defendant representation.

In Idaho as in most of the country, however, the use of these simple labels can be deceptive. Counties often call their defense system by one of these names, but that defense system may differ dramatically in type from these standard definitions. For example:

Public Defender Office Model

Many counties claim to have a public defender office as their model for delivering public representation services.

- In one county, this may well be the private law office of a single attorney who has been designated as the “public defender,” and that attorney may carry a full private-pay caseload of clients in addition to his public defense work.
- In another county, all of the public defender attorneys may work part-time, work in their own separate private law offices, maintain private-pay client caseloads, or all of the above.

These are public defender offices in name only, and in fact they are much more like a contract system.

- Or, a county may have established a true public defender office as a county agency, with staff paid as full-time government employees.

Contract Model

Some counties claim to have contract systems.

- In one county, this may mean the county has an annually renewable contract with a nonprofit corporation that employs several attorneys full-time and where these attorneys only represent public defense clients. This looks much more like a “public defender office” than do many operating under that moniker.
- Another county may have a contract with an attorney for a given sum of money to represent all of the primary conflicts, and this is known as a flat-fee contract.

Assigned Counsel Model

Assigned counsel systems are structured in myriad ways.

- Some systems have a single assigned counsel administrator who selects the attorney to be appointed in each case.
- In other counties the chief public defender may have responsibility for administering the appointment rotation.
- In other counties each judge will select an attorney from a pre-approved list.
- A county may claim to have an assigned counsel system, but where a single lawyer is paid a certain fee to handle all of a particular type of case and who does almost exclusively public defense – this of course is truly a contract system.

Because of all these variations, the label that a county applies to its provision system does not tell us anything at all about how the lawyers who work in that system view themselves and their role.

Just as the county contract places financial responsibilities on F&V, it also places responsibilities on them that consume their time, and it allows them to spend their time on matters other than representing indigent defendants.

F&V is responsible under the contract for administering the public defense system. Every person who comes before a judge in Nez Perce County and who requests and is eligible for appointment of an attorney is directed to the Law Office of Fitzgerald & Van Idour. F&V is responsible for making a file for each of these clients and determining whether there is a conflict. If a conflict exists, F&V is responsible for assigning that client to a conflict attorney and notifying the court of the substitution of counsel. Whatever the total number of indigent defense cases handled by the system each year, F&V is responsible for the administration of them all. These administrative tasks must be accomplished before F&V turns their attention to the actual defense of any individual client.

The public defense contract requires that the attorneys satisfy the requirements for practicing law in Idaho. This means, in terms of training, that each of the attorneys must obtain ten hours of continuing legal education each year, of which two hours must be in ethics.⁴⁷ There is very little criminal defense training available in Lewiston and so they generally have to travel if they want to be up-to-date on advances in criminal defense. All of the three F&V attorneys are members of the Idaho Association of Criminal Defense Lawyers (IACDL), and they voluntarily attend training offered by IACDL in Sun Valley, Coeur d'Alene and Boise. They also attend training offered by the federal public defenders. Some amount of time must, therefore, be set aside to meet this training obligation.

All three of the F&V attorneys handle private criminal cases outside of their public defense duties in Nez Perce County, as their contract allows. Bill Fitzgerald represents private clients in civil negligence. Bob Van Idour has a general civil practice on the side, handling low-level domestic (mainly modifications) cases, wills, and civil negligence.

The public defenders have ever-increasing responsibilities in staffing the county's various treatment courts. In addition to standard felony, misdemeanor, and juvenile courts, Nez Perce County has four problem solving courts.⁴⁸

- Drug Court — adult felony only, presided over by District Judge Brudie;
- Mental Health Court — adult felony and misdemeanor, presided over by Magistrate Judge Kalbfleisch;
- Family Reunification Court⁴⁹ — presided over by Magistrate Judge Gaskill; and
- DUI Court — adult misdemeanors and 3rd offense felonies that are amended down to misdemeanors, presided over by Magistrate Judge Merica.

The F&V attorneys serve as members of the treatment team in each of these courts. The three defender attorneys divide up the staffing responsibilities. Fitzgerald staffs the family reunification court, Van Idour staffs the drug court, and the F&V associate attorney staffs both the mental health court and the DUI court.

After accounting for all of the above, we can then look at the F&V attorneys' remaining time available to spend representing individual public defense clients. Bill Fitzgerald and Bob Van Idour divide the felony cases between themselves. The other F&V attorney handles the remaining cases — primarily juvenile delinquency, misdemeanor, and some Child Protection Act cases — that come into the office. Though the contract specifically excludes appellate matters for which the Idaho State Appellate Public Defender must provide representation, the firm is responsible for indigent appeals from magistrate to district court.

The F&V attorneys estimated that the public defender is appointed to represent approximately 191 new felony defendants each year and that, of those, 72 cases are sent to conflict counsel.⁵⁰ F&V provided an exact number for public defender system case assignments they received from January 1 through May 31, 2008. In the first five months of the year, there were 85 felonies, 73 juvenile delinquencies, and 391 misdemeanors assigned to the public defender system (primary and conflict).⁵¹ If we extrapolate from this system-wide data for a full year's caseload, we can estimate a total of: 204 felonies,⁵² 938 misdemeanors,⁵³ and 175 juvenile delin-

A Tale of Two Counties: Washington State & the Prohibition of Flat Fee Contracts

In January 2009, the Washington Supreme Court banned indigent defense providers from entering into flat fee contracts because of the inherent conflict of interest it produces between a client's right to adequate counsel and the attorney's personal financial interest. The decision was the result of the great disparity of services provided by Washington's counties.

For example, King County, Washington (Seattle) has a high quality indigent defense system. Poor people charged with crimes in Seattle are assigned to one of four independent, non-profit private law firms that contract with the county to provide right to counsel services. The contracts with the county government limit the number of cases to reasonable levels. If, for instance, the district attorney's office finds reason to charge a defendant with a crime carrying the possibility of a death sentence, the public defender automatically receives additional money from the county to put two attorneys solely on that one case until its completion. Oftentimes this results in the public defender offering mitigation evidence to the prosecutor in advance of a formal filing of death penalty charges to persuade law enforcement that it is not in the best interest of justice to continue to pursue death as a sentencing option. The executive director of at least one office is clearly seen as an equal partner in the administration of justice and the setting of criminal justice policy.

Contrast that with Grant County, Washington — a jurisdiction of approximately 80,000 that is situated two counties east of King County. Grant County contracted with a single public defender to administer the indigent defense caseload for a predetermined dollar amount — regardless of the number of cases opened within that year — as a means of controlling rising criminal justice costs. The public defender administrator retained the authority to farm out any portion of the work for

whatever price he could negotiate. As a spotlight series conducted by the *Seattle Times* described it, “[t]he more cases [the administrator] kept for himself, the fewer he had to dole out. The fewer he doled out, the more money he kept.”^a In one year, the administrator made \$225,000 — though to do so he had to handle 415 felony cases himself, or more than 175% above the prescribed number of felony cases any one attorney should ethically handle in a given year according to all nationally-recognized caseload standards. The Grant County indigent defense provider spent on average four hours on each case — including those cases that went to trial.

Grant County's problems were addressed as a result of an American Civil Liberties Union of Washington class action lawsuit against this system, alleging that the overwhelming caseload compelled the attorney to take short cuts, like failing to investigate cases, failing to file credible motions, and failing to meet with the clientele. The case was settled after Superior Court Judge Michael Cooper found that indigent defendants in Grant County have a “well-grounded fear” of not receiving effective legal counsel. Under the terms of the settlement, the county had to hire sufficient staff to meet national caseload guidelines, provide effective supervision and training, and hire a magistrate to ensure standards are met. Moreover, a client who spent months in jail due to the deficient work of his Grant County public defender was awarded \$3 million that held his public defender personally responsible for the inadequate service. The public defender was also disbarred. Grant County settled with this one client for \$250,000.

^a Ken Armstrong, Florangela Davila and Justin Mayo. “The Empty Promise of an Equal Defense: Part 2: Attorney profited, but his clients lost.” *The Seattle Times*, Local News: Monday, April 05, 2004.

quencies⁵⁴ for 2008. Assuming slightly more than 37.5 percent of all felonies are sent to conflict attorneys, based on the estimates of the F&V partners (approximately 72 out of an annual 191 felony case assignments), then of an estimated 204 felonies the conflict attorneys would receive 77 of them in 2008.⁵⁵ That means Fitzgerald and Van Idour will each handle 63 or 64 felonies.⁵⁶ The national caseload standards limitation of 150 felony cases per attorney per year was constructed assuming that an attorney works on felony indigent defense cases *and nothing else*. Fitzgerald and Van Idour have private clients, administrative responsibilities, training requirements, and staffing obligations with the county's treatment courts. Under these circumstances, national standards suggest a significantly reduced threshold.

Though the caseload numbers for Fitzgerald and Van Idour may appear reasonable, those of the F&V associate attorney do not. She was hired to handle the firm's misdemeanor and delinquency caseload. In 2008, we estimate she handled the combined 938 misdemeanors and 175 delinquency cases — a total of roughly 1113 cases. Recall that national standards call for a single attorney to handle no more than 400 misdemeanors or 200 juvenile cases. This means the F&V associate was handling 322 percent of what national standards allow. Put

another way, she alone is carrying the caseload three attorneys could reasonably be expected to handle. This of course does not include the mental commitments and termination of parental rights cases also assigned to her. It also does not take into account her time devoted to staffing two of the county's treatment courts and her time spent obtaining required continuing legal education, not to mention her private practice.

Additionally, all national standards strongly recommend that workloads should be adjusted to account for the extent to which an attorney has access to adequate support staff (investigators, social workers, paralegals, legal secretaries, and office managers). 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 crime scenes, and gathering and evaluating evidence — tasks that otherwise have to be conducted, at greater cost, by an attorney. 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 deficiencies 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 meeting the requirements and expectations of the court, the prosecutor, and the law.⁵⁷

Because of this, some states impose further restrictions on their indigent defense caseload standards. For example, public defenders in Indiana who 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). And as with felonies, under the Indiana Standards, attorneys without adequate support staff cannot carry more than 300 misdemeanor cases per year (down from 400).⁵⁸ To the extent that any investigation or social work is being done on behalf of misdemeanor clients in Nez Perce County, it is being handled by the associate attorney. Therefore, because she has no paralegal staff and conducts all her own investigations, the F&V associate attorney is in breach of the Indiana standard by 429 percent.

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 case:

On cases that are disposed by a plea bargain well in advance of trial:⁵⁹

- 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, investigating possible defenses, 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;
- 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

Additional duties for cases that actually go to trial:

- Analyzing potential and final jury instructions;

- Conducting the trial

Duties for sentencing after pleas and 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;
- 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 associate attorney's current workload. The F&V attorneys told us that the increase in the number of misdemeanor cases has outpaced the increase in the number of felony cases over the past few years and that the specialty court staffings are taking up an increasing amount of time.

Forced Change through Litigation: Montana

In February 2002, the ACLU and the law firm of Cravath, Swaine & Moore LLP filed *White v. Martz* against the state and seven of its county governments for failure to provide constitutionally adequate representation to indigent persons charged with felonies. At the time, Montana's indigent defense system mirrored Idaho's current system with a statewide appellate system but county-based trial level services.

In conducting the litigation, the ACLU deposed more than eighty witnesses, including current and former public defenders, state and county officials, various members of the judiciary, and the chief justice of the Montana Supreme Court. The ACLU also engaged a team of local and national experts to provide professional opinions on whether the then-existing indigent defense program in Montana provided constitutionally adequate representation.

The ACLU hired NLADA to conduct a seven-county assessment of indigent defense services. NLADA's final report concluded that Montana's defense system was still plagued by the same systemic deficiencies that NLADA had found during its last assessment in Montana some 30 years earlier – namely that each county program suffered from a stunning lack of sufficient financial resources and oversight, which impeded attorneys working within the programs from performing even the most basic tasks necessary to an adequate defense. There were no uniform standards, policies or procedures designed to ensure that the indigent who were assigned counsel were provided with constitutionally adequate counsel.

The local experts (numerous leading criminal defense practitioners from across Montana) were prepared to tes-

tify at trial that these systemic deficiencies caused grievous constitutional harm to current and former public defender clients. The ACLU, and its local affiliate, also oversaw an intense media campaign to highlight the defense issues in the press, with special emphasis on human interest stories of defendants who were given poor representation or were inappropriately detained for substantial periods of time.

The trial was set for May 2004. Just eight weeks before the trial was to commence, Montana Attorney General Mike McGrath contacted the ACLU to postpone trial to provide the legislature the opportunity to strengthen the public defender system. The attorney general agreed to advocate for legislation creating an adequately funded and administered statewide public defender system that would meet national standards.

On June 9, 2005, Montana Governor Brian Schweitzer signed into law the Public Defender Act of 2005. The Act creates an independent 11-member public defender commission that is statutorily bound to issue standards and to hire a chief state public defender and other centralized staff. At the same time, the Act provides the flexibility required to address the diverse needs of a geographically large, yet sparsely populated state. Deputy chief defenders operating in eleven distinct geographic regions will monitor and enforce commission standards – some by relying on public defender offices, others by employing contract defenders. Indigent defense providers in the regions will be supported by the chief state defender's centralized staff, including: a director of training; the state appellate office; a state serious crimes defender unit; and, director of management information services.

Independence & Caseload Challenges Throughout the Rest of the Sample Counties

Bonneville County

Indigent defense in Bonneville County is provided through a public defender office, that has five attorneys including the chief public defender, and through a contract for conflict cases, that is let to a lead conflict attorney who then subcontracts with two additional attorneys. There is no independence of the defense function, as both the chief defender and the lead conflict attorney are selected directly by the county commissioners. At the time of the NLADA site visit, both the chief defender and the lead conflict attorney had been in their positions for only a little over five months, having begun in July 2008. The chief defender noted that, though he is appointed for a term of years, he feels as if he serves at the pleasure of the commissioners – in his words, serving “at will.” The commissioners determine the amount of funding for both the public defender office and for the conflicts contract.

The office has five attorneys and four clerical support staff. The chief defender could not tell us how many cases his individual attorneys or his office overall was handling and he was not aware of how the current annual caseload compared to that of previous years.⁶⁰ The caseload is divided among the five staff attorneys by case type, a process which the chief intended to result in caseloads being as equal as possible. Felony cases and civil commitment cases are divided among the three most senior attorneys (including the chief defender who maintains a full caseload along with his managerial duties). One of these three attorneys also handles all of the child protection cases. The fourth attorney handles all of the county misdemeanors. And the fifth attorney handles all of the city misdemeanors and all juvenile cases.

NLADA obtained the monthly reports that the public defender office provides to the county, and from these reports calculated the estimated annual caseloads for each of the attorneys in the public defender office. On average, each of the three senior attorneys handle 208.67 felonies per year (or 39 percent more cases than allowed by national standards for felonies alone), plus 22 civil commitment cases per year. One of the felony attorneys also handles 30 child protection cases per year, which by itself would be a significant portion of a workload. The county misdemeanor attorney has 797 cases per year (99.25 percent more than the maximum national standard of 400 misdemeanors allows).

The fifth attorney’s caseload is even more egregious. He is assigned 1154 city misdemeanors. That caseload alone is 188.5 percent *above* national standards. He then also handles 248 juvenile cases per year. Even if he were only assigned to juvenile cases and nothing more, he would still have a caseload 24.8 percent above the acceptable maximum of 200 juvenile cases per attorney per year. Therefore, this single attorney is assigned to handle more than four full-time attorneys’ worth of work -- and a caseload that allows only one hour and ten minutes per client. The attorney estimated he is only able to spend one hour per case.

In addition to their heavy caseloads, the public defenders are allowed to have private practice cases on the side. This conflicts with the ABA *Standards for Providing Defense Services*, Standard 5-4.2 “Restrictions on private practice,” which provides: “Defense organizations should

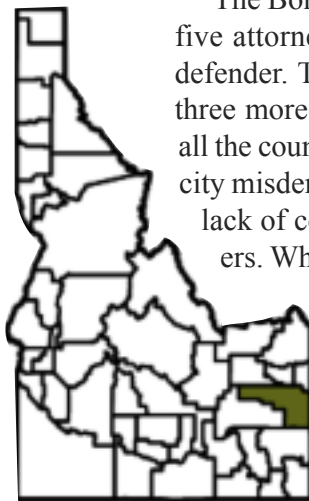
be staffed with full-time attorneys. All such attorneys should be prohibited from engaging in the private practice of law.” According to one defender, the rule as established by the county commission allows a private practice as long as it does not interfere with regular duties, and internal office policy is simply that attorneys should “keep it reasonable.” While NLADA was assured by some of the attorneys that their private caseloads are quite minimal⁶¹ and that they are taking fewer and fewer private cases, there is no policy within the county that compels defenders to track and report their private caseload. As the office’s full-time attorneys already have overwhelmingly high workloads, the addition of a single private case fundamentally interferes with the attorneys’ “regular duties.”

The public defender office’s five attorneys are attempting to cover the number of cases that 11 attorneys would be reasonably expected to handle according to national norms,⁶² and at the same time their workload is compounded by the lack of adequate support staff, particularly in the area of investigation. The *Guidelines for Legal Defense Systems in the United States* issued by the National Study Commission on Defense Services (see Guidelines 2.6, 3.4, 4.1) direct that “defender offices should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every 3 staff attorneys in an office.” As another measure of the support staff presumed by national standards to be necessary for effective representation, the *Guidelines* further prescribe precise numeric ratios of attorneys to cases: one full time investigator and one full time social service caseworker for every 450 felony cases; one full time investigator and one full time social service caseworker for every 600 juvenile cases; one full time investigator and one full time social service caseworker for every 1,200 misdemeanor cases. So the office’s caseload warrants the employment of at least one full-time staff investigator, and to accord with national standards they would have four full-time staff investigators. Instead, the public defender office has a \$6,000 line item in its budget for investigation, which is used almost exclusively on major felony cases. If any investigation is being conducted on behalf of the vast majority of the office’s clients, it is done by the attorney himself and rarely, if ever, in misdemeanor cases.

The office’s defenders are aware of the impact their workload has on their clients. One felony lawyer said “our caseload is such we could miss something.” He mentioned one case in which he had not believed his client’s story and lacked the investigative resources to check it out; fortunately the client came up with documentation on his

Overview: Bonneville County

Bonneville County, Idaho’s fourth most populous county (82,522), is home to Idaho Falls, a major population center of eastern Idaho. The rest of the county, however, is quite rural. The county is centrally located in a major agricultural region, producing much of the state’s famous potato crop. As a result, particularly in recent years, Bonneville County has experienced an uptick in migrant workers coming into the area to work the fields. Many are of Hispanic descent, but because many migrant farm-workers are undocumented persons, the county’s demographics may not reflect this (87.7 percent white, 9.2 percent Hispanic/Latino). The poverty rate is 10.8 percent, and the median household income is \$51,260. The county’s high school graduation rate



is 87.8 percent.

The Bonneville County public defender office has five attorneys, including the appointed chief public defender. The felony caseload is divided among the three more-senior attorneys. A fourth defender takes all the county misdemeanors, and the fifth handles the city misdemeanors and all juvenile cases. There is no lack of courtroom talent among the public defenders. When they have time to devote to a client and otherwise recognize an issue worth pressing in a hearing, they put up a good fight. But there is a serious lack of independence, caseload controls and training. The county administration’s desire to keep costs to an absolute minimum, and the court’s compliance in doing so, has effectively chilled the right to counsel in Bonneville County.

own. He also noted a few cases that had been reversed on appeal, as a result in his opinion of the office not being sufficiently attentive to case law. One of the more experienced lawyers said he is so limited for time that he asks clients to give him witness lists and have witnesses call him. He said, "I don't have ready funds available and I don't have a heck of a lot of time." Another defender said his investigation "depends on what I can do or the client can do," and occasionally he can get a judge to grant investigation but he has "to show great need." When we asked one of the misdemeanor defenders what he would do if he had more time, he responded flatly: "The bottom line is I'd probably provide more effective counsel. I guarantee that there are things I am missing because I just don't have the time."

The Bonneville County judges we spoke with also recognized the public defenders' crushing workload. As one district judge noted: "The public defender shows a lack of preparation in routine hearings – arraignments, probation violations, and pre-trials. I'm convinced he doesn't even see the client before the hearings, because he's sitting in my courtroom explaining the process to the defendant and trying to work out how they're going to plea – things that should have happened well in advance. Typically a guilty plea is what he's going to recommend, because that's the safest thing to do for your client when you don't have time to investigate."

There are three district judges in Bonneville County, so one method the office uses to help manage its caseload is to assign each of its three felony attorneys to all of the cases before a particular judge, ensuring that each attorney will by-and-large remain in one courtroom and before one judge for their entire caseload. The practice of assigning attorneys to individual judges has unintended consequences, creating the potential for undue judicial interference. Where public defenders practice in front of the same judge day in and day out, they risk a heightened desire to keep the judge happy by keeping the dockets moving and tend to "focus on the preferences and work patterns of the particular judge to whom s/he is assigned and with whom s/he works every day,"⁶³ rather than serving the representation needs of the client by zealously advocating on her behalf.

Despite the chief defender's stated intent to make caseloads as equal as possible, the assignments of work to attorneys are not balanced. The chief defender seemed unaware of national caseload standards or of standards re-

Driving Without Privileges

The bulk of the magistrate court's docket in many counties involves Driving Without Privileges (DWP) offenses, usually because a person's driver's license has been suspended. DWP carries a mandatory minimum of two days in jail. As one prosecutor in Nez Perce County explained it, the goal "is to get their driver's license reinstated." And if the defendant is able to get his license reinstated, the prosecutor will reduce or dismiss the charges. Driving With Invalid License, for example, does not have a mandatory jail sentence and carries a \$100 fine plus \$75.50 in court costs, which the defendant can repay in monthly installments over a six-month period. Or the prosecutor might offer to settle the case as a Failure to Purchase, a charge that comes with a \$50 fine.

Prosecutors will likely dismiss outright more DWP cases than they pursue. The elected prosecutor in Bonneville County estimated they are settling about one-third of the cases on the calendar by the time of the pre-trial conference.

Most people are originally charged for Driving Without Privileges because they have numerous unpaid tickets, often from several jurisdictions. So, most cases are continued over and over again while the defendant saves up money, and then goes from one jurisdiction to another paying off and resolving their tickets in the magistrate courts. But a DWP charge can only be resolved, even by reducing the charge and providing a six-month payment plan for fines and costs, once all of the defendant's outstanding out-of-county matters are resolved and the driver's license is reinstated. Therefore, the prosecuting attorney serves as a collection agent.

Even though the majority of DWP cases are dismissed or settled at a reduced charge, the original charge carries a mandatory jail sentence. Thus the right to counsel attaches and each individual must be granted an attorney. Consider that in Bonneville County there are an average of over 7,500 misdemeanor case filings each year, and according to the court administrator there were 835 first-offense-DWP cases as of December 2008. This means for at least one Idaho county, DWP constitutes more than 10 percent of the misdemeanor caseload. Counties and trial courts could save considerable resources by diverting this type of case out of the criminal courts or finding alternatives to existing practices.

lating to investigation and has not asked budgeting authorities for additional staff to allow him to meet those standards. In addition, because he does not have a handle on the workload trends in the county, the chief defender is not able to articulate to the budgeting authority the reasons why they should provide additional resources. In the five plus months that he had been on the job at the time of our evaluation, he had not shown himself to be a significant player in developing system improvements or in responding to changes in the court practices, and he did not see his role as one of seeking change. Even though the chief emphasized that he felt adequately supported by the county – “If I had a need, they’d address it” – it is clear that no one in Bonneville County is causing indigent defense services to rise on the commission’s list of priorities. As one of the deputy public defenders put it: “We’re the forgotten step-children.” Indeed, our study of the caseloads and workloads of the public defender office attorneys demonstrates that the public defender office lacks the resources to provide an adequate defense for each and every client they are assigned to represent.

All cases for which the public defender office has a conflict go to conflict counsel. Yet there is no written conflict policy in Bonneville County, and each public defender staff attorney makes his own decision about whether a case assigned to him presents a conflict. One attorney told us he had identified about six or eight conflicts in the two-and-a-half months he had been with the office, and on a couple he had consulted the chief defender. The attorney said his method of determining whether there is a conflict was to check on whether the office has represented a victim in a case, and he does this himself by using the office’s computer software if an assistant is not available to do it for him.⁶⁴

When a conflict is identified, the public defender office withdraws from the case and the lead conflict defender is appointed. A former prosecutor with eight years of experience, the lead conflict counsel works under contract with the county commission for a flat annual fee. The contract requires the lead conflict attorney, for a flat rate of \$102,000 per year, to represent all conflict cases “regardless of their number.”⁶⁵ He also is required to handle all appellate cases other than on felony matters. This poses a theoretical disincentive for the conflict attorney to advise a client to pursue an appeal, because every appeal creates more work for the lawyer without any increase in pay. And in fact he had not had a single appeal during the first six months of the contract.

In order to fulfill his obligation to represent “all conflict clients,” the lead conflict attorney subcontracts with two other lawyers.⁶⁶ One reason he gave for hiring additional attorneys and dividing the work among the three of them was that he did not want to lose the rest of his private practice and be totally financially dependent on the appointed defense work.

As is the nature of flat-fee contracts, the workload of the conflict attorneys is not controlled to permit effective advocacy for each client they are appointed to represent.⁶⁷ The lead conflict attorney reported that he received 16 felony and 38 juvenile/child protection cases in the first five and a half months of the contract. Under national standards, this number of felonies is about 23 percent of a full-time workload and this number of juvenile cases constitutes 40 percent of a workload, meaning that his conflicts work requires about 60 percent of a full-time defender. Yet by his own estimate, he spends only about 40 percent of his time on appointed conflict cases and spends 60 percent of his total time working on behalf of his private civil clients. Nonetheless, he believes that, by scheduling his time efficiently and putting a number of cases on a single court calendar day, he is able to manage the workload. He indicated that he is able to meet with most of his clients before court. He relies on clients to help with investigation, though he will go to the scene of the incident and will meet in people’s homes. He knows many of the police officers and “which ones I can trust.” Still, the lead conflict counsel notes the weakness of the agreement with county is that there is no way to expand or contract depending on the number of cases. As he explained to us, the commissioners wanted to have a set amount in the budget.

Canyon County

Like Nez Perce County, Canyon County maintains a flat-fee multi-year contract with a private law firm to provide for public defense services. From 1980 until 1997, Canyon County contracted with Van Bishop, a local attorney, for indigent defense and some civil representation services. In 1995, the law firm of Klaus Wiebe and Scott Fouser bid on the contract, but lost to Bishop. However, in May 1997, Wiebe and Fouser were the successful bidders, and their law firm retained the contract to provide public defender services for Canyon County from 1997 until 2009 when the county terminated the contract (see side bar, next page). There is no independent board to shield the public defense lawfirm from undue political or judicial interference or from cost-saving efforts by county administrators.

At the time of our visit, the three-year contract between the county and Wiebe & Fouser was effective through September 2008, and the county paid the firm a flat annual rate of \$1,496,950.⁶⁸ From this flat annual rate, Wiebe & Fouser hire whatever number of staff attorneys they deem appropriate and determine their salaries. Also from this flat annual rate, Wiebe & Fouser subcontract with whatever number of attorneys they deem appropriate to handle all conflict cases. Finally, costs of ordinary investigative expenses are paid out of this flat annual rate.

Scott Fouser oversees the money management and business requirements of the firm. The office maintains separate accounts for its private firm business and its public defender contract. Employees receive pay checks drawn on each of these two separate accounts. From the public defender contract account in FY2007, the firm paid out \$966,330.50 in total salary. The office also offers its employees health and dental insurance.

The contract authorized a maximum of \$65,000 per year (in addition to the flat annual rate) to cover the firm's "extraordinary expenses." These include psychiatric evaluations, expert witness fees, travel, lab, forensic work and investigation "in extraordinary circumstances such as cases involving complex or unique issues of fact and law, capital cases (not attorney fees), and other cases uniquely distinguishable on the fact and law from regularly encountered criminal cases." Furthermore, these extraordinary expenses must also be approved by the court, and, if the \$65,000 allowance is exceeded, the county will only pay those costs above that amount that are approved by the court. Therefore, regardless of the actual expense incurred, the firm is dependent upon the favor of the court to receive payment for such "extraordinary expenses."

Part of the nature of flat-fee contracts is that the defenders are expected to handle every case they are assigned, with no limit to their annual workload. The firm's contract with Canyon County requires that it accept all cases coming to it from the court system. The contract required representation services in criminal matters, including misdemeanors, felony charges (including homicide), and juvenile delinquency. The law firm also provided public representation: on behalf of children in Child Protection Act cases; in Child Protection Act cases on behalf of a parent whose child is involved in the case; mental competency hearings; guardianship and conservator cases; probation violations; civil contempt;⁶⁹ appeals from magistrate court to district court and from district court to the court of appeals and the Idaho Supreme Court; civil representation of inmates located in the county detention centers⁷⁰ related to legality of confinement or legality of conditions of confinement as required by governing law; and criminal extradition cases.

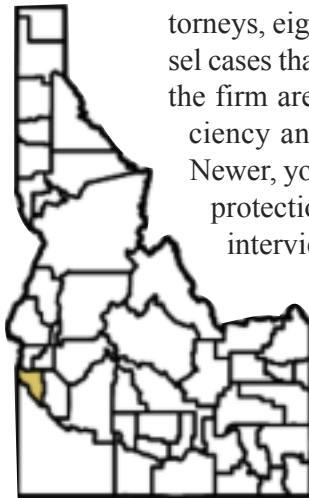
For each capital case, the firm is required to provide two attorneys qualified by the Idaho Supreme Court to serve as lead counsel and co-counsel.⁷¹ The office has three qualified death penalty attorneys. At the time of our site visit, the office had two capital cases on which Fouser served as lead attorney. A second chair was also assigned to these cases, and mitigation specialists and investigators were hired under contract. As a practical reality, it has been some time since a death case in Canyon County has actually gone to trial. Most death-eligible cases have been negotiated and pled out.

Except for first degree murder, felony cases are assigned on a rotating basis to each of the lawfirms' attorneys. Once assigned, the attorney attends the felony arraignment, pretrial conference, plea/trial and sentencing. All of the felony attorneys we spoke with stated that they litigate with frequency in this office. One attorney told us she did three jury trials a year; another stated one a year; a third indicated more than six a year. Attorneys are

Overview: Canyon County

Idaho's second largest county, Canyon County sits just west of Ada County. While Nampa (pop. 51,867 as of the 2000 U.S. Census) holds the majority of the county's 131,441 people, Caldwell is the county seat. Both are considered part of the larger Boise metropolitan area. But that is not to imply that Canyon County is merely an extension of Ada. Rather, Nampa is among the fastest growing cities in the state. As of 2007, its population was estimated to have reached 79,249, passing both Idaho Falls and Pocatello in size.

From 1997 to 2009, indigent defense services for Canyon County were handled under flat-fee contract by the private law



firm of Wiebe & Fouser, PA.

At the time of our visit, the firm employed 15 attorneys, eight support staff and took all public counsel cases that come into the court system. Lawyers in the firm are assigned cases for their level of proficiency and experience off an assignment wheel. Newer, younger attorneys start with juvenile, child protection cases and misdemeanor cases (office interviews, pre-trials, and trials), moving up to lower level felonies and then more serious felony cases. The firm must also self-identify conflict of interest cases and pay for conflict and overflow attorneys out of its flat rate with the county. There are no workload controls for attorneys working within or under subcontract with the firm.

The Right to Counsel's Continuing Devolution in Canyon County

After the NLADA site visit, the move to place cost concerns above constitutional due process has continued in Canyon County. In April 2009, the county administration gave the Wiebe & Fouser contract public defender law-firm 90 days notice that it would terminate the public defense contract due to budget constraints. At first, the request for proposals put out by the county (pursuant to Resolution No. 09-049) suggested the lowest bidder would win.

Wiebe and Fouser in-turn filed a law suit against Canyon County and the state of Idaho to stop the county from terminating its defender contract, charging, among other things:

The state does nothing to ensure that any particular county has either sufficient funding or adequate policies, programs, guidelines and other essential resources in place to guarantee its indigent defendants are provided effective assistance of counsel as mandated by the United States and Idaho Constitutions.^a

Facing growing concern over the flat-fee bidding process, the Canyon County administrators quickly terminated the earlier request for proposals for defender services. The county instead requested that firms interested in obtaining the new contract for defender services

submit letters of interest and resumes to the county, rather than openly looking to "find the bottom" of adequate services. The new request, however, expressly stated the commissioners "may wish to consider much of the information sought in the RFP." (Resolution No. 09-078.)

Remaining resolved to terminate the contract with Wiebe & Fouser, presumably due to fiscal concerns, the county commission on June 29 awarded the new contract to Mark Mimura, effective Oct. 1, 2009.^b The county and Wiebe & Fouser settled the pending lawsuit in mid-September, with both sides agreeing to walk away.^c

This on-going devolution of due process in favor of cost containment is a common theme throughout Idaho.

Breaking News!

Contract defenders file suit against Canyon County and the state of Idaho.

^a Full text and information about the complaint are available via the *Idaho Press-Tribune*:

<http://www.idahopress.com/news/?id=22889>.

^b <http://www.idahopress.com/?2009-08-04-Judge-Canyon-county-without-public-defender>

^c <http://www.idahopress.com/news/?2009-09-16-Firm-settles-county-lawsuit>

expected to do their own investigations, but, if an investigator is needed for a “major” case, the request is submitted to one of the firm’s partners for approval. Since an investigator comes out of the public defender budget, it must be justified. Experts are used, but not that often, as they have to be approved by either Fouser or Wiebe.

The office handles appeal cases it believes have significant substantive case issues, sending less substantive appeals to the Idaho State Appellate Public Defender. One of the firm’s senior staff attorneys does many of these appeals. He also does post-conviction cases if they do not involve ineffective assistance of counsel claims against current or former staff attorneys. Post-conviction cases involving ineffective assistance of counsel claims against staff attorneys are assigned to conflict attorneys.

The Wiebe & Fouser law firm employed 15 attorneys and eight support staff, who together represented all appointed cases, other than conflict cases.⁷² Fouser and Wiebe each carry a small number of the most serious and complex felony cases in the office. Wiebe also supervises the training of new attorneys, monitors courtroom performance of staff attorneys, and mentors all staff attorneys on their case issues and presentation. Fouser is primarily responsible for the administrative and fiscal management of the office.

Although the office has an ABACUS case management system, the office manager had to count the cases by hand to provide us with a hand-written list of their attorneys’ FY06 and FY07 caseloads.⁷³ During 2006 – 2007, the office’s felony-only attorneys handled an average of 223 felony cases per year — 48.9 percent above (or 148.9 percent of) the accepted national limit of 150 felony cases per attorney per year.⁷⁴ Attorneys handling mixed misdemeanor/juvenile/CPA caseloads were in breach of their ethical limits to an even greater extent. The magistrate court caseload is the largest for the office. Over the same two-year period, we calculate that each attorney averaged 954 mixed-docket cases per year.⁷⁵ Even if we assume that all of these cases were misdemeanors — juvenile delinquency and Child Protection Act cases are more complex and require greater time and attention — these attorneys were still carrying a workload more than 138.5 percent above (or 238.5 percent of) the standard maximum.

Neither the law firm nor the county has adopted any specific caseload standards. If an attorney believes they have too many cases, getting relief is entirely dependent upon the individual attorney’s willingness to bring such issues to the attention of Klaus Wiebe or Scott Fouser. When notified by one of their attorneys, the partners have intervened to provide some assignment relief. But they do not actively monitor the public defender workload of their staff.

The county contract allows Wiebe & Fouser attorneys to have a private practice in addition to their public defender caseload. This is a major factor for the firm in attracting and retaining attorneys because, even though their salaries are not as high as the Canyon County prosecutors or the defenders in neighboring Ada County, they may increase their incomes through representing private clients. The office does not limit the number of private cases an attorney may handle, but its policy is that those cases cannot interfere with public defender assignments.

Attorneys, mostly the more senior felony attorneys, may handle retained criminal cases in Canyon County as well as other counties, and it is possible for a former public defender client with a new or returning case to hire his previous public defender as retained counsel. One 10-year veteran attorney we spoke with told us he currently carried approximately 20 private criminal case clients with cases in Boise, Nampa and Caldwell. He also had five or six personal injury cases. There is a serious danger that the Wiebe & Fouser attorneys’ ethical responsibilities to their clients give way to the economic requirements the law firm has undertaken.

For conflict of interest representation, the firm subcontracts with two conflict attorneys, the selection of which must be approved by the administrative judge. The firm has to pay for these conflict attorneys out of its flat fee. If additional conflict counsel beyond these two attorneys is required, the county pays for their services at a rate of \$50 per hour, but following an itemized fee approval by the administrative judge.

Before a client’s case can be transferred to a conflict attorney, the conflict must be approved by one of the firm’s two partners. Because payment to conflict counsel is made by the law firm out of its annual fee, there is a significant financial disincentive for the firm to accurately identify conflict cases. This, of course, creates a potential conflict of interest between the firm and its clients. One attorney told us about a situation where, while he

was representing his client, a witness called by the state to testify against his client was arrested during the hearing for refusing to testify. The same attorney was then appointed to represent the non-cooperative witness – who of course had a direct conflict with the original client. When the attorney asked for approval of conflict withdrawal, it was denied by the office. The defender in this case commented that this was a concern. “Conflict” is what the partners say it is, and it has an economic overlay.

Ada County

Ada County, Idaho’s most populous county, has a full-time staffed public defender office. The county commissioners directly appoint the chief public defender and have power over the office’s funding and resources.

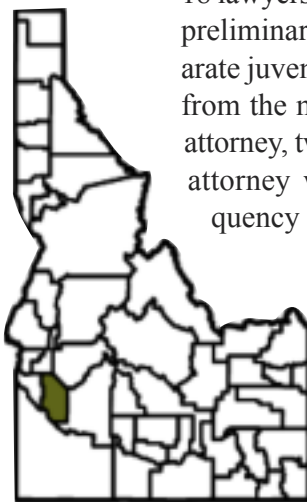
The stability of the Ada County Public Defender’s Office is directly attributable to the stewardship of the chief defender and to a highly experienced senior staff. Alan Trimming, the head of the public defender office, had at the time of our visit been in his position for over 23 years. He lists as the strengths of the office the overall quality of the practice, the dedication of the staff, and the experience of the most senior people, with five of them having between 15 and 28 years in the office. We were impressed with the commitment of the senior staff and also the respect accorded to the chief defender by others in the justice system. The county commissioners told us they admire the chief, who has developed loyalty among his staff and keeps the commissioners informed of issues. The defender office staff described Trimming as available, with an open door, meeting with the felony team leaders four to five times a year and sitting down with lawyers as needed.

The office’s ability to sustain its current level of effectiveness and rapport with the county commission in future years, however, is a major concern. Because of Trimming’s sustained leadership, the defender office has considerable independence in operation. But the selection process for the chief defender is particularly problematic. The selection panel, according to state statute, includes the county commissioners, the administrative district judge, and three special masters from the private bar. The position is “at will” and therefore subject to undue political and judicial interference. What functional independence Trimming has established over the years will have to be recreated from scratch by whomever succeeds him.

Overview: Ada County

Ada County is home to Boise, the state capital of Idaho. With approximately 400,000 people, Ada County has the state’s largest populace, though it is relatively small in terms of land area (1,054 sq. miles). It is the most urban of Idaho’s counties, but at the same time has a low poverty rate (7.9 percent). The median household income is \$55,121, and a 90.8 high school graduation rate.

The Ada County public defender office is the state’s largest trial-level defender agency. The office divides its attorney staff into units based on experience and case type. In the felony unit, for example,



18 lawyers are divided into four trial teams and a fifth preliminary hearing team. The office also has a separate juvenile unit, located in separate facilities away from the main downtown office, with a supervising attorney, two full-time juvenile defenders, and a third attorney who splits time between juvenile delinquency and misdemeanor court caseloads.

Because of the veteran makeup of the attorney staff — some senior attorneys have been with the office for over 20 years — there are a lot of positive aspects to build off of in Ada County. Still, without independence from the county commission, the chief public defender is pretty much stuck with the current resources he has available.

Despite Trimming's leadership, the workload of Ada County public defenders exceeds national standards. In August 2007, the office had nine pending first-degree murder trials, in one of which the prosecutor had announced the intent to seek the death penalty. Trimming would like to have a capital unit in the office. He described the number of murder cases as "unprecedented," leaving him unable to provide caseload relief to attorneys on capital cases until they approach trial. He then provides some "decompression" time after the trial. While the office is fortunate to have an extremely experienced staff of senior felony attorneys, it simply lacks the resources to "ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation."⁷⁶

The commentary to the ABA *Death Penalty Guideline* 6.1 notes: "In terms of actual numbers of hours invested in the defense of capital cases, recent studies indicate that several thousand hours are typically required to provide appropriate representation. For example, an in-depth examination of federal capital trials from 1990 to 1997 conducted on behalf of the Judicial Conference of the United States found that the total attorney hours per representation in capital cases that actually proceeded to trial averaged 1,889."

In some jurisdictions, it is well settled that defense attorneys may only work on one trial-level capital case at one time. In Washington State for example, by court rule "[b]oth counsel at trial must have five years' experience in the practice of criminal law, be familiar with and experienced in the utilization of expert witnesses and evidence, and not be presently serving as appointed counsel in another active trial level death penalty case."⁷⁷ In King County (Seattle), Washington, under the contract between the public defender office and the county, if there are 32 open capital cases then the office would have 64 attorneys working on those cases.

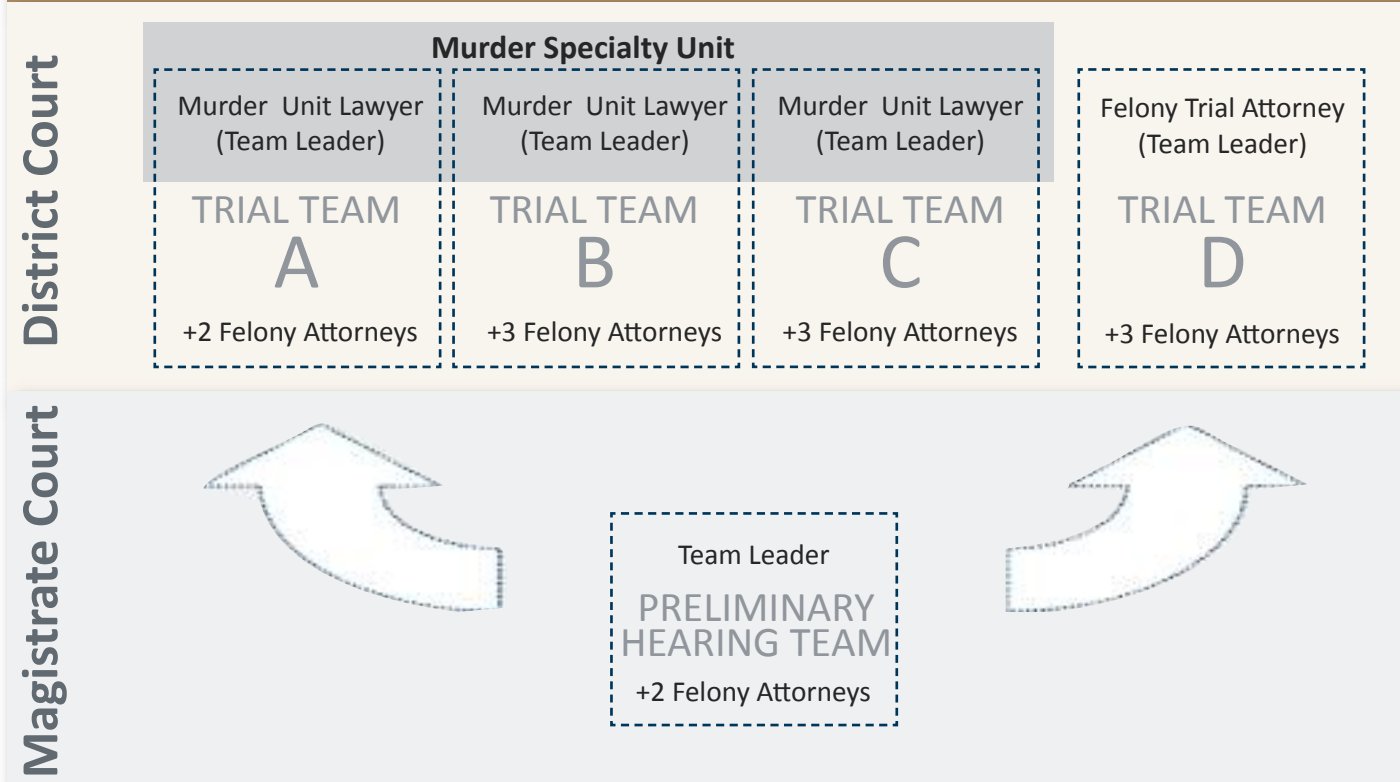
Furthermore, the Ada County defenders lack adequate support staff and resources for capital representation. For example, the defenders do not have in-house mitigation experts. Mitigation specialists and expert witnesses are available, but they generally are not used before the prosecutor makes the death penalty request decision. The office does not have anyone in-house who is available to screen clients for the presence of mental or psychological disorders or impairments. The investigation staff is not trained in mitigation work, and they are not always immediately assigned to murder cases. And the office lacks paralegals and social workers. As one experienced defender said: "the lawyers have to do everything."

Because the Ada County public defender office is unable to sufficiently limit the workload of its homicide attorneys, many public defenders acknowledged being worn out and having to cut corners in their other felony cases. A veteran district court judge commented that, while the public defenders handling serious felonies and murder cases were "among the best defense lawyers in the state," the defenders could use more funding to hire more people. Another judge complimented the attorneys' work, as she had had two death penalty trials with the defender office, both resulting in non-death verdicts. But, between the low level of pay the attorneys receive and the workload imposed upon them, the low morale is cause for major concern.

At some point they are "not going to get people stupid enough to do this job," one attorney told us. They "grind you up, spit you out." At the time of our visit, this attorney was carrying three murder cases, which "is ridiculous." He was also supervising two felony attorneys. Describing the triage he faces in allocating time to a probation violation case in the midst of robbery cases, he said "you're cutting corners all the time." Another attorney once had an exhausting eight-week-long capital trial. His client received a life without parole verdict on a Saturday night and the attorney had yet another felony trial the very next week. "It's tough to have a caseload and a capital case at the same time." This attorney handles 200 felonies per year. Another defender said his active felony caseload is "so time demanding" that it is difficult to do capital work.

While the office is over-extended handling its murder caseload, there is a notable impact on the office's regular felony practice. The felony caseload for the office has increased during the past 25 years: from 818 in 1984; to 2,124 in 1997; to 2,981 in 2005. It dipped to 2,711 in 2006, but reached about 2,750 in 2007. This includes cases at the preliminary hearing stage, indictments, and probation violations. About 15 percent of felony cases result in misdemeanor settlements at the preliminary stage, and a small percentage of those that have gone up to district court from the preliminary stage result in misdemeanors.

Ada County Public Defender: Felony Unit



As of August 2007, there were 12 felony attorneys (all men), handling about 200 open cases each – at that moment. The office received 238 felony cases in the single month of July 2007. That projects to approximately 2,856 cases per year, or 952 per lawyer.⁷⁸ To put that in perspective, consider in a given year there are 2,080 working hours.⁷⁹ That permits a lawyer to spend an average of only 2.18 hours on each case, no matter how serious.

One attorney, who has more than ten years of experience, had 45 active open trial cases and 20 probation cases. He said, yes, “it’s a little too much.” When we asked what gets sacrificed, he said: “Direct client concerns.” He is also unable to file motions on enough of his cases; he files “when I have a handle on something.”

Some of the public defenders are resigned to not being able to spend time with or get to know their client, and to sacrificing direct client concerns. One attorney who tries about five trials a year told us: “The days are gone when I could go to jail and get to know the client.” It is an indication that the attorneys have accepted overwhelming caseloads and the consequences of being over-extended. This is at odds with client-centered representation and can undercut effective assistance of counsel.⁸⁰

One veteran judge said the lawyers “get swamped” and they need more funding. They are “really stretched.” They do “not have as much depth if someone gets sick.” She said the court used to have complaints about the defenders not seeing clients, but that is less true now. The judge feels that if the lawyers ask for a continuance, they need one. The lawyers do not try a lot of cases, but are willing to go to trial, she said.

Based on our conversations while visiting his office, the chief defender made some significant changes.⁸¹ By January 2008, Trimming reported by email he had established a three-attorney murder-only case unit.⁸² Having moved six attorneys from the misdemeanor division to the felony division,⁸³ the office then had a total of 18 felony lawyers (four of whom were women), divided into four trial teams and one magistrate court preliminary hearing team. Leading each of the trial teams is a senior trial lawyer. By December 2007, Trimming reported the average felony caseload for trial team members had dropped to about 185 per attorney (about 20 percent of

which were probation violation proceedings). Still, due to the lack of resources, the office was forced to provide horizontal representation in felony cases (to be discussed in Chapter V), with three of the felony attorneys handling all felony preliminary hearings in magistrate court.

The head of the preliminary hearing team has been with the office for 18 years. He focuses considerable attention on communication with clients and tries to go to the jail as often as possible to see them, sends them police reports and takes their phone calls. He prepares memos for the district court defenders who receive the cases after the preliminary hearing. He has preliminary hearings every day, and had about 75 open cases at the time of our visit.

The volume is such that when one member of the preliminary hearing team goes on vacation, they “beg” other lawyers to come to help. Because time is limited, the lawyers do not “try to chase down” out of custody clients, and they “don’t have the resources to send letters.” The team leader relies on the court’s order to the defendant telling them to contact their public defender. If there are conflict issues, he may try to reach the clients. “If I had half as many cases, it would be easier.” He told us he would settle for one additional attorney, however if there were four attorneys they each would still have more than 700 cases per year and slightly less than three hours per case. The inability of attorneys to get to know their clients before the preliminary hearing, or even to meet with out-of-custody clients, is a major cause for concern.

As overwhelmed as the felony lawyers are, misdemeanor representation is far more under-resourced. The number of misdemeanor cases in Ada County is staggering, with 12,000 cases per judge per year.⁸⁴ The defenders are handling caseloads nearly double national standards. The misdemeanor supervisor told us his attorneys each have 200 to 300 open cases at any one moment and probably 700 to 800 cases per year.⁸⁵ A caseload of 700 misdemeanors per year results in slightly more than two hours of attorney time per case -- simply not enough to do the thorough representation required by constitutional provisions and by attorney ethical requirements, including Idaho Rule of Professional Conduct, Rule 1.1: COMPETENCE, which provides: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

A magistrate judge wondered “if there is effective assistance of counsel” because of the caseload the defenders carry, adding he is “waiting for the ACLU to drop in here.” He noted that in four days, he and his partner judge had 200 jury trials set, most of them represented by the public defender office, but they could only try eight. Another magistrate judge said some of the misdemeanor defenders are “flying by the seat of their pants,” looking at the file the day of the hearing and meeting clients for the first time in court. He said the addition of new judges should be accompanied by new defender staff.⁸⁶ But, as one experienced misdemeanor defender pointed out, the public defender office is at “the bottom of the totem pole” with regard to resources and respect. “We don’t have time to do beyond what we do.” With more time, he said the misdemeanor attorneys could write more briefs and make more visits to the jail (this attorney limits visits to jail to once a week). But, “we’re in court almost all the time.” Another misdemeanor defender told us he lacks the time to look into every aspect of his cases or to track down clients. He does not have time to contact the Department of Transportation to sort out his DWP clients’ records. This same attorney reported he does file a number of motions and had tried four jury trials as of August, winning three acquittals.

The volume affects investigation as well. One lawyer said he had asked the investigators to take photos for a trial, but he was told to have the client take the photos, so he did. The chief investigator, a 28-year veteran of the public defender office, supervises four investigators for 35 lawyers. There are simply not enough resources to comply with national standards related to investigator services.⁸⁷ For example, ABA Standards for Criminal Justice, Providing Defense Services (Third Edition, 1992), Standard 5-1.4 provides:

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

necessary for providing quality legal representation should be available to the clients of retained counsel who are financially unable to afford necessary supporting services.⁸⁸

The investigation unit works on about 20 percent of the office's cases, including serving subpoenas and handling client clothing. They have no secretary, and use their own cars to transport people. By contrast, the prosecutor's office has two cars available. The investigators have to reproduce discovery on city cases, as the city will not provide it. In August 2007, there were three murder cases in the defender office with no investigator assigned to them. The chief investigator had on his caseload two rapes, two "shaken baby" cases, and two murder cases. The office does not have adequate space to make use of investigator interns. One staff investigator with law enforcement experience said that "the system here is obviously skewed against the defense."

Power County

Indigent defense services in Power County are delivered under a series of three contracts with private attorneys: one for primary representation, one for conflicts and a third for overflow cases. All three are administered and funded by the county commission. As things go in small counties — like Power County — there are few strangers in the criminal justice system. The current magistrate judge was the elected county prosecutor for many years, and in that role he had worked closely with local criminal defense providers. Because of his insight, the county commissioners sought out his recommendation in awarding the current contract for primary defender services.

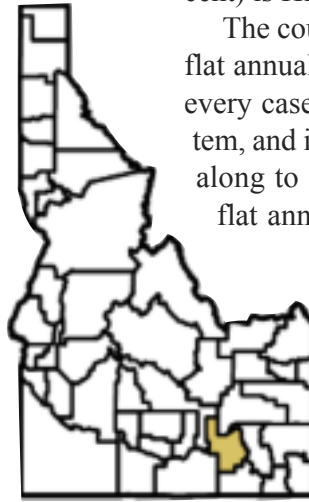
While the commissioners' intentions were clearly well-meaning, the magistrate judge's role in determining who receives the public defense contract sends a clear signal that the defense providers must weigh the wishes of the judiciary against those of their clients or risk a negative report to the county commissioners. A public defense contractor in Power County would quite reasonably feel that they could not politically afford to rock the boat — with either the county commission or the judiciary — by raising systemic challenges or by loudly opposing policies, like unrepresented truancy court defendants and extended juvenile probation sentences, that negatively impact and hurt a substantial number of his eventual clients. A defender might well hesitate before objecting to the over-use of "discretionary time" or protesting the limitation of representation to "proceedings" that have been formally filed. The system simply is not free from undue political interference.

The county currently contracts with Bob Eldredge for primary public defender services. It is a one-year contract — from October 1, 2008 through September 30, 2009 — and it calls for a flat annual payment of \$75,000. In addition to carrying malpractice insurance of at least \$500,000, Eldredge is required to file an annual report with the county commissioners showing the nature of representation provided, the total number of hours devoted to representation, and the status of his cases at the time that the report is due. The contract provides for Eldredge's medical, dental and optical services under Power County's Medical Insurance Program.

Under the contract, Eldredge provides representation for felonies, misdemeanors, probation violations and juvenile court proceedings, including: delinquency cases under the Juvenile Corrections Act, cases under the Child Protection Act⁸⁹ and involuntary termination proceedings where the state is a moving party. He also handles extradition cases, post-conviction and habeas corpus. Eldredge also handles appeals in district court⁹⁰ and civil commitment proceedings.⁹¹ The public defender's contract specifically excludes representation in civil contempt proceedings, adoption, involuntary termination proceedings, any actions before the Idaho Commission on Pardons and Parole, all federal court proceedings, civil indigent claims, and any civil or defense of civil claims brought by or against clients of the office. The contract also prohibits representation of clients on charges stemming from criminal events outside of Power County, except that the defender may "cooperate and assist" proper officials in resolving criminal charges as part of a joint disposition agreement on out-of-county matters and matters represented by the public defender. The Office of the Public Defender does not provide representation in

Overview: Power County

Power County is a tiny county in eastern Idaho. Though it shares a border with prosperous Blaine County, it is a world apart. American Falls, the county seat, is a tiny town about 30 minutes west of Pocatello, the fourth largest city in the state and a major regional population center. There were 7,538 people in Power County as of the 2000 U.S. Census. Of those, 4,111 lived in American Falls. A poor county, 16.1 percent of the population falls below the poverty line. The median household income is \$38,259, and the high school graduation rate is extremely low (74.7 percent). A large portion of the population (21.73 per-



cent) is Hispanic/Latino.

The county contracts with a private attorney for a flat annual fee to serve as public defender. He takes every case that comes into the right to counsel system, and if he identifies a conflict of interest sends it along to a conflict defender also working under a flat annual rate. If there are multiple defendants, there is an overflow defender who is paid hourly for appointed cases. None of the contracts are full-time. In fact, the Power County public defenders also serve as conflict defenders in neighboring counties. Each attorney's offices are located in Pocatello, so they commute to and from the courthouse in American Falls.

first degree murder cases.⁹²

The scope of representation involves "all stages of the proceedings until completed." Necessary representation encompasses investigation, trial preparation, preparation and filing of motions, hearings on motions, briefing, and argument on appeals and retrials following an appeal. This representation must also comply with state and federal constitutional standards, as well as the ethical and professional standards of the American and Idaho State Bar Associations. Though Eldredge is required "at all times" to be "capable of providing not less than two (2) qualified attorneys to act in a particular matter or matters where the interests of the client represented are in conflict with the representation of another client or with Eldredge," the county maintains separate contracts with two other attorneys for conflict representation.

The county contracts directly with Scott Heide for conflict defender services. Heide's contract with Power County for conflict cases pays a flat annual rate of \$16,800. The scope of Heide's contract covers the same areas of representation as that of the primary defender contract. His agreement also limits his cases to a maximum of eight per month, two of which must be felonies.⁹³ If his felony caseload exceeds that limit, Heide will be paid \$75/hour for the additional conflict cases, though it must be agreed upon in advance with Power County. If one of his additional felonies is of a complex nature, he told us he may be paid up to \$100/hour. He must go to the court for approval and compensation authorization for fees for expert witnesses, medical and psychiatric evaluations and investigation services. Heide told us that he does his own investigative work.

Finally, the county contracts with John Souza to provide representation in any additional conflict cases. Souza does not have a written contract with the county. Instead, he has a set verbal agreement that he will be paid \$85/hour for the cases he is assigned. He keeps track of his work hours and sends the clerk of the court a monthly billing statement for his services. He takes all appointments except contempt and mental health cases, and he no longer does death cases as he is not an Idaho Supreme Court death certified attorney.

Eldredge is responsible for screening all cases and determining whether there is a possible conflict. If a conflict exists, he notifies the court and prosecutor, and he makes arrangements for the conflict case to be sent to Scott Heide. If there are multiple defendants in a case, Eldredge keeps the more difficult case for himself, and the overflow clients go first to Heide and then to Souza.

All three contract defenders maintain their private offices in downtown Pocatello, about 20-30 minutes northeast of American Falls. The county allows the attorneys to accept private clients in addition to their public caseload.⁹⁴ All three accept private cases in Power County as well as a number of neighboring counties. In addition to serving as primary contract defender for Power County, Eldredge is a special prosecuting attorney for Franklin County and Caribou County, he does retained criminal and civil legal work, and he also accepts federal criminal appointments through the federal Criminal Justice Act panel. Heide's current law practice consists of contracts in Franklin, Bannock and Power counties for conflict cases, plus private retained clients in both criminal cases and in the civil areas of divorce, child custody, Child Protection Act, adoption, probate and wills & trusts. Souza takes conflict case appointments in Bannock, Franklin and Oneida counties, in addition to his private and overflow cases from Power County.

There are no workload limits for any attorneys accepting appointments in Power County. For example, while Heide's conflict case contract limits him to receiving no more than eight cases per month, no one monitors his total caseload — public and private — to guarantee that he has the time and resources to provide a uniformly high level of advocacy for each of his clients. Furthermore, Eldredge's and Souza's agreements with the county have no set monthly caseload limits at all.

Given their court schedules and travel between their offices in Pocatello and the courthouse in American Falls (not to mention their obligations to their clients in other counties), none of the contractors have the time to fully investigate all of their cases. Due to the restrictions placed on them by the county, there is no adequate independent investigation beyond placing the burden on the client to get his witnesses into court for trial or motion.

Blaine County

Unlike either Canyon or Nez Perce Counties, where one law firm receives the entire public defense contract, Blaine County divides indigent defense services into a set of rotating flat-fee contracts. There is no independent board or commission with oversight responsibility for either the awarding of the defender contracts or for the supervision of the defender contracts or the attorneys, and there is no contract administrator with oversight for indigent defense services. Therefore, the county commissioners have direct control over the entire system.⁹⁵

At the time of our visit, the county had contracts with five private law firms. The term of the contract is one year, and it cannot be assigned to another person or entity without the written consent of Blaine County. In the last several years, the county has not issued a request for proposal. Doug Werth and Doug Nelson, a Roark Law Firm attorney, seem to take the most responsibility for reviewing and negotiating contract terms with the county. NLADA was told that the Roark Law Firm has in the past influenced who received a contract.

The county's annual budget for payment under the five contracts is \$264,000. Additional conflict payments or extraordinary case payments, which the attorneys can apply for in special circumstances, bring the county's total annual indigent defense budget to about \$304,000.⁹⁶

The contract language assumes that most cases may be adequately defended using less than 60 hours of attorney time. The county makes exception in non-capital first and second degree murder cases (and post-conviction appointments for these cases), recognizing that they are more serious and complex. In these cases the county pays attorneys (in addition to the base contract monthly fee) \$100 per hour up to a maximum of 600 hours (excluding travel time), capping the total at \$60,000. If the attorney believes that more than 600 hours are necessary to defend the case, then within 90 days from appointment the attorney must file a request with the court to allow a higher number of hours. It then falls to the judge to establish a new maximum number of hours for which the attorney will be compensated.⁹⁷

In a second exception to the contract's flat rate, the county allows that certain complex non-murder cases may require more than 60 hours of attorney time. In such cases, the contractor can apply to the court to set a maximum cap above 60 hours, where the attorney will work the first 60 hours as part of her monthly flat rate and

will then be paid \$90/hour for any additional time spent on the case.

In both circumstances, bills for attorney time and expenses will be reviewed by a second district court judge (i.e., not the judge presiding over the specific case requiring additional time). The attorneys also have to submit a sworn affidavit to the county board verifying that the services were approved by the court, that they were rendered, and the number of additional hours spent by the attorney on the case.

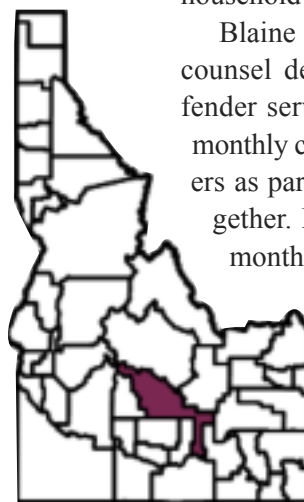
Four of the contractors were sole practitioners.⁹⁸ The fifth, Roark Law Firm, split its caseload among three attorneys on staff, including the named partner Keith Roark. Cases are distributed on a monthly basis, with a given contractor receiving all of the primary case assignments during a given month. Because cases are not assigned by category type or severity level, there is no effort to match the case with the experience level of the attorney. Instead, with the exception of capital cases,⁹⁹ all contractors must be prepared to handle all levels of criminal, delinquency, child protection, Guardian ad Litem, involuntary mental commitments, post-conviction relief,¹⁰⁰ appeals from magistrate to district court and probation violations.

The attorneys decide among themselves which months they prefer for assignment, and if there is disagreement the district court judge decides the assignment rotation, though this latter situation has not occurred. The Roark firm and Doug Werth each contract for three months a year, and Cheri Hicks, Dan Dolan and Chris Simms each contract for two months. For each month of case appointments, the contractor receives a flat fee of \$22,000. Therefore, the three attorneys with two months of assignments are paid \$44,000 each per year and the two attorney entities with three months of assignments are paid \$66,000.¹⁰¹ For access to funds for expert witnesses or investigators, the contract defenders must petition the court; if granted, the funds are paid by the county.

Conflicts are handled by each contractor during their “off month,” as are multi-defendant cases. When an attorney identifies a conflict of interest, a final decision from the court is necessary as to whether or not an attorney may be excused. The case will then be reassigned to the next contract defender on rotation. So, if in October the attorney on rotation has a conflict, the case will be assigned to the November attorney. If there are multiple codefendants, then one goes to the October attorney, one to the November attorney, one to the December attorney and so on until the September conflict attorney. When additional attorneys (beyond the seven attorneys involved in the contracts) are necessary for a multi-defendant case, Blaine County assumes the re-

Overview: Blaine County

Since the opening of the Sun Valley resort in 1936, Blaine County has established itself as an affluent tourist destination. Located in central Idaho, the county has three main population centers: Ketchum & Sun Valley to the northwest (combined population of 11,430); Hailey & Bellevue to the west (combined population of 8,076); and Carey in the center (pop. 513). Most residents live in the western portion of the county, and the southeastern panhandle is particularly sparse. The county doesn’t offer much by way of diversity (90.73 percent white), and has a very high standard of living compared to the rest of the state. The county’s high school graduation rate is 90.2



percent. The poverty rate is 7.8 percent, and the median household income is \$50,496.

Blaine County has, by far, the most unique right to counsel delivery system we observed in Idaho. Defender services are divided into a set of five rotating monthly contracts: some with individual attorneys, others as partners in a law firm entering the contract together. Each attorney entity is assigned a month or months where they receive all primary case assignments. Three contract attorneys with two months of assignments are paid \$44,000 per year. The other two contracts with three months of assignments get \$66,000 each. Conflicts are assigned to the next attorney on the list.

sponsibility for recruitment and payment of additional counsel. The district and magistrate courts maintain their own attorney conflict appointment lists, and in the event that all of the contracting attorneys have a conflict, the court appoints non-contract counsel, frequently from out of county, to the less serious or less complicated cases.

All of the attorneys are allowed to maintain a private civil and criminal practice in Blaine County and other counties, as long as the private practice does not create a conflict of interest with public defender representation. If the attorney becomes “unavailable” due to illness, vacation or other assignment, it is the attorney’s obligation to provide competent substitute legal counsel, but subject to the final approval of the court.

Contract attorneys are required to submit monthly reports to the county, providing for each public defense case: (1) the name of defendant and case number, (2) the charges against the defendant, (3) any conflict information that requires assigning the case to another defender, (4) the number of out-of-court hours spent on the case, (5) the number of in-court hours spent on the case, (6) clerical time spent on the case, and (7) any other miscellaneous costs.¹⁰² The county uses these reports for fiscal rather than attorney-caseload data. At the sentencing hearing, the attorney is also required to submit to the court a statement listing the time spent on the case, so that the court may order the indigent defendant to pay restitution to the county for the public defender’s services.

We did not hear any major complaints from the contract defenders about their caseload numbers, and as attorneys receive assignments “all at once,” they are able to plan accordingly as they near their month on rotation. In 2007, Werth had four months on rotation, during which he handled a total of 95 public defender cases — a mixture of adult criminal, juvenile delinquency, mental health, child protection and few criminal contempt cases. Dolan and Hicks reported they each handle about 50 to 60 cases a year. Roark and Nelson of the Roark Law Firm did not raise any issues about the caseload numbers. Their concern, rather, was only with the amount of payment received under the contract for their public cases. While the Roark Law Firm usually bills retained clients around \$250 per hour, Blaine County contract cases paid an equivalent of about \$50 per hour, representing a clear financial loss for the firm. Roark and Nelson were considering dropping the contract for the next year. So, while the defender workload is not compromised by the current contract system, there are significant problems with the structure of this system.

The low level of compensation offered by the county creates a disincentive for contract attorneys to zealously advocate for their public clients to the same degree to which they advocate on behalf of their retained clients. There are few trials, except in the most serious cases, and almost everything is pled out. There is no systemic litigation, such as challenging the denial of the right to a jury trial for a juvenile charged with a serious offense, and there is no independent use of investigators or experts to challenge the testimony of probation officers, mental health doctors, or state child welfare personnel.

Furthermore, the local attorney capacity for sustaining the current defender contract system is problematic. If the Roark Law Firm leaves the contract, the county does not have sufficient numbers of qualified, proven defense counsel to assume some or all of Roark’s three month primary caseload and conflict cases. Current contractors may be able to pick up a month, but they may not wish to do so, given the impact on their ability to represent private clients. If there is a death case in Blaine County, there is no one other than the Roark attorneys to provide representation, unless the county finds death certified attorneys from another county. The elected county prosecutor indicated that there are problems with finding a sufficient number of qualified defense attorneys whenever there are a multi-defendant drug cases.

The awarding of public defender contracts is not currently governed by a public request for proposal. Instead, there appears to be an informal process whereby the county offers contracts to the current yearly providers. Private political conversations may govern the awarding of the contracts. It appears as though the county consults informally with the Roark Law Firm when vetting contracts for other defender services. Therefore, adding to the obvious problems with potential political interference from the county commission, there are possible conflict issues within the pool of rotating contract attorneys.

Kootenai County

Like Ada County, the stability of the right to counsel delivery system in Kootenai County is directly attributable to the strength of the public defender office's leadership. This, despite the county commission's political influence over the defense function. The office lacks an independent board. Commissioners directly appoint the chief public defender and control the office's budget and funding. Therefore, the only thing protecting the office from undue political interference is the strong personalities of its chief and deputy chief public defenders.

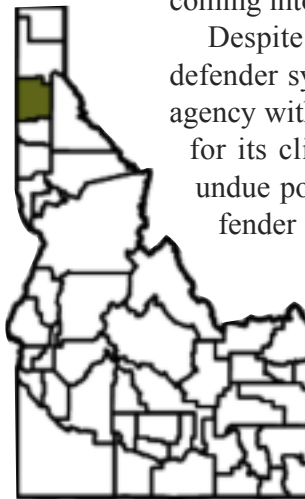
John Adams, the current chief public defender, has been with the office since the late 1980s. Adams has established himself as an institution within the Kootenai County criminal justice system, unafraid to stand up for his office's policies. The public defender office maintains the most client-centered approach to representation of any Idaho system we observed during our study. They are litigious, and as a result the office has more cases on appeal than the larger Ada County public defender office. Adams is justifiably proud of the zealous advocacy provided by his attorneys on behalf of their clients. But their long-standing approach to client representation has generated a significant amount of ill will toward the public defenders from the rest of the criminal justice system.

It is common knowledge that there is animosity between the county prosecutor's office and the public defender's office. Everyone accepted that the then-elected county prosecutor¹⁰³ and the chief public defender did not get along. Judges described the defenders' philosophy as "non-collaborative." Adams believes this is a result of his attorneys' working hard for their clients and refusing to worry about being friends with the prosecutors or judges.

In addition to establishing the office's practice philosophy and serving as its head official, Adams has for the past several years handled the bulk of the office's capital caseload. Adams is a highly regarded criminal defense attorney in Idaho, and one of the few public defenders outside of Boise who regularly tries death penalty cases.¹⁰⁴

Overview: Kootenai County

Kootenai County is a relatively affluent county in the northern Idaho panhandle. Situated on a resort lake, Coeur d'Alene, the county's largest city and county seat, is in the midst of enormous population growth, as is the entire county. As of the 2000 U.S. Census, Kootenai County's population was 108,685, of which 34,514 lived in Coeur d'Alene. In 2006, Coeur d'Alene's population was estimated at 41,328 — a 19 percent growth in six years. In the same period of time, the county's population had swelled to 134,442 (a 23.7 percent growth). All indicators during our visit to Kootenai County were that the rate of growth in the county continues today. And, despite its affluence relative to other Idaho Counties (Kootenai has a 10.4 poverty rate, and a \$40,080 median household income), the county struggles to keep pace with the



population growth in providing adequate funding to the criminal justice system — prosecution, courts and defense — that itself has seen an explosion of cases coming into the courts system.

Despite having the foundation of a solid public defender system — a large staffed public defender agency with an internal culture of zealous advocacy for its clients — there is no independence from undue political interference. The chief public defender is a direct appointee of the county commission and the county commission has control of the office's budget. The office remains understaffed, resulting in excessive workloads, and lacks adequate support staff, meaning the office is forced to triage services in favor of the most serious felony cases, leaving juvenile and misdemeanor clients lacking an adequate level of representation.

Kootenai County Public Defender Office Workloads

Attorney	Appeals	CPA	Civil Commitment	Felonies	Juvenile	Misdemeanors	Misdemeanor Equivalent***	% NAC
Staci Anderson	5	21	5	89	22	290	703	176%
Brad Chapman	8	5	5	155	1	63	626	157%
Michael Clapin	6	25	21	5	83	483	850	213%
Dan Cooper	4	32	13	4	80	380	705	176%
Ed Lawlor *	2	4	3	99	2	50	364	91%
Martin Neils	6	10	5	146	3	102	623	156%
Lynn Nelson	23	18	21	87	1	33	713	178%
Larry Purviance *	7	10	0	14	4	104	281	70%
Dennis Reuter	25	10	10	130	1	81	870	217%
Chris Schwartz*	5	21	8	12	42	246	500	125%
Sarah Sears **	0	1	0	0	11	19	43	11%
Val Siegel	20	6	7	156	0	93	855	214%
Anne Taylor	11	2	8	123	0	83	607	152%
Kevin Walker *	0	1	1	0	9	49	71	18%
Sean Walsh **	0	25	30	7	111	301	652	163%

* Left office before end of 2007

** Joined office midway through of 2007

*** Cases can be weighted as misdemeanors by multiplying: appeals cases x 16; CPAs x 2; civil commitments x 2; felonies x 2.66; and juvenile delinquency cases x 2. "Misdemeanor equivalent" is therefore the sum of all case-types weighted as misdemeanors.

The office currently has four death-qualified attorneys.

The office has seven legal assistants. Adams' legal assistant keeps track of the office's budget and serves as the office's administrative supervisor. Each of the other six are assigned to support two staff attorneys. Additionally, the office has three clerical assistants and two floaters. The office does not employ a staff mitigation specialist or social worker/alternate sentencing advocate.

The day-to-day operations of the Kootenai County public defender office are managed by the chief deputy public defender, Lynn Nelson. A veteran of the office since 1996, Nelson handles the scheduling and case assignments of the staff lawyers and all training for the public defender office. He is the supervisor of the 11 staff attorneys, two investigators and a legal intern. There are no designated attorney unit supervisors or "team leaders."

Nelson coordinates attorney assignments by posting daily court-coverage on a board placed prominently in the office. Following his daily review of the new cases coming into the office, Nelson assigns cases to the staff attorneys. He closely monitors attorney caseloads so that he knows on any given day what types of cases an attorney is carrying and how many cases are currently open on that attorney's caseload. Nelson is therefore able to make quick adjustments as he needs. But there are no set caseload limits or attorney workload limits.

Attorneys carry a mixed caseload, with some attorneys carrying more cases in one area than another, depending in large part on their level of experience. Felony cases are assigned to the more senior attorneys. Adult misdemeanors and juvenile delinquencies are handled by the office's newer and less-experienced defenders. Defenders must do 20 misdemeanor jury trials before they are promoted to felony first-chair level. Along the way,

Kootenai County Part-Time Conflict Attorney Workloads

Attorney	Appeals	CPA	Civil Commitment	Felonies	Juvenile	Misdemeanors	Misdemeanor Equivalent	% NAC
Jonathan Hull	4	11	3	70	5	55	351	88%
Michael Palmer	4	11	3	70	5	55	351	88%
Linda Payne	2	6	1	35	3	28	175	44%

they will also serve as second-chair in some felonies to gain experience. Because of Lynn Nelson’s daily review of case counts, he ensures that no one defender is significantly more overloaded than the rest.

Five attorneys handle most of the office’s felony caseload, and among those the more experienced defenders tend to receive the more complex cases. Brad Chapman, the office’s senior staff attorney, had been with the office for about 14 years at the time of our visit. In 2007, he was assigned 155 felonies — right at the maximum caseload recommended under the NAC Standard of 150 felony cases per attorney per year. But as attorneys handle a mixed caseload, Chapman was also assigned 63 misdemeanors, one juvenile delinquency, five civil commitments, five Child Protection Act cases, and brought another eight cases up on appeal. His 2007 caseload was in fact 57 percent above the NAC Standard. (See table, previous page.) The other four felony attorneys likewise were in excess of the national standards by significant percentages: Anne Taylor (+52 percent), Dennis Reuter (+117 percent), Martin Neils (+56 percent) and Val Siegel (+114 percent).

As with the felony staff, the attorneys assigned predominantly to misdemeanor and juvenile delinquency cases are also in breach of national caseload standards. For example: Dan Cooper (+76 percent), Michael Clapin (+113 percent), Staci Anderson (+76 percent) and Sean Walsh (+63 percent).¹⁰⁵ The national caseload breaches are more serious than even these numbers suggest, particularly with regard to the misdemeanor/juvenile attorney staff, because of the lack of investigative resources. The public defender office has two fulltime staff investigators who are very experienced, but they are assigned to the more complex and serious felony cases.¹⁰⁵ Therefore, what investigation is being done in non-felony cases is handled by the attorneys themselves.

The public defenders’ workloads are further affected by significant deficiencies in the Kootenai courtroom infrastructure. The criminal court facilities verge on abysmal. The justice building, located in downtown Coeur d’Alene among a campus of county government buildings, is where the courthouse holding cells were located, but at the time of our site visit that building had been condemned for several months. Because of this, there was not a single place in the entire courthouse where in-custody defendants could be held while awaiting trial or hearing.

Instead, to the extent that it is necessary to bring defendants to court, they all have to sit in a van in a fenced-in area in a yard adjacent to the courthouse. There are Porta-Pottys located in the yard, for the use of the defendants who are sitting waiting in the van — sometimes for hours on end. The windows of the jury deliberation rooms for the only two courtrooms that have them — courtrooms #5 and #6 — look out into this yard, so that deliberating jurors who look out the windows will see detained defendants in jail garb and shackled. Because of this situation at the courthouse, the entire system does everything possible to avoid bringing defendants to court.

All first appearances, for example, are conducted by video conference. Instead of bringing felony defendants to court for their preliminary hearing settings, the entire system goes out to a courtroom located in the county jail for “Status Call” on the morning of preliminary hearings, so that only those defendants who are actually going to have a hearing will have to be brought to the courthouse in the afternoon. The jail, adult misdemeanor probation office, work release center and the juvenile detention center are all located a short 10-minute drive away, about three miles east of downtown Coeur d’Alene.¹⁰⁷ These infrastructure problems severely and negatively impact all of the critical stakeholders in the County’s justice system.

The Rider System and its Effect on Workloads

Idaho has what is a fairly unique sentencing scheme. This sentencing scheme can result in a district court judge having almost unfettered discretion over a defendant's sentence throughout the full term of the sentence. It can also result in a case being "open" far beyond the conviction and imposition of sentence, such that the public defender cannot close the file.

Under Idaho law, the length of sentence imposed must be within the statutory minimum and maximum established by the legislature, however *the type of sentence is up to the judge's discretion*. In all non-capital cases, the judge may impose any of the following types of sentences:^a (1) withheld judgment - no judgment of conviction is entered and the defendant is required to comply with stated conditions of probation for a stated period (which may include serving some amount of time in jail), after which if he successfully completes probation, the case will be dismissed; (2) probation or suspended sentence - a judgment of conviction is entered and the defendant is placed on probation with conditions for a period of time or a sentence is imposed but some portion of that sentence is suspended and the defendant is placed on probation with conditions during the suspended portion of the sentence; (3) 180-day sentences, known locally as "on a rider" – a prison sentence is imposed in a felony case and the defendant is remanded to prison, however the judge retains jurisdiction over the defendant for 180 days^b following sentencing, during which the judge will decide whether to alter or suspend the remainder of the sentence; or (4) prison sentence within the statutory range.

A judge can use these various sentencing options to hold jurisdiction over a defendant for quite a long time. Here is an example, as explained by one district court judge. First, a defendant can indicate his desire to plead guilty to a felony. The judge can initially "withhold judgment" and place a defendant on probation for a period of time that is equal to the length of the maximum sentence that can be imposed for the offense charged, with conditions of probation that can include requiring the defendant to spend some time in jail. So, for example, if a defendant pleads guilty to a crime that carries a potential sentence of up to 20 years, then the defendant can be on probation under "withheld judgment" for up to 20 years. If the judge finds that the defendant is not compliant, then the judge can enter a judgment of conviction, and impose a sentence (or not) and place the defendant on probation with conditions for up to 20 years. If the judge finds that the defendant

is still not compliant, then the judge can revoke the probation, and actually sentence the defendant to prison; but at any time during the first 180 days of that prison sentence, the judge can bring the defendant back under the district court's "retained jurisdiction" – known colloquially as "on a rider." The Department of Corrections makes a recommendation, which is not binding on the judge, as to whether the defendant should serve out the remainder of his imposed prison sentence (which could be less than the potential 20 year maximum) or be placed back on probation (for the remainder of the 20 year potential maximum). Idaho law expressly provides that "[t]he court in its discretion may sentence a defendant to more than one (1) period of retained jurisdiction after a defendant has been placed on probation in a case." Idaho Code of Criminal Procedure, §19-2601(4). So this means that a district judge can boomerang a felony defendant back and forth from serving 180 days toward an imposed prison sentence, to being on probation for the maximum statutory sentence, to serving 180 days toward an imposed prison sentence, to being on probation ... ad infinitum theoretically for the entire length of the maximum possible statutory sentence. One would presume that any judge would eventually tire and would finally send a recalcitrant defendant to prison to serve out his imposed sentence, but there is nothing under Idaho law that seems to cabin a district judge with a strong paternalistic streak.

In the example given above, it is likely that a defendant would be under the jurisdiction of the criminal justice system for a much shorter period of time if he were actually sentenced to serve a prison term at the time of his plea and sentence. Felony prison sentences in Idaho have two components that together make up the entire "Unified Sentence." There is a "fixed" or "determinate" portion of the sentence, during which the defendant does not receive any good time diminution and cannot be released from prison prior to serving the entire fixed portion of the sentence. This is followed by an "indeterminate" portion of the sentence, during which the parole board has discretion to release the defendant at any time. Together, the fixed and indeterminate sentences make up the entire Unified Sentence. But if a judge sentences a defendant to a prison sentence, and does not bring him back within the 180-day retained jurisdiction period, then the judge loses jurisdiction over the defendant. So for our same defendant who could be placed on probation for up to 20 years (the maximum statutory sentence available for the

crime of which he was convicted), if he were actually sentenced to serve a prison term, that sentence might be, for example, a Unified Sentence of 10 years, with eight fixed and two indeterminate (because most defendants do not receive the maximum statutory penalty for the offense of which they are convicted - and in particular those defendants whom a judge would place on probation would typically not receive the maximum statutory prison sentence).

There are also significant effects on the caseloads of the public defenders. For any case with either a withheld judgment or on a rider, the case *cannot be closed* because

it is not yet final. An entire wall of filing cabinets in the Kootenai County public defender office contains files for defendants on riders at any given moment.

^a See e.g. Idaho Criminal Rules, Rule 33(d) and Rule 35; Idaho Code of Criminal Procedure, §19-2601 and §19-2604.

^b Although “riders” are intended to be for 180 days, most defendants actually only spend 90 days in prison on a rider before being returned to the county. Most defendants serving rider time are sent to Cottonwood.

The Additional Impact of Treatment Courts on Workloads

This problem is compounded sometimes by the practices in the Treatment Courts. Kootenai County again provides an example. In addition to standard felony, misdemeanor and juvenile courts, Kootenai has several treatment courts. There is a mental health court, a drug court and a DUI court.

The information provided by the Mental Health Court judge is informative about the view of treatment courts in the county. Kootenai County established its Mental Health Court approximately five years ago. The criteria for admission to the program is that a defendant must have both: (1) a significant/severe mental illness (such as bi-polar, schizophrenia, major recurring chronic depression); and (2) an addiction or abuse (of drugs/alcohol). The judge is considering allowing a deviation from this criteria for some defendants who have only a mental illness. The minimum amount of time to complete the program is one-and-a-half years, but there is no maximum amount of time that a defendant can

remain in the program (or be ordered to remain in the program). Typically, there are approximately 30-40 felony defendants and 3-4 misdemeanor defendants in the program at any one time. If a defendant successfully completes the Mental Health Court program, then the charge upon which s/he was convicted will be dismissed.

The Mental Health Court judge positively lights up when talking about the treatment court program. He says: “I love it. It is the highlight of my week.” He explained that there are “very few sociopaths [in the world]. So when we send someone to prison, it is meant to be rehabilitative.” Before there were treatment courts, the judge sentenced a client to probation or prison and hoped for the best, but a judge seldom knew whether the sentence he imposed had a successful effect on a defendant or not. Now, with treatment courts, a judge gets to personally experience the success (or failure) of his sentence on a defendant.

The Mental Health Court judge also explained his view of the role of the

public defender in the treatment court. According to the judge: “once a defendant is in mental health court, the public defender [assigned to the treatment court] represents every defendant in the mental health court program. The public defender attorney is both an advocate for the defendant and a team member.” The judge did not explain how he imagines that a public defender can advocate zealously on behalf of a defendant and simultaneously participate on the team, nor did he explain how a public defender can be tasked to represent a defendant who has their own private attorney or who is not eligible for representation by a public defender. The judge advised that a defense attorney must be present in mental health court proceedings: where a defendant is being discharged from the program, or where sanctions will be imposed on the defendant – however he qualified that and said sanctions “might be imposed without an attorney present on behalf of the defendant.”

Court Order to Correct State Retreat from *Gideon's* Promise: Nevada

Unlike Idaho, the Nevada Legislature took initial steps to move to state funding and oversight of the various right to counsel obligations in 1971, creating a statewide commission to oversee services of the State Public Defender in the rural counties. The Nevada Legislature, however, soon started a long retreat. The first step was to disband the state's commission in 1975, making the State Public Defender a direct gubernatorial appointment. In 1989, the State Public Defender was placed under the Department of Human Resources, which means: (1) to secure adequate funding the State Public Defender must first advocate amongst the various departments within Human Resources, and (2) the Human Resource budget must compete against the other executive branch funding priorities. After this re-organization, services continued to decline. With such undue political interference, the State Public Defender was ill-equipped to fight for appropriate resources.

The failure of the State Public Defender system led many rural counties to a Hobson's choice. They could continue to participate in the State Public Defender system and receive some financial assistance, but inadequate services, or they could shoulder the entire financial burden, but have greater input regarding

the delivery of services. Nye and Lyon counties left in the aftermath of the re-organization of the State Public Defender system in the early 1990s. Douglas County soon followed. The current decade also brought a retreat from financial support of the State Public Defender. Originally providing nearly 80 percent of all costs, the Legislature has gone back on that commitment to the point where they now provide only 20 percent of all indigent defense costs. The result is that only two counties remain in the system.

In March 2007, the *Las Vegas Review-Journal* began running a spotlight series on the continuing problems of indigent defense in Nevada. Based on the articles, the Nevada Supreme Court formed an Indigent Defense Task Force. In January 2008, the Court issued a court order that adopted as many of the ABA *Ten Principles* as prudent, including adopting performance guidelines, ABA death penalty guidelines and juvenile and appellate-specific performance standards. The order also established a permanent indigent defense commission and promulgated rules on the uniform collection of indigent defense data (caseloads, experts, expenditures, etc.) and eligibility thresholds (250 percent of Federal Poverty Guidelines).

Judges are not assigned to one permanent courtroom. Instead, they are assigned each day to a different courtroom for a morning docket, and then possibly rotated to a different courtroom for the afternoon docket, depending upon a particular day's court listings and types of trials or hearings. Therefore, the judges do not know where they are sitting until the very morning they are scheduled to hear a case or manage a docket, and neither does anyone else.

This random assignment system creates significant problems for the public defender office. The chief deputy each morning has to first find that day's "final judicial assignment schedule" and then, at the last minute, track down or move around his staff attorneys to make sure that all the courtroom dockets and listings are covered. Therefore, on top of workloads that already exceed national standards, the defenders are forced to react to daily coverage issues that pull them from court to court and out to the county jail and back, leaving them with less and less time to devote to their primary duties in representing each client.

The public defender office is responsible for recruiting and contracting with attorneys to handle conflict of interest case assignments. There are no standards or oversight of the workloads of conflict attorneys under contract with the Kootenai County public defender office. They may well have the same workload issues as do the staff public defenders, but without adequate oversight it is impossible to know. The deputy chief defender makes the conflict determinations for each case,¹⁰⁸ and then assigns out the conflict cases to one of three contract attorneys. In 2007, the conflict defenders handled 11 appeals, 28 CPA cases, 7 civil commitments, 175 felonies, 13 juvenile delinquencies and 138 misdemeanors. At the time of our visit in 2008, the annual conflict workload was divided into shares among the contractors:¹⁰⁹

- Linda Payne, one-fifth @ \$3,250 per month (\$39,000 annually);
- Jonathan Hull, two-fifths @ \$6,500 per month (\$78,000 annually); and
- Michael Palmer, two-fifths @ \$6,500 per month (\$78,000 annually).

Using the previous year's caseload numbers, it appears that each of the attorneys would carry caseloads comfortably below the national standards: Payne (-56 percent), Hull (-12 percent) and Palmer (-12 percent). But these

attorneys worked only part-time on their publicly appointed contracts. They also have private paying clients. If Palmer, for example, represented only 20 private clients in felony cases or 50 in misdemeanors, on top of his conflict appointments, he would reach the maximum caseload allowed under national standards. Furthermore, Lynn Nelson projected that the conflict caseload would increase significantly in 2008.¹¹⁰ Nelson told us his office has a difficult time recruiting conflict lawyers, particularly with the low level of pay, and they need more than just three conflict attorneys to cover the workload.

When it comes to the office's public defender staff, Nelson estimated they are at least four or five attorneys short of what they need to meet the demands of their workload. In truth, the public defender (non-conflict) caseload in Kootenai County requires upwards of 22 staff public defenders.

Parity of Resources

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.”^a One of the reasons *Gideon* determined that defense lawyers are necessities rather than luxuries is 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; federal and state crime labs; state retained experts, etc. – can overwhelm a defendant unless he 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* went so far as to declare: “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.”^b

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 “[s]alary 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.”^c

The greatest discrepancy between prosecutorial resources and defense resources in the Idaho counties studied is in access to investigators. The essential foundation for effective criminal defense (and criminal prosecution) is investigation. While prosecutors throughout Idaho can rely upon the full array of city, county, state and federal law enforcement resources, most public defense attorneys in Idaho have only limited at best investigative capacity. In Bonneville County, the defender does not have any investigation staff and has no social workers or paralegals. They have an annual budget of approximately \$6,000 for investigation, and beyond this they must petition the court for investigative funding. Similarly, in Canyon County the contract public defense law firm does not have a single investigator on staff, and must hire them on a case by case basis, either paying for them out of the flat-fee contract amount or seeking permission from a court for extraordinary expenses. And in Power County, the defenders must also apply to a judge for approval to hire an investigator in each case. No prosecutor has ever had to seek per-

ABA 8th Principle

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. Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. 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, and separately fund expert, investigative, and other litigation support services. 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. 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.

mission or funding from a judge in order to hire an investigator – nor should defense counsel be required to do so. The lack of investigative resources for defendants compounds the already grinding workloads of Idaho public defense system attorneys.

^a *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 five 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). See also 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).

^b *Argersinger v. Hamlin*, 407 U.S. 25, 43 (1972).

^c *Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations: Report of the National Symposium on Indigent Defense*, Office of Justice Programs, March 2000, NCJ 181344, p.2.

The Failure of Idaho Counties to Uphold the Right to Counsel in Misdemeanor Courts

Understanding the Right to Counsel in Misdemeanor Cases

Most citizens' only encounter with the criminal justice system will be in misdemeanor court. All misdemeanors in Idaho carry a potential penalty of up to one year in jail, and therefore every person charged with a misdemeanor who cannot afford to hire their own attorney is entitled to have one appointed to represent them. These are relatively minor offenses, such as driving without privileges, low-level shoplifting, possession of small amounts of marijuana, underage possession of alcohol and so forth. In Idaho, as in all states, the misdemeanor courts are the workhorse of the criminal justice system. For example, in 2007 statewide there were 74,210 misdemeanor cases filed, while there were only 6,135 felony cases filed.¹¹¹ That means there are 12 people appearing in Idaho's courts on misdemeanors for every one person appearing on a felony.

Unless a person has committed a misdemeanor in a particularly egregious way or is a peculiarly notorious repeat misdemeanor offender, they are far more likely to be sentenced to pay a fine and court costs than to be sent to jail. Law enforcement officers in Idaho are authorized to make an arrest for most misdemeanor offenses. When a person arrives at jail on a misdemeanor arrest, they will have a preset bond, except on domestic violence cases where they must see the magistrate judge to have their bond set.¹¹² But a poor person may not be able to post bond and so may remain in jail pending trial on their case, which typically means they will lose their job (if they have one) and/or be unable to pay their bills and support their family while in jail. The desire to get out of jail as soon as possible leads many people to plead guilty quickly, without consulting a lawyer. Even for those who are able to make bail on a misdemeanor arrest, or who are not arrested and merely receive a summons to appear in court, the days spent at the courthouse dealing with the charge will mean missing work or having to pay for child-care or worrying about what the outcome of their case will be. Again, avoiding these costs of both time and money, particularly for a person who is already struggling financially, often means pleading guilty without talking to a lawyer and doing so even if innocent. While people of means are inconvenienced by these things, they nonetheless have the resources to deal with them.

Most people convicted of a misdemeanor, whether by a guilty plea or following a trial, will probably not be sentenced to serve time in jail. When a judge sentences a person convicted of a misdemeanor to pay a fine and court costs, the person is typically also placed on probation for some period of time. If they do not pay their fine and court costs on time, then the judge can revoke their probation and send them to jail. A Bonneville County public defender summed it up like this: "I tell my clients: 'as long as you're paying your fines, you won't get your probation revoked. But if you fall behind, the county wants your probation revoked.' See, the misdemeanor caseload is a cash cow for them." Another Bonneville attorney said: "We're very good

at minimizing jail time at the front end. Every judge imposes the maximum sentence and suspends it. So you get far more people serving lengthy sentences on probation violations than on up-front sentences. We have no chance at getting jail time knocked off on a probation violation.” Poor defendants who were already unable to make ends meet — who may well have ended up in the misdemeanor court to begin with because they had failed to pay a traffic ticket, or drove without car insurance because they could not afford it — are far more likely than more affluent defendants to be unable to pay their court-ordered fines and court costs, have their probation revoked and end up serving jail time on a misdemeanor charge with all of the attendant life ramifications that entails.

The United States Supreme Court noted all of these same aspects of misdemeanor cases when it held, in *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972), that the Sixth Amendment requires a defendant to receive an attorney if faced with loss of liberty on any charge, no matter how minor. The Court observed:

The requirement of counsel may well be necessary for a fair trial even in a petty offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more. ... While only brief sentences of imprisonment may be imposed, the cases often bristle with thorny constitutional questions....

Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor, as well as in felony, cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.

In addition, the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result. ... There is evidence of the prejudice which results to misdemeanor defendants from this “assembly line justice.”¹¹³

From 1972 until 2002, faced with the clear ruling of *Argersinger* that all misdemeanor defendants are entitled to counsel if they are going to be jailed for their offense, many jurisdictions throughout the country took the position that they did not have to provide an appointed attorney to indigent misdemeanor defendants who were going to be placed on probation with a suspended sentence. This led to the case of *Alabama v. Shelton*, 535 U.S. 654 (2002). Mr. Shelton was indigent and did not receive an attorney to defend him on his misdemeanor charge. He was convicted and was placed on probation with a suspended sentence. The United States Supreme Court clarified in *Shelton* that a suspended sentence cannot be imposed unless an indigent defendant is provided with an attorney during the prosecution on the charge — it is insufficient to wait until a probation revocation hearing to provide the defendant with a lawyer.¹¹⁴ The Court held that, if the individual was not afforded counsel at the time of the original charge, the judge is foreclosed from incarcerating that individual for failing to comply with one or more of the conditions stemming from probation or a suspended sentence.¹¹⁵

Alabama v. Shelton

A *Alabama v. Shelton* 535 U.S. 654 (2002) held that an accused person has a right to counsel at trial even if he is ultimately sentenced to a totally suspended period of incarceration, with the defendant’s continued freedom conditioned upon meeting one or more probationary requirement. Should the state accuse the probationer of violating the terms of his probation, the judge cannot punish him by locking him up unless the probationer was afforded the right to be represented by a lawyer when he originally went to trial or pled guilty. Moreover, the Court explained, the failure to initially provide the lawyer cannot be remedied by providing an attorney at the hearing where the judge determines whether to revoke the suspended sentence because, at that point, the attorney can only challenge the facts surrounding the probationer’s alleged failure to meet the conditions of the suspended sentence and not the facts of the underlying conviction.

The Necessity of Early Appointment of Counsel

Requirements for prompt appointment of counsel are based on the constitutional imperative that the right to counsel attaches at “critical stages” occurring before trial, such as custodial interrogations,¹¹⁶ line-ups¹¹⁷ and preliminary hearings.¹¹⁸ 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.¹¹⁹ Such promptness is equally important elsewhere in Idaho's statutory scheme; valid legal challenges that could result in dismissal of a case should not be delayed for lack of counsel to identify and raise them at the first opportunity.

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. Most standards take requirements regarding early assignment of counsel beyond the constitutional minimum requirement, to be triggered by detention or request even where formal charges may not have been filed, in order to encourage early interviews, investigation and resolution of cases, and to avoid discrimination between the outcomes of cases involving public defense clients and those clients who pay for their attorneys.¹²⁰

Magistrate judges in Idaho have jurisdiction over misdemeanors from arrest through disposition of the charge. For each defendant charged with a misdemeanor, it is the magistrate judge who is responsible for: advising him of his right to appointed counsel if he cannot afford to hire an attorney; ensuring that, if the defendant wants to proceed without an attorney, he makes a voluntary, knowing and intelligent waiver of his right to counsel; and, if the defendant asks for an attorney to be appointed, deciding whether he is in fact indigent such that he is entitled to have a publicly-funded attorney. All of this occurs at the defendant's first appearance before the magistrate judge, which will also be the arraignment on the misdemeanor charge. Sadly, magistrate judges in each of the counties we studied use subtle and not-so-subtle methods to dissuade misdemeanor defendants from requesting and receiving the attorneys to which they are constitutionally entitled, and they do so in the ways that they carry out each of their responsibilities.

ABA 3rd Principle

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.

1. Advising Defendants of Their Right to Counsel & Informed Waivers of that Right

When a person is charged with a misdemeanor and comes to court on that charge, they do not know what to expect. Unlike those who work in the criminal justice system, they are not familiar with court procedures or the mechanisms by which their charge will be resolved — they are waiting to be told what to do. In theory, the first thing they should hear is an explanation of their constitutional rights and how those rights will be carried out, and in theory this explanation should come from the judge.

Every person has the right to a trial on the charge brought against them, the right against self-incrimination, the right to confront and cross-examine the witnesses whom the state will bring against them, and the right to have an attorney represent them and to have an attorney appointed at public expense if they cannot afford to hire their own attorney.¹²¹ While this might seem simple and obvious when we are watching the latest criminal law show from our living rooms, when we are the defendant in a courtroom we need to know more about how to exercise these rights and what will happen if we give them up. This is particularly true in Idaho for an indigent defendant, where the very first thing she will be asked is whether she wants to plead guilty or not guilty to the charge and will be required to enter one of these pleas before she ever has an opportunity to talk to a lawyer.

In some Idaho misdemeanor courts, the only advice of rights that a defendant will receive is a written form

which they will be handed by the clerk of court. This is often accompanied by a warning that a public defender is not free and that the defendant will have to pay the county if they ask to have a lawyer appointed to represent them. No effort is made to ensure that a defendant can actually read either the advice of rights or the warning about the cost of a lawyer, so there is no protection for the illiterate, the mentally impaired, or the non-English speaker. None of the forms or signs posted in the counties we visited told clients they would only be required to reimburse the county for their appointed lawyer if they could in fact afford to do so. None of the notices gave clients any indication as to what amount they would ultimately be required to pay to the county for the lawyer to which they are entitled because they are indigent.

Some courts, such as those in Bonneville and Kootenai Counties, rely heavily on a videotape recital of the defendant's constitutional rights.¹²² There is no guarantee that defendants have a full understanding of their rights from watching the video. In some courts, this video is not shown until after the defendants gathered in the courtroom have been told to talk to the prosecutor about working out a guilty plea and sentencing agreement, leaving the clear impression that a defendant should first meet alone and uncounseled with the lawyer for the state and then, and only then, ask for appointment of a defense attorney if they do not reach a plea agreement with the prosecutor. In some instances, defendants are even told explicitly that they cannot talk to the prosecutor if they request an attorney and will have to return to court again, but if they do not request an attorney they can talk to the prosecutor and possibly resolve their charges today. Especially for an indigent defendant who is in jail, the possibility of getting out of jail today creates a strong incentive to forego asking to have a lawyer appointed.

Despite the U.S. Supreme Court's seven-year-old ruling in *Shelton*,¹²³ many judges we interviewed frankly acknowledged that they simply will not appoint counsel if they do not plan on sentencing a person to jail immediately. Again, all misdemeanors in Idaho carry a potential penalty of up to one year in jail, and therefore every person charged with a misdemeanor who cannot afford to hire their own attorney is entitled to have one appointed to represent them. But judges told us, unless a defendant is charged with a serious misdemeanor (such as driving under the influence, driving without privileges, battery, domestic violence, etc.), they know they will not send a defendant to jail and will instead put the defendant on probation with various conditions and a requirement to pay fines and court costs. If a defendant successfully completes probation, then in the view of the judges: no harm, no foul. If a defendant is alleged to violate a condition of probation, *then* the judge will appoint a lawyer to represent the defendant at the probation revocation hearing where it will be decided whether they are now going to jail. This, of course, was exactly the factual situation before the Supreme Court in *Shelton* and is exactly what the Supreme Court plainly said is prohibited by the Constitution — and yet it continues to occur in Idaho. Of perhaps even greater concern is that defendants are never told why they are not offered a public defense attorney or are denied the right to one if they have already filled out an application requesting appointed counsel. This leaves them even less likely to ask the court to appoint an attorney to counsel and represent them in any later interactions with the criminal justice system, whether on a new charge or in a probation revocation proceeding.

After the judge advises a defendant of her rights, including her right to have counsel appointed if she cannot afford to hire her own attorney, the next step in the proceeding should be for the judge to ask the defendant whether she has an attorney or would like to apply to have an attorney appointed or would prefer to represent herself. This is not, however, what we observed in most of the courtrooms we visited. Instead, in some jurisdictions we visited, the defendants were expressly told that a prosecutor would meet with them to discuss their charge and make a plea offer.

Any person charged with a crime, whether felony or misdemeanor, has the right to represent themselves if they so choose. When a person works out a plea agreement with the prosecutor and pleads guilty to the offense, they are choosing to represent themselves. And when this occurs at their arraignment date — the first time they go to court on a charge — a defendant is giving up all of their rights without ever having the opportunity to receive advice from an attorney, consider any factual or legal defense they may have to the charge, talk to a lawyer

about the possible sentencing options that might be available to them, and learn from that lawyer about the collateral consequences that may ensue from their decision to plead guilty. As the *Argersinger* Court said of guilty pleas: “Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution. In addition, the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result. ... There is evidence of the prejudice which results to misdemeanor defendants from this ‘assembly line justice.’”¹²⁴

The focus of misdemeanor courts in Idaho seems designed to yield speedy dispositions by getting as many defendants as possible to plead guilty at their arraignments and without having to provide counsel to those who are indigent. First, there are not any public defense attorneys present at the courthouse for misdemeanor arraignment, so any defendant who is asking to have a lawyer appointed will necessarily have to come back to court on another day if they want their attorney to be present with them. This is true, even though just last year the Supreme Court again emphasized the early attachment of the right to counsel in *Rothgery v. Gillespie County, Tex.*, ___ U.S. ___, 128 S.Ct. 2578 (2008), holding that a defendant’s right to counsel attaches at the initiation of the adversarial process and without regard to when the prosecutor becomes involved.

Second, prosecutors are present at misdemeanor arraignments for the purpose of negotiating plea agreements with defendants. If the defendant and the prosecutor reach an agreement for the defendant to plead guilty, in some jurisdictions the defendant will go before the judge to enter that plea and then the court *may* advise the defendant she is entitled to counsel before she enters her guilty plea; in other jurisdictions the defendant will not even appear before the judge but instead can enter her guilty plea and receive her sentence simply by signing a form.

Our courts are supposed to protect defendants by ensuring, before they waive their right to counsel and plead guilty, a judge confirms the defendant understands the rights he is giving up. The Constitution grants a defendant the option to waive her right to counsel and represent herself,¹²⁵ to be valid, however, a waiver of counsel must be voluntary, knowing and intelligent.¹²⁶ The U.S. Supreme Court most recently addressed the requirements for an effective waiver of the right to counsel prior to entry of a guilty plea in *Iowa v. Tovar*, 541 U.S. 77 (2004). Before a judge will allow a defendant to waive his right to counsel and enter a guilty plea, the judge must ensure the defendant possesses sufficient information to make an intelligent election dependent on a range of case-specific factors, including his education or sophistication, the complexity or easily grasped nature of the charge, and the stage of the proceeding.¹²⁷ Idaho law similarly provides:

A person who has been appropriately informed of his right to counsel may waive in writing, or by other record, any right provided by this act, if the court concerned, at the time of or after waiver, finds of record that he has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise according to law. The court shall consider such factors as the person's age, education, and familiarity with the English language and the complexity of the crime involved.¹²⁸

Tovar confirms that warnings about the pitfalls of proceeding uncounseled must be “rigorous[ly]” conveyed.¹²⁹ Any waiver of the right to counsel must protect against the danger that “innocent men pitted against trained prosecutorial forces may waive counsel and plead guilty to crimes they have not committed, if they think that by doing so they will avoid the publicity of trial, secure a break at the sentencing stage, or simply get the whole thing over with.”¹³⁰ Moreover, taking the time to ensure a defendant actually knows what he is doing before accepting his waiver and allowing him to plead guilty without counsel protects the criminal justice system from unnecessary appeals, post-conviction and retrials.¹³¹

It is clear, from our observations and discussions in each county we studied, that in most cases the inquiries conducted before allowing misdemeanor defendants to enter uncounseled guilty pleas are not sufficient to comply with the federal Constitution or with the Idaho statute. Judges lack the time and resources to know the defendant’s education and familiarity with English or the complexity of the crime. A simple enumeration of rights

recited through a video recording or posted on a sign by the clerk's office does not ensure a defendant actually understands her rights, in order to be able to make a knowing and voluntary waiver of them. Too often, people in need of public defender services are undereducated, illiterate, mentally ill and/or developmentally delayed. Without counsel to advise them, they become victims of exactly the assembly-line speed over justice systems decried in *Argersinger*. It is safe to say that Idaho's trial courts lack the safeguards necessary to prevent defendants from offering, and judges from accepting, uninformed waivers of counsel.

2. Determining Eligibility for Appointed Counsel & Recoupment of Costs

After a judge advises a defendant of her constitutional rights, if the defendant asks to have an attorney appointed, the next step is to determine whether this defendant is "indigent" and therefore eligible to receive an attorney at public expense. Though *Gideon* and its progeny require states to provide counsel

A Uniform Standard for Determining "Indigency"

For those jurisdictions wanting to assure tax-payers no one is getting a free ride, national standards are clear on how best to conduct eligibility screening. The *Guidelines for Legal Defense Systems in the United States* issued by the National Study Commission on Defense Services state "[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."^a "Substantial hardship" is also the standard promulgated by the ABA.^b While *ABA Defense Services Standard 5-7.1* makes no effort to define need or hardship, it does prohibit denial of appointed counsel because of a person's ability to pay part of the cost of representation, because friends or relatives have resources to retain counsel, or because bond has been or can be posted.

In practice, the "substantial hardship" standard has led many jurisdictions to create a tiered screening system. At some minimum asset threshold, a defendant is presumed eligible without undergoing further screening. Defendants not falling below the presumptive threshold are then subjected to a more rigorous screening process to determine if their particular circumstances (including seriousness of the charges being faced, monthly expenses, local private counsel rates) would result in a "substantial hardship" were they to seek to retain private counsel. Examples of such presumptive standards include: a) a defendant is presumed eligible if he or she receives public assistance, such as

Food Stamps, Aid to Families of Dependent Children, Medicaid, Disability Insurance, or resides in public housing; and b) a defendant is presumed eligible if he or she is currently serving a sentence in a correctional institution or is housed in a mental health facility.

For those who do not meet the presumptive standard but who may still qualify under the "substantial hardship" standard, many jurisdictions have developed financial eligibility formulas that take into account a household's net income, liquid assets, "reasonable" necessary expenses and other "exceptional" expenses. The National Study Commission on Defense Services *Guidelines* is more comprehensive than other national standards in guiding this second tier of eligibility determinations.

The first step is to determine a defendant's net income (usually verified through documented pay stubs) and liquid assets. Under Guideline 1.5, liquid assets include cash in hand, stocks and bonds, bank accounts and any other property that can be readily converted to cash. Factors not to be considered include the person's car,^c house,^d household furnishings, clothing, any property declared exempt from attachment or execution by law, the person's release on bond, or the resources of a spouse, parent, or other person.

Next, the screening agency assesses a defendant's reasonable necessary expenses and other money owed for exceptional expenses, like medical care not covered by insurance or court-or-

Best Practices: Eligibility Screening

Nevada and Louisiana have both set uniform eligibility screening procedures to eliminate any bias in the determination of who gets a publicly financed attorney. Louisiana did it statutorily, while the Nevada Supreme Court did it through an Administrative Court Order. The language of the Nevada Order mirrors the Louisiana statute:

A person will be deemed "indigent" who is unable, without substantial financial hardship to himself or to his

dependents, to obtain competent, qualified legal representation on his own. "Substantial financial hardship" is presumptively determined to include all defendants who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Disability Insurance, resides in public housing, or earns less than two hundred percent of the Federal Poverty Guideline. A defendant is presumed to have a substantial financial hardship if he or she is cur-

rently serving a sentence in a correctional institution or is housed in a mental health facility. Defendants not falling below the presumptive threshold will be subjected to a more rigorous screening process to determine if their particular circumstances, including seriousness of the charges being faced, monthly expenses, and local private counsel rates, would result in a "substantial hardship" were they to seek to retain private counsel.

for those unable to afford counsel, the Supreme Court has never said how courts are to decide who can afford to hire their own lawyer and who cannot. Jurisdictions across the country have weighed various interests and taken varying approaches when considering how best to make such determinations.

Some locales have determined that the important fiscal goals of cost-control and accountability are served best by implementing procedures to ensure no one who can possibly afford counsel is ever appointed one at public expense. In these areas of the country, there is often thorough verification of financial information provided by the defendant — many times by an independent pre-trial services unit and often at substantial cost. This level of eligibility screening takes significant time as well.

At the other extreme are jurisdictions throughout the nation that have no eligibility guidelines and conduct no inquiry, or simply appoint a lawyer for all defendants who claim they cannot afford retained counsel. The reasons for such systems (or non-systems, to be more accurate) vary: poverty rates among the defendant population may have been empirically found to be so high that the cost of eligibility screening would exceed the potential

Federal Poverty Guidelines

Family Size	Poverty Guideline	200%
1	\$10,400	\$20,800
2	\$14,000	\$28,000
3	\$17,600	\$35,200
4	\$22,200	\$44,400

dered family support. Though jurisdictions vary as to what constitutes “necessary” expenses, most include rent, day-care and utilities. Screeners then determine an individual’s available funds to contribute toward defense representation

by adding the net income and liquid assets and subtracting from the total the sum of reasonable and exceptional expenses. [(Net Income + Liquid Assets) — (Reasonable + Exceptional Expenses) = Available Funds]. The resulting “available funds” can then be measured against a second tier presumptive eligibility standard. In many jurisdictions, this second presumptive level is tied to a percentage of the Federal Poverty Guidelines. For instance, both Louisiana and Nevada recently adopted a “presumptive threshold” of 200 percent of the Federal Poverty Guideline. In some jurisdictions across the country, eligibility screening is terminated if a person’s net income and liquid assets exceed these income thresholds, and the person is deemed ineligible for public appointment of counsel. In others, persons can be deemed eligible if their net income and liquid assets exceed these thresholds, but reasonable and exceptional expenses bring them under the threshold.

In lieu of the Federal Poverty Guidelines, other jurisdictions take into account the going rate for private counsel to represent a defendant on various case types. For instance, private attorneys

may routinely ask for a \$7,500 retainer to represent a person on a felony indictment, in which case a defendant may fall above the 200 percent Federal Poverty index (\$2,166 monthly available funds) but would still face a “substantial hardship” if he or she were to attempt to retain private counsel. Similarly, private attorneys may routinely charge \$800 to defend a person against misdemeanor charges. In such an instance, the defendant in the above example would not qualify for counsel if facing a misdemeanor charge while qualifying if facing felony charges.

ship” if he or she were to attempt to retain private counsel. Similarly, private attorneys may routinely charge \$800 to defend a person against misdemeanor charges. In such an instance, the defendant in the above example would not qualify for counsel if facing a misdemeanor charge while qualifying if facing felony charges.

^a Guideline 1.5.

^b 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.”

^c A defendant’s vehicle may be the only thing keeping him or her off of public assistance by allowing him or her the means to get to work, or comply with conditions of probation or pretrial release such as drug or mental health treatment, or family counseling. In a county that is geographically expansive, including a car in a person’s liquid assets may be ultimately more costly than appointing the person a public defender.

^d It is assumed that the goals of the criminal justice system are not served by rendering homeless a charged-but-unadjudicated defendant or his or her family.

Best Practices: Eligibility Screening

Nationally, many states have Pre-Trial Services 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. Pre-Trial Services are separate agencies from the sheriff, prosecution or probation/parole, and often provide greater efficiencies throughout the court system

while eliminating much of the bias in bail determinations. Since much of the same information is required to determine both eligibility for a public defender and flight risk, having the indigency determination done at the same time of the risk assessment could allow for earlier notification of appointment to the public defender offices. This in turn will allow defenders to be more informed when meeting the client, leading to more informed bail hearings. Having a third party presenting objec-

tive information does not reduce the role of judges. The bail determination is still their decision. But presenting more information, including accurate criminal histories, will produce better bail decisions. Pre-Trial Services agencies also often perform an oversight function that allows for defendants to be released through a type of pre-trial probation — a cheaper alternative to pre-trial detention that allows defendants to maintain their jobs and family life.

cost-savings; the need to keep court dockets moving may have been determined by the judiciary to be more important than taking the time and effort to conduct eligibility screening; or the reason may be simple inertia on the part of the responsible officials.

Idaho courts lack any uniformity in (a) the type of information collected from the defendant requesting counsel and (b) the manner in which the magistrate judges come to determine eligibility. There is not a specific income level or asset-to-liability ratio or percentage of federal poverty guidelines that is used as the criteria for having a lawyer appointed. The ability of a poor person to have their constitutionally-mandated right to counsel met is entirely dependent on which side of a county line the crime is alleged to have been committed, and sometimes dependent further upon which judge within a given county is presiding on the day one comes to court.

In every Idaho county we visited, judges screen defendants at least semi-formally to determine eligibility for representation at public expense. County governments or magistrate courts in most jurisdictions we visited have created an application form for public representation on which defendants must supply personal information related to employment and financial status. But the information collected from defendants seeking public representation is unique to the county creating the form. Furthermore, not all forms in all counties are written in both English and Spanish,¹³² so there is no guarantee that the defendant understands all that she is asked to provide.

While the information provided to magistrate judges varies from county to county, each individual judge additionally exercises broad discretion in determining “indigency” and does so without any direction. A Power County judge informed us that he tends to be “conservative” when determining eligibility for public counsel, but the economic realities of the county result in frequent appointments. In Bonneville County, a judge expressed concern about the integrity of the entire process, particularly the lack of uniformity *between* judges’ methods of determining eligibility. Many judges expressed frustration with the lack of guidance, one saying “I would certainly welcome indigency standards from the Court.”

Situations like these in Idaho, where individual judges, courts and jurisdictions are free to define financial eligibility as they see fit and where the client must waive confidentiality of personal information *before the judge even makes a determination*, 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.¹³³ This becomes even more problematic when the lack of uniform standards allow courts to assess clients’ fees for the cost of their public attorney.

In addition to simply determining whether a person is fiscally eligible to have counsel appointed, across the country more and more policy-makers are asking whether defendants who cannot afford to hire their own attorney, but who could make some contribution toward the cost of representation, should be required to do so. For example, if it would cost a defendant \$1,500 to hire an attorney to defend them on a misdemeanor, while they might not have that amount of money to pay an attorney at the time of their arrest, it is possible that they might be able to make monthly payments of \$100 to defray the cost of providing a public defender. This is referred to as seeking “recoupment” from a defendant. Recoupment practices vary throughout Idaho. Some jurisdictions begin collecting payments from a defendant at the time that counsel is appointed. Other jurisdictions assess a reimbursement to the county or to the public defense system as part of the court costs which a defendant is sentenced to pay if found guilty of the charge, in essence reimbursing the county for having provided them an attorney.

National standards permit cost recovery from partially indigent defendants under limited circumstances, but a preemptive notification that all defendants will be responsible — before the determination of their indigency status and without regard to their ability to pay — causes a chilling effect in which defendants waive counsel rather than incur charges that they do not believe they can pay. The American Bar Association’s *Criminal Justice Standards, Providing Defense Services*, Standard 5-7.1 directs that: “Counsel should not be denied because of a person’s ability to pay part of the cost of representation.”¹³⁴ In other words, the defendant who can pay \$100

toward the cost of their defense attorney should not be denied appointment of counsel where private counsel would cost \$1,500 and the defendant cannot afford to pay that to hire a private attorney.

Even in instances where defendants are determined to be able to pay something for their representation, the practice of trying to recover defense costs after the representation has been provided is unconditionally prohibited under ABA Standard 5-7.2.¹³⁵ Although various states have tried it through the years, via statute, civil suit, lien, or court-ordered condition of probation, post-disposition recoupment has frequently been struck down by the courts and has been a practical failure. Courts have struck down recoupment statutes on equal protection, due process and Sixth Amendment grounds.¹³⁶ Imposition of recoupment as a condition of probation can additionally lead to the incarceration of indigent people under circumstances to which a non-indigent person would not be exposed, in violation of equal protection.¹³⁷ The practical difficulties are obvious. Imposing additional debt on a poor or marginally indigent person yields a likelihood of recovery so low (less than 10 percent, according to a U.S. Department of Justice Study¹³⁸) that the revenues produced are less than the administrative costs of processing recoupment orders.¹³⁹

Suffice it to say the national standards set out above are violated by all of the recoupment plans we encountered in Idaho. In every jurisdiction we visited, potential public defense clients were informed up-front that they could or would be responsible for repaying the county for the cost of representation. They were never told, however, what amount they should expect to pay; nor were they told they would only be ordered to pay if found financially capable of doing so. In most instances, magistrate courts automatically assess a fee on anyone granted public counsel, added on top of court costs and fines at the end of the case and in a sum arbitrarily determined by the judge.

The methods used by counties to collect these fees for public defense attorneys are also particularly problematic. Indigent misdemeanants who are placed on probation are ordered to pay these fees as a condition of that probation, and they will quickly find themselves back before the court and facing the threat of jail if they fail to keep up with payments. One judge from the Seventh Judicial District explained how it works: “I tell defendants: ‘if you have had three months to pay [fines, court costs, and fees] and you had money for cigarettes and beer, then you can afford to reimburse the county. So you’ve got three days to pay or report to jail.’” This leads to a debtors’ prison situation, where poor people end up in jail when the non-indigent would not.

It also creates a conflict of interest between the public defender representing the client, where the public defender on the one hand should be defending the client and explaining to the court why the client was unable to pay the fee, while on the other hand the public defender is employed by the system the client is supposed to be repaying. Similarly, for defendants not on probation, failure to pay the fee for public defense is addressed through show cause hearings in magistrate court, where the defendant can be held in contempt of court and be subjected to further fines and costs. Many counties will not appoint counsel in these civil contempt hearings, as they are not of a “criminal” nature. For example, in Power County, the contract for defender services specifically excludes representation in civil contempt proceedings. A judge in another county said of the show cause hearings: “It’s our version of debtors’ prison. ... The defendant’s brought before me on contempt for failure to pay and I ask him: ‘Can your phone company put you in jail? How about your gas company? No? Well I can.’ And that’s how I get people to pay their fines.” She was clearly concerned with the whole practice. “Because I’m the rotation judge, I take all the show cause hearings, and I know most of these people can’t pay the fines. So I’m always begging the other judges to stop imposing these huge amounts.”

Tying it All Together

Though there are differences among Idaho's counties in how they circumvent the right to counsel for the poor, it is clear that without guidance from the state, the trial courts will continue to turn a blind eye to current U.S. Supreme Court law and the Sixth Amendment to our Constitution.

In Nez Perce County's magistrate courts, arraignment does not happen in the courtroom. Arraignment happens at the clerk's window when the defendant signs the notice and waiver of rights form which she receives from the clerk and turns it back into the clerk, all without seeing a judge. Posted on the window of the Clerk, where all defendants report prior to going to court, is a sign which reads:

“If you apply for a Public Defender
and the service is granted to you
IT IS NOT FREE!
You may be required to reimburse
Nez Perce County.”

The defendant will be instructed to take a seat in the hall and wait for the prosecutor to call her name. She will meet with the prosecutor, who will explain the charge to her and make a preliminary plea offer. If the defendant and the prosecutor agree, the prosecutor will give the defendant a “green sheet,” filled in by the prosecutor, to take into the courtroom and give to the clerk. The court *may* advise the defendant that she is entitled to counsel before pleading, but if so the court will also again advise the defendant that she may be required to reimburse the public defenders for their services.

Defendants in Power County have to fill out an “Application for Public Defender” in order to receive appointed counsel. On the second page of the form, the client is informed that by signing she is waiving any confidentiality rights to the information she has provided, for use by “all parties contacted by Power County” including law enforcement agencies, which later can be used by the prosecutor against the defendant in bond determinations. The form leaves room for the judge to order reimbursement of an undetermined sum “on or before the Defendant's next hearing date ... Notice is hereby given that additional fees could be assessed based on hours required until final disposition of your case by said Public Defender.”

In Kootenai County, first appearances following arrest are heard every day Monday through Friday at 2:00 p.m., with the magistrate judges rotating duty for these hearings daily. Most of the defendants who appear will have been arrested on felonies and are coming before the magistrate to have their bail set, but those misdemeanor defendants who cannot pay the preset bail will also have their combined first appearance and arraignment at these hearings.

These first appearances are conducted by video feed between the jail and the courthouse. The jailed defendants are gathered together in a room at the jail, while the presiding magistrate and the prosecutor are physically located at the courthouse,¹⁴⁰ and there is not a public defender involved in first appearances at all. One magistrate judge told us the public defenders used to have an attorney present at the jail with the defendants during the video first appearances — he did not know why they no longer do this.

At 7:00 a.m. every weekday morning, the transport deputy at the jail will move all defendants who have been arrested in the last 24 hours to the video room at the jail. This is normally 15 to 25 defendants, with the largest number they have ever had after a 3-day weekend being 48 at one time. The adult misdemeanor probation department gathers all pre-trial services information on each defendant (both felony and misdemeanor) and sends it on to the presiding magistrate by 7:30 a.m. The jail personnel have each defendant sign a written rights form and complete an application for a public defender, then they fax all of this information to a clerk at the courthouse by 10:00 a.m.

The application form to request a public defender leaves room for the clerk to fill in the total sum the defendant will later be responsible to repay: “The applicant is ordered to pay \$_____ monthly beginning _____,

Performance Standards & Early Case Resolution Programs (ECR): Nevada (Part II)

Washoe County, Nevada (Reno) was one of the first jurisdictions in the country to implement an early case resolution program. However, it has long been documented that the particular ECR program in Washoe County failed to adequately protect the rights of the poor. A 2000 report conducted for a Supreme Court Task Force on the Elimination of Racial, Gender and Economic Bias under a grant of the United States Department of Justice and the American Bar Association (DOJ/ABA report) acknowledged the Washoe County ECR program — though originally intended to be a way to eliminate many non-serious cases from the court dockets — had been expanded to include serious felonies through time. The DOJ/ABA report noted the most troubling aspect of ECR's operation is the discovery rules "are such that public defenders do not always have the state's discovery in the client's file before discussing the plea with him or her, and sometimes ... only have a statement of probable cause." The DOJ/ABA report raised the serious concern that deals not favorable to the defendant were being accepted "without a full review of the facts." The report questioned whether defendants felt coerced to accept pleas whether or not they are guilty of the crime as charged simply because their public defenders — lacking the time, tools and training to look beyond the sparse information at their disposal — were advising them to do so. The section of the 2000 report related to the Washoe County ECR program concluded "one of the most notable effects of the ECR program is that the Washoe County Public Defender Office takes only approximately 30 cases to trial each year." That is, 30 cases out of 6,391 in 1999, or a trial rate of less than half of one percent (0.47 percent).

In the absence of the Court responding to the criticisms documented in the DOJ/ABA report, the failures of the Washoe County ECR program became institutionalized and expanded through the subsequent eight

"The prompt disposition of criminal cases is to be commended and encouraged. But, in reaching that result, a defendant ... must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of a mob."

Powell v. Alabama, 287 U.S. 45 (1932)

years. The truncated period for accepting pleas still did not allow public defenders to get follow-up discovery beyond the probable cause and supplemental reports — including video or audiotapes. The district attorney and law enforcement personnel often did no further investigation and discovery once a case was set for ECR, so mitigating/exculpatory evidence might not be found. And, with discretion for which cases went to ECR solely in the hands of the prosecutor, more and more serious cases continued to be sent to ECR.

Interestingly, the haste with which the system was run left open the possibility that certain categories of cases were charged simply because the district attorney and police realized the ECR process would result in a quick, negotiated plea. Contrary to popular opinion that the Washoe County ECR program saved the county taxpayers money, this dynamic may actually have increased the jail population — and subsequent costs — because of the number of people accepting pleas for jail time they otherwise would not have received if the case had been thoroughly investigated.

The Nevada Supreme Court Order implementing attorney performance standards has ended the Washoe ECR program. Public Defenders in Washoe could not actively participate in the program and maintain their duties under the standards. The Washoe County Public Defender notes the jail population in that county is lower today without the ECR program than it was when program was handling 200 cases a month.

Another Possibility: ECR Standards

The Oregon Public Defender Services Commission (OPDSC) has total authority to establish and maintain a public defense system that ensures the quality, effectiveness, efficiency and accountability of defense services consistent with Oregon and national standards. In line with their mission, OPDSC has adopted a series of guidelines for public defenders participating in early disposition programs (EDP). These guidelines include, among others:

1. An EDP should insure that the programs operation and rules permit the establishment and maintenance of attorney/client relationships.
2. An EDP should provide the opportunity for necessary pre-trial discovery, including adequate opportunity to review discovery material and investigate the facts of the case and the background and special conditions or circumstances of the defendant, such as residency status and mental conditions.
3. An EDP should provide for adequate physical

space to ensure necessary privacy and adequate time to conduct confidential consultations between clients and their attorneys.

4. An EDP should provide adequate time for defendants to make knowing, intelligent, voluntary and attorney-assisted decisions whether to enter pleas of guilty or whether to agree to civil compromises or diversion. Clients should be allowed a reasonable continuance to make their decisions in the event there is incomplete information or other compelling reasons to postpone entry of a plea, civil compromise or diversion agreement. Clients should be allowed to withdraw their pleas, petitions or agreements in an EDP within a reasonable period of time in extraordinary circumstances.
5. An EDP should insure that attorney caseloads are sufficiently limited to provide for full and adequate legal representation of each client.
6. An EDP should provide for alternative representation for a client eligible for an EDP where such representation would constitute a conflict

of interest for the client's original attorney.

7. An EDP should not penalize clients or sanction their attorneys for acting in conformity with any of the foregoing standards.

One of the more controversial aspects of the Oregon standards is found in Guideline 2, which states: "Defendants participating in an EDP should be notified on the record that their attorney has not been afforded the time to conduct the type of investigation and legal research that attorneys normally conduct in preparation for trial." Such an acknowledgment shows just how precariously close any ECR program comes to breaching clients' constitutional right to counsel. Indeed, the United States District Court, Eastern District for Michigan has held that early case resolution programs that dispose of cases prior to preliminary examination hearings violate clients' right to counsel. *United States v. Morris*, 470 F. 3d 596 (6th Cir. 2006), *aff'd*, 377 F. Supp. 2d 630 (E.D. Mich. 2005).

20__ for the cost of appointed counsel.” The defendant, when filling out this application, has no way of knowing how much he may be required to pay — only that if he asks for a public defender he will likely be ordered to pay something whether he can afford it or not. The clerk delivers the forms to the presiding magistrate judge in advance of the daily first appearance hearings.

At the beginning of the daily hearing, the presiding magistrate advises all of the in-custody defendants of their rights first as a group, before calling on them individually to address their specific charges. Each defendant is then required to enter a plea of either not guilty or guilty. As the judge accepts each individual’s plea, he asks if they have received a form advising them of their rights, if they understood its contents, if they had any questions, and then asks each to indicate their plea, sign it and return it to the bailiff.

For defendants who are not in custody, they will appear in open court for their combined first appearance and arraignment. They are advised of their rights by being shown a video, but this advice of rights often comes long after they have been told to talk to the prosecutor about working out a guilty plea and sentencing agreement. For example, we observed a Coeur d’Alene city prosecutor manage a misdemeanor arraignment docket. With no judge and no public defender present, the prosecutor stood and explained to the gathered defendants that she would call them up one-by-one to discuss their charges and the plea offer. She explained “most misdemeanors have the right to a jury trial” and after meeting with each individual she would show the video detailing all of their rights. “If you think you might want to talk to an attorney, you should get an attorney” but she made no mention of the right to counsel for defendants who could not afford to hire their own attorney.

Then this prosecutor met with each defendant one at a time, but there in the same room with all of the other waiting defendants, to talk about their cases. One defendant asked if the plea deal she was offering him would be taken off the table if he asked to speak to a lawyer. Rather than assure him that he could have an attorney and come back with that attorney to discuss plea options, she responded that she could not offer him any advice. “Well, isn’t this a manner of you pressuring me to take a deal before I talk to a lawyer?” he continued, with every other defendant in the courtroom listening, to which she replied flatly: “I can’t advise you.” The bailiff then entered the room: “Raise your hand if you want a public defender.”

Later we asked a magistrate judge about what we had witnessed. He expressed sincere concern that the video of rights was not played prior to the defendants meeting with the prosecutor. And like us, the magistrate worried, because everyone in the courtroom heard the fear of one defendant that he was being pressured into accepting a plea prior to meeting with a lawyer, all other defendants in the courtroom were less likely to request a lawyer for fear they would lose a good plea deal. According to data from the state court, about 65 percent of all Kootenai County misdemeanor defendants go unrepresented each year.¹⁴¹

In one Bonneville County courtroom, rights were given by video to a large number of adult defendants in court for their initial appearance on misdemeanor charges. After the video was shown, the judge entered the courtroom and called up defendants one-by-one. To each she explained the charge against them and asked how he wished to plead. To those who pled not guilty, she asked if they wished to have a public defender appointed; but for those who pled guilty, she merely accepted the plea without ever conducting any formal waiver of their right to counsel. We noticed after the docket had started and well after the rights video had been shown, some defendants appeared late to the hearing. When their names were called they each pled guilty. There was no indication that these late-comers were ever informed of their right to counsel. Based on our observations and discussions, the Bonneville courts often forego written waivers of rights, they are not providing a lawyer to advise the defendant before an in-court waiver is accepted, and they seldom conduct a thorough inquiry of the accused’s ability to understand what is happening.

Bonneville County has formally established an Early Case Resolution system, in use during some misdemeanor arraignments. Defendants filed into a courtroom for an initial appearance docket on misdemeanors. A bailiff approached each individual, asked for their name, and asked whether they had retained counsel in advance or (if not) whether they wished to apply for a public defender. Most of them filled out the application for a public defender given to them by the bailiff.

The “Application for Public Defender” form requires them to provide: personal information (name, address, Social Security Number and phone); employment information (wages, number of hours per week, etc.); monthly gross and net income; insurance income (social security, worker’s compensation, disability, etc.); spouse’s personal and financial information; home equity; car value; current debts; and, if under 18, the personal information of the child’s parent/guardian. Printed in bold face type just above where the defendant must sign, the form states:

“I request a lawyer be appointed to represent me. I AGREE TO REPAY BONNEVILLE COUNTY FOR PUBLIC DEFENDER COSTS AS ORDERED BELOW.”¹⁴²

Just below it reads further:

“You are hereby ORDERED TO REPAY BONNEVILLE COUNTY FOR THE COSTS OF THE PUBLIC DEFENDER \$25 EVERY TWO WEEKS UP TO THE AMOUNT SET BY THE JUDGE IN YOUR FINAL APPEARANCE.”¹⁴³

There is no mention of whether anyone will consider whether the defendant has the ability to pay such costs, nor is any hint given as to what the total sum due to the county might be.

After defendants turned in their applications for a public defender, then the bailiff addressed the room:

“You are here because you have been charged with a misdemeanor. You have two choices: you can plead guilty or not guilty. If you plead guilty you will be sentenced today. If you plead not guilty, we’ll schedule a preliminary hearing for a later date. Right now we’re scheduling preliminary hearings for some time in March [more than three weeks away]. The prosecutor will be in here in just a minute. We’re trying this new thing called Early Case Resolution, where certain case types meet the criteria for you to make a deal with the prosecutor and resolve the case today. And if you ask me — the prosecutor is offering some pretty good deals. If you have applied for a public defender, you can still meet with the prosecutor. If you have your own lawyer, you probably don’t want to do that [meet with the prosecutor].”

The bailiff then played a recorded video of a magistrate judge reviewing the defendants’ rights and the processes of the court. The video advised defendants of their right to counsel, but again warned them they may be responsible for reimbursing the county for the cost of public representation.

Next, a prosecutor entered the courtroom and introduced himself to the group. He explained: “We are trying this new program called Early Case Resolution. I’ll call some of you up one-by-one to talk to me. I won’t call on all of you — only certain cases meet the criteria for the program. It’s strictly voluntary — you don’t have to talk to me if you don’t want to. Also, if you have an attorney, I would really appreciate it if you tell me because I cannot ethically speak to you if you have one.” Then he called individual defendants up to the front of the courtroom to negotiate a plea agreement.

As the prosecutor completed the first half, defendants were processed on to the judge. She took the bench and began calling the docket, while the prosecutor continued to meet with the remaining defendants. There was never a single defense attorney in the room (public or private). “Were you able to work out a deal with the prosecutor?” the judge asked one defendant who had participated in the Early Case Resolution. In exchange for the defendant pleading guilty that day, the prosecutor had agreed to reduce a charge of first offense minor possession of marijuana down to a minor possession of illegal drug paraphernalia. The judge never made any acknowledgement that the defendant had already filed an application for a public defender with the bailiff, and instead accepted his guilty plea and imposed a fine of \$85.50 plus court costs, without ever asking for any written or oral waiver of counsel by the defendant. There was no discussion of counsel at all. The judge said to the defendant: “if you get in trouble again and come back here before me, I can impose a much larger fine on you

along with a six-month jail sentence.”

Later that day, we had the opportunity to talk with the judge about the Early Case Resolution program. She emphasized that most cases that qualify are low-level misdemeanors, such as driving without a license or with a suspended license, minor possession of drug paraphernalia, or even a barking dog complaint. As she explained it, none of the charges would ever result in an immediate loss of liberty and could thus be resolved in one court appearance and without the involvement of the public defender’s office. She acknowledged that some of these defendants might eventually be sent to jail on their charges, because if a defendant fails to follow through with the terms of his sentence — even for something as simple as a failure to pay court costs or fines — in her mind the judge has every right to send them to jail. “But we’ll give them a public defender then if it gets to that point.” When asked to reconcile this with the holding of *Shelton*, the judge responded: “We do the best with the resources we have, but you can only spread the butter so thin. What good is it to give someone a lawyer on a barking-dog charge, if they’ll have to wait two or three weeks for the preliminary exam only to get the same result they’d get through Early Case Resolution? It’s on them to pay the fine! It’s on them to call Boise to get their license reinstated. ... We are trying to work with the resources we have, without violating anyone’s rights.”

Another magistrate judge shrugged and explained that Early Case Resolution in Bonneville County would probably continue unchallenged. “Who’s even going to look at probable cause?” With no judge or public defender even in the room while the prosecutor is having direct conversations with the defendant, there is no one to challenge the basic facts of any plea deal being struck. “Even the prosecutor is just looking at the complaint. He’s not keeping an eye on probable cause. He’s too busy. So when you’re talking about *Shelton*, probably no one is going to look at it.”

The Lack of Continuous Representation & Client Confidentiality in Idaho Courts

American Bar Association *Principle 4* demands that the attorney be provided sufficient time and a confidential space to meet with the client. 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,¹⁴⁴ the breach of which is punishable by disciplinary action. It also fulfills the responsibility of the jurisdiction and the public defense system to provide a structure in which confidentiality may be preserved¹⁴⁵ — 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.¹⁴⁶

The trust that is fostered in the early stages of the case 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 —

ABA 4th Principle

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. 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.

whenever possible — throughout the life of the case. 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 known as “horizontal representation” — 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 horizontal 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 “as-

sembly line.”¹⁴⁷ But standards uniformly and explicitly reject this approach to representation¹⁴⁸ for 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.¹⁴⁹

Ada County

Due to the heavy caseload, the Ada County public defender office uses horizontal representation, in which the same attorney does not stay with the client from arraignment to disposition.

Like in many other Idaho counties we visited, the Ada County courts use video arraignments to save time and to cut down on the cost of transporting in-custody defendants between the jail and courtrooms. There is a public defender, however, assigned to staff the initial hearings, unlike what we saw in most other counties. During one short afternoon arraignment calendar, the defender was wearing a short sleeve shirt with no tie or jacket and was chewing gum.¹⁵⁰ The quality of the rights video shown to defendants was grainy and the picture was washed out. One defendant who admitted a probation violation for not paying a financial obligation was sentenced to 90 days in jail. Another defendant appeared without an attorney, but the court observed it knew the person was represented and entered not guilty pleas for him. During another arraignment calendar on a different day with a different judge, the defendants were in shackles. All in-custody defendants in Ada County appeared for their court hearings while in chains and handcuffs. The public defenders observed did not contest this practice.¹⁵¹

We spoke later with a magistrate judge who agreed the video hearings contribute to a lack of respect for defendants. The judge pointed out the enormous volume in the court, with 12,000 cases per year per judge. And with the volume of cases assigned to the public defender office, the lack of time to see clients puts the office in violation of *ABA Principle #4*. The misdemeanor supervisor noted that there is not usually enough time or information for an attorney to recommend a guilty plea, so a charge such as urinating in public gets continued to a jury trial schedule.

For felony cases, the office has a team of three lawyers to handle preliminary hearings in magistrate court. They receive the cases after the video arraignments, handle the preliminary hearing stage and then pass the cases along to the felony trial teams once bound over to district court. So a client who does not plead out right away will have three different public defenders assigned to advocate on her behalf in three different stages of her case. In-custody defendants may receive correspondence from the preliminary hearings team of defenders. But any contact with the attorney for out-of-custody defendants must be initiated by the client. Because time is limited, the lawyers do not “try to chase down” out-of-custody clients, and they “don’t have the resources to send letters.” And there is no support staff to call clients and set appointments. One team leader noted, “If I’m going to do the trial, it helps if I do the preliminary hearing,” but the amount of time sitting in court “doing nothing” resulted in wasted time that “was killing us” when the office had a vertical representation system.

The office’s lack of diversity further stifles the defenders’ ability to develop the level of trust with their clients necessary to provide adequate representation in all cases. In August 2007, the chief defender reported there were 10 women out of 35 attorneys and no attorneys of color on the staff. One judge said, in six-and-a-half years, she had never seen a woman defender in felony cases, but there were lots of women prosecutors.¹⁵² The chief estimated that less than 10 percent of the clients are people of color, with Hispanic and Native Americans being the largest groups, but this may be an underestimate.¹⁵³ A number of signs in the courthouse are in English and Spanish, and we noticed a number of Spanish-surname defendants in court. Out of 10 in-custody defendants on one felony arraignment calendar we observed, four were African-American.

Seventy percent of the public defender office’s attorneys graduated from the University of Idaho College of Law, which reports that of its 2009 graduating class 48 percent are women and 17 percent are minority persons.¹⁵⁴ But the office does not recruit and there are no apparent special efforts to achieve diversity on the staff. The last

ABA 7th Principle

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.

four offers to attorneys had been declined. One judge told the site visit team that the prosecutor's office has a recruiting budget and both the city and county prosecutors use interns and externs extensively.

Nez Perce County

Few people are held in the jail following arrest that are unable to make bond. If a person is arrested on a felony warrant, the magistrate judge will have set the bond when he signed the warrant. If a person is arrested on a misdemeanor, the bond is set by a legislatively established schedule for all except domestic violence charges. If a person is arrested on a probation violation, either the magistrate judge set the bond when issuing the warrant or the person was arrested on an agent's warrant and will be brought before the judge for a probation violation hearing.

The jail only has a capacity of 44 people. At the time of our visit, we were advised by the sergeant in charge of the jail that typically 50 percent of the beds are inmates with felony probation holds and another 10 percent are typically sentenced and serving "work release." When the jail is at capacity, detained defendants and sentenced inmates are housed out to various other counties, primarily Latah, Clearwater and Lewis counties.

If a person has been arrested and is in jail, the prosecutor must file the criminal complaint charging the offense within 24 hours of the arrest (or within 48 hours on a weekend). The defendant will be brought before the court for a combined first appearance/arraignment on a misdemeanor or for a first appearance on a felony.

As we have seen in Chapter IV, Nez Perce County's magistrate court eliminates a significant number of defendants from even seeking the right to counsel, in violation of ABA *Principle 3*. Defendants are warned that public representation "is not free," directed to meet with prosecuting attorneys without counsel to try to work out a plea, and forced to appear in court without counsel at the initial arraignment and bail hearing. The magistrate judges report that any felony defendant who requests appointed counsel will be granted an attorney. Though all misdemeanors carry up to one year in jail and therefore trigger the right to counsel, the judges frankly acknowledge there are only certain cases where they typically contemplate the possibility of imposing jail time (all DUIs, DWP, battery, domestic violence, petty theft, resisting & obstructing, and sometimes in reckless driving), and therefore they do not necessarily appoint counsel for people charged with other types of misdemeanors. The court may advise the defendant that she is entitled to counsel before pleading, but if so the court will also again advise the defendant that she may be required to reimburse the public defenders for their services.

For those defendants who manage to hold strong in their determination to receive public counsel, the Nez Perce County criminal justice system still fails to provide them prompt access to their appointed attorney. If counsel is ultimately appointed, the court will give the defendant a business card for F&V, along with setting her next court dates — the matter is then continued for a preliminary hearing if a felony and for a pretrial conference if a misdemeanor. Once the court appoints the public defender, then the clerk of court sends to the offices of Fitzgerald & Van Idour the order of appointment and the court file which contains: complaint, initial police report, affidavit of financial status and sometimes the defendant's criminal history. For felony clients who make bail, the F&V law firm also sends out informational letters advising them to make an appointment to see their attorney. In either case, it is up to the client to contact her attorney before the next court appearance.

If the defendant is charged with a misdemeanor that is punishable by not more than one year in jail, the magistrate court will conduct the trial and sentence the defendant if found guilty. In felony cases (generally, cases that are punishable by more than one year in prison) the magistrate court will set the bail amount and hold a preliminary examination to determine if a crime was committed and if there is probable cause to believe the defendant committed the crime. If so, the case is transferred to the district court for trial. In both instances, it is unlikely that a defense attorney will do any work on a case or even meet the clients before the next court date (whether for a misdemeanor or felony).

The district and magistrate judges all with one voice expressed concern that public defense clients do not receive high quality representation. Their biggest complaint is they do not believe the public defenders meet with their clients in advance of appearing in court, but instead they believe these public defenders meet with their clients primarily *only* at the courthouse. Though most criminal justice system stakeholders agree Fitzgerald and Van Idour “have a wealth of experience,” the big complaint is their lack of day-to-day communication with their clients.

The public defenders agree that meeting with clients other than at court is difficult. They told us there is probably only a “35 percent show-up rate” of clients for appointments made to meet the attorneys in their offices. The defenders think there are several reasons why clients fail to show up for appointments with their attorneys: a lack of willingness to deal with the situation, especially on the part of long-term meth addicts; and clients are not educated and often say they understand when they don’t. They acknowledge they end up having meetings with their clients at the courthouse where, if they are lucky, they can grab a room with a door. There are no private attorney-client meeting rooms designated for that purpose at the courthouse.

At the time of our visit, the jail was located on the 3rd floor of the courthouse and had a capacity of 44 inmates, although plans were then afoot and have since been realized to build a new jail just on the other side of the river with a capacity of 159 inmates. Though it was quite small, the old jail had two rooms where attorneys could meet privately with their clients. The sergeant in charge of the jail says there are attorneys there all the time meeting with clients, although it was unclear whether he was referring to the public defenders or to criminal defense attorneys generally. All jailed clients are able to contact their attorneys toll-free on the jail phones. There are phones in every cell, and the jail inputs into their phone system the phone numbers of every attorney who requests, so their clients can call them without charge. When the jail is at capacity, detained defendants and sentenced inmates are housed out to various other counties, primarily Latah, Clearwater and Lewis counties. This inhibits communication between clients and their public defenders.

The first appearance a felony client will have with appointed counsel present will be the preliminary hearing. In a felony case, the defendant is entitled to have a preliminary hearing within 14 days of arrest if in custody and within 21 days of arrest if out of custody.¹⁵⁵ These are typically set for the first Wednesday following the first appearance. The defendant may elect to have the hearing or may waive the hearing and agree to be bound over to district court. If probable cause is found or if the defendant waives the hearing, then a bill of information will be filed and the defendant will be arraigned on the felony charge in district court. There are typically one or two felony preliminary hearings held in Nez Perce County each week. However, one prosecutor told us that preliminary exams are typically waived in most cases (never held at all) or certainly not held timely (most being continued for up to six weeks). In part the delay in those cases where a preliminary exam is eventually held is often because, in drug cases, they cannot get the drug test results back quickly and the judges will not accept the field tests results. A senior prosecuting attorney described the typical preliminary exam process as follows:

- Within 14-21 days of a felony arrest, a preliminary exam will be set for hearing.
- Before the preliminary exam date, the prosecuting attorney will make a plea offer.
- As part of the plea agreement, the defendant will agree to waive the preliminary exam, and agree to be bound over to the district court for arraignment and a change of plea date.
- Under “Rule 11” the plea agreement may address sentence in one of three ways: (1) the state and defendant do not make any sentence recommendation; (2) the state and defendant make a sentence recommendation to the judge but it is not binding; or (3) the state and defendant make a sentence recommendation to the judge, which it is not binding, but if the judge is going to impose a sentence greater than the recommendation, then the defendant will have the right to withdraw the plea of

guilty.

- At the district court change of plea date, the defendant will enter a plea of guilty to the agreed charge.
- For sentencing purposes, the Judge must have a Pre-Sentence Investigation report (PSI), however this can be waived if both the state and the defendant agree (where a PSI is required, it typically takes six-to-eight weeks to receive it).
- The defendant returns to district court to be sentenced.

The public defenders say they file a Rule 16 “Motion for Request for Discovery” in every case.¹⁵⁶ The magistrate judges told us that the F&V associate attorney files appropriate motions in misdemeanor cases, but they do not see many motions to suppress. The district judges feel there are probably not an appropriate number of motions filed in felonies — that less motions are filed than should be.

Nez Perce County does adhere to *Principle 7*’s demand for continuity of defense representation by both the primary and conflict contract defenders. However, given that no attorney is present during the critical stages at the start of the case in magistrate court, Nez Perce County does not meet the basic parameters of the *Principle*.

Kootenai County

Timely access to representation and space in which the client can have a confidential discussion with her attorney is extremely limited. Defendants appointed a public defender will be told to wait three days before contacting their lawyer (see side bar). There is no private courthouse meeting space for attorneys to speak with their clients. And the heavy workload means that attorneys frequently have scheduling conflicts, resulting in continuances or their having a “stand-in” attorney represent the defendant, thus jeopardizing their continuous representation of clients. The number of cases assigned, their mixture and the number of courtrooms that need to be covered on a daily basis make it difficult for the misdemeanor attorneys, in particular, to have sufficient time to meet with all of their clients.

But one magistrate judge felt that the Kootenai County public defenders appear to do a good job of meeting with their clients and of filing necessary mo-

Kootenai County Client Information Form

When the public defender is appointed, a copy of the appointment is given to the public defender office and the defendant is given information about how to contact the public defender office. The form given to the defendant says:

KOOTENAI COUNTY PUBLIC DEFENDER
 Courthouse Plaza
 500 Government Way, Suite #600
 P.O. Box 9000
 Coeur d’Alene, Idaho 83816-9000
 208-446-1700

**DO NOT DISCUSS THE FACTS OF YOUR CASE
 WITH ANYONE BEFORE YOU SEE YOUR ATTORNEY.**

UNLESS YOUR SITUATION IS AN EMERGENCY,
 WAIT AT LEAST 3 (THREE) WORKING DAYS
 AFTER YOU RECEIVE THIS NOTICE,
 TO CONTACT YOUR ATTORNEY
 OR SET UP AN APPOINTMENT.

If a person is released on bond or on his own recognizance, he is given a form that says:

Kootenai County
Pre Trial Services
 Adult Misdemeanor Probation Department
 106 E. Dalton Ave.
 Coeur d’Alene, ID 83815
 208-446-1996

You must report in person, at the address noted above, the next business day after your release between the hours of 8:00 am - 12:00 pm.

Failure to report as required will result in notification to the court of failure to comply with your pre-trial release conditions.

Therefore, a person who has requested and been deemed entitled to appointment of counsel, and who has also been released from custody pending trial, is told to see the pre-trial services office (probation) on the very next day, where they will of course be asked for various types of information by the pre-trial services officer, but they are told to wait at least three business days before attempting to contact their attorney.

tions and conducting hearings on those motions. As an example, he told us that in a recent three-month period he had presided over two suppression hearings in misdemeanor cases, and both of those hearings were brought on motions filed by public defenders. His primary issue with the public defenders is that they frequently stand in for each other, which requires a continuance for anything substantive because the attorney standing in cannot go forward with the hearing. Another magistrate judge likewise advised that he feels the public defenders file “appropriate” motions in misdemeanor cases. A Kootenai County district judge told us the conflict attorneys, “do a very, very good job.” In his estimation, about half of the staff public defenders are “good solid attorneys who work hard,” and the other half “just are not effective, have a bad attitude, are very disorganized — although this could be a secretarial problem — and do not follow through.”¹⁵⁷

We observed public defenders at a Status Call (preceding preliminary hearings on felonies) doing a thorough job of explaining everything to their clients. It was clear they were intimately familiar with both the facts and the law of the cases they were handling. Furthermore, it appeared the defenders had generally already met with their clients, either in-person or by telephone, prior to appearing in court for the Status Call.

But Kootenai County lacks sufficient infrastructure and facilities to allow for confidential in-person meetings between clients and their attorneys. The jail only has one attorney-client full-contact visiting room, and the public defenders *must* schedule in advance to get this room. Because there is just the one full contact room, defenders are competing with doctors, probation officers and parole officers — all who have reason to meet with in-custody defendants — for its use. In addition to the lone full-contact room, there are two additional meeting rooms that have doors that close: one allows the attorney and client to talk by telephone through a window, and does have a pass-through slot to exchange documents; the other allows the attorney and client to talk by telephone through a window, but there is no pass-through slot for documents. Finally there are four visiting areas where an attorney can visit with their client by telephone through a window, but these areas do not have doors and are basically open to each other such that everyone using them can hear each other’s conversations. By contrast, when prosecutors go to the jail and need to meet with a defendant, they are allowed to use the booking rooms for confidential communications — but public defenders are not.¹⁵⁸

There is also a critical lack of space at the courthouse for in-custody defendants brought down from the jail or juvenile detention center for their trials or hearings, including proper holding cell attached to the courthouse. The building that formerly served this holding facility purpose, and is located between the Old Courthouse and the Justice Building, was condemned. A new holding area will eventually be constructed, but the court and county’s temporary “solution” has been to fence off a portion of the parking lot located directly behind the Justice Building and to use this area to hold defendants, who wait in their (heated/air conditioned) van for their case to be called to the courtroom. Even for out-of-custody clients, there is no confidential space at the courthouse for attorney-client discussions.

Bonneville County

The defenders in Bonneville County do not appear at misdemeanor arraignments or at the initial appearance for felonies. The elected county prosecutor estimates that 35 to 40 percent of misdemeanor defendants “don’t want” an attorney and proceed without counsel. While the court pressures defendants charged with low-level misdemeanors into pleading prior to being appointed counsel (see Chapter IV),¹⁵⁹ judges will appoint counsel in all felony matters.

“We have limited time and resources,” the chief defender told us, adding: “We only represent when we are appointed.” The Office of the Bonneville County Public Defender is located in a building less than a block from the courthouse. Each of the office’s five attorneys has a private office. They meet some of their clients there, but the office has a practice of conducting many if not most of their client conferences on the telephone. In-custody

clients are interviewed almost exclusively by phone (there is an unmonitored, dedicated phone line from the jail to the public defender's office). And even then, the attorney told us his personal policy is that clients have to make an appointment with one of the secretaries for a phone-interview. Noting that it is usually several weeks between the arrest and the misdemeanor pretrial conference, he explained that encourages clients "to contact me as close as possible to the date of the pretrial."

One of the consequences of an excessive caseload is the defenders meet the vast majority of felony clients for the first time at the preliminary exam. "The felony client will not meet the public defender until the preliminary hearing," one magistrate judge told us, which for an in-custody defendant will be held within 14 days or 21 days for an out-of-custody defendant. "I always tell out-of-custody clients to go meet with their public defender. Often the public defenders will ask for more time, particularly in more serious cases, to look at discovery materials and investigate the case more fully."

While the misdemeanor defendants by-and-large do meet with their attorneys at the public defender's office, there simply is not enough time to conduct a thorough interview. One misdemeanor lawyer told us he would feel lucky if he were able to meet with his clients for more than 30 minutes each. "The timeline speeds up things. I get the notice of appointment and immediately file for discovery. Three days later we have the pre-trial conference, and I almost always have to request a continuance." He estimated that he was able to meet with maybe 2/3 of his clients prior to the pre-trial conference. "Client meetings are entirely client-driven," another lawyer explained. The office will send a letter to its out-of-custody clients, asking them to make an appointment to meet with their attorney in the office. One estimated upwards of 70 percent of his out-of-custody clients come to his office prior to the next court date.

While excessive caseloads limit their available time to drive outside of town to the county jail facility, the public defenders are reluctant to visit clients at the jail primarily because there is no confidential space there for them to meet with their clients. Instead there is only a glass room where everyone is forced to shout through the glass to be heard. An attorney also mentioned that the office does have "a video conferencing line to the jail — when it works, just like the TV appearance system the court uses. An officer is usually standing by at the jail though." Another lawyer said if a client asked for an in-person meeting in advance of the next court appearance, he would do it. But with close to 400 open cases, "it is hard to take time to go to the jail."

Nor is there any confidential space in the courthouse. One attorney told us that in the holding cells downstairs from court, attorneys may talk with clients without an officer present. "At court, usually the marshals will clear out and let you talk to the client at court if need requires — and I've had no conversations reported, yet." When NLADA asked about the lack of confidential space at the courthouse for client interviews, one magistrate judge said "there just isn't any." The crush of one pretrial conference docket we observed — the judge at that docket estimated that he had over 150 misdemeanor pretrial conferences scheduled for that day alone — simply kept the public defender from doing more than meeting clients in the hallway outside, if even that. Most clients met with the public defender at a table off to the side of the courtroom, next to the jury box where the bailiff guarding the in-custody defendants was seated. The judge's impression was that what we observed was normal for a pretrial conference docket.

When we asked the elected county prosecutor for his opinion on the defenders' level of client-communication, he said he did not think it possible to establish rapport with a defendant by phone. Instead, he prefers when the defendants have met their lawyers and at sentencing have reviewed the pre-sentence report. One of the judges mentioned that often the defenders have not met with their clients in person before court, that their clients have not seen the pre-sentence report in their case, and they have discussed the matter with their lawyers only on the telephone. Judges we spoke with uniformly complained of a lack of preparation by the public defenders. We later asked one of the lawyers whether his lack of time and space to meet with clients caused any concern. He replied: "Sometimes I wonder if I get all the information I need from my clients."

Further compounding effective communications between the public defenders and their clients is access to court interpreters for Spanish-speaking clients. In southeastern Idaho, there is a significant population of migrant

farm workers. We observed one arraignment in district court where the chief public defender represented a defendant on felony drug trafficking charges. The client spoke no English. Standing between he and his attorney was a bailiff, wearing a sheriff's badge, translating for the client. After the docket, we had opportunity to ask the judge about access to court interpreters and were informed that the court makes use of this particular bailiff as she has been certified by the state as an official court interpreter. When we later spoke with a public defender, we pointed out how a client might be hesitant to convey sensitive information when speaking through someone wearing a badge. He told us the potential conflict had never dawned on him. The office does, however, make frequent use of its bilingual clerical assistants as interpreters for clients who come into the office, as well as for phone conversations with clients at the jail. Still, there is a notable lack of diversity among the attorney-staff at the public defender's office — all are white males. The chief public defender explained that few women apply to work at the office and more apply for prosecutor positions. The office does no recruiting and when they have had vacancies they "had to fill them quick." Unfortunately, this lack of diversity among the attorney staff can further stifle effective communication between the attorneys and their clients.

Another consequence of excessive caseloads is that public defenders are not always able to provide vertical representation for their clients. Motion dockets frequently require stand-in counsel for both the prosecution and the defense because the attorneys are stuck in another courtroom. "Most motions are written so that makes it easier for the stand-in public defender to argue in court, because he's reading the motion right there — he's got the gist of it." We were told the public defenders often stand in for each other for sentencings as well.

Blaine County

Assignment of counsel does not take place until charges are filed by the prosecutor, in violation of *Rothgery*. Given the nature of the rotating monthly contracts for public defense appointments, the system is subject to manipulation by the county prosecutor where the office might wait to file charges until a weaker or less-skilled defense attorney was on primary rotation. We did hear quiet suggestions that this has happened in the past; the scope of our project did not allow us to be certain. Regardless, there is a capacity for prosecutors in Blaine County to attorney-shop, which is cause for concern.

Eligibility screening for the appointment of defense counsel is handled by the magistrate judge at the defendant's initial court appearance. These proceedings usually take place within 24 hours of arrest, but since the defender is not yet appointed, the contract lawyers do not actually staff these hearings. The courthouse offers no real confidential space for communications between defenders and their clients. Most of these communications instead take place at counsel table or in the hallways outside the courtrooms.

All representation in Blaine County is vertical, unless the assigned attorney has a problem or illness or identifies a conflict of interest after assuming the case representation assignment. In this situation, the attorney must petition the judge to withdraw from the case and to have new counsel appointed.

Canyon County

Defendants appear in magistrate court for their initial appearance and, unless privately retained, they will not have counsel present with them. These initial hearings will usually occur within 24 hours of arrest. There, magistrate judges conduct arraignments, set bond, set the next court date and screen defendants for the appointment of the public defender office. For at least the last 15 years or so, the magistrate court in Canyon County has used video arraignments for in-custody defendants. Because the contract defender office has not yet been appointed, it does not staff these arraignments. They will be notified of any appointments when the

court orders of appointment and the criminal complaint are placed in the office's mailbox at the courthouse for pick-up later that day.

One district court judge told us his only "complaint" was the public defenders were not as swiftly prepared (as private attorneys) to settle the case or to declare trial at the pre-trial conference listing, generally 60 days after arraignment. He indicated that retained counsel seemed more quickly prepared. This may reflect the difference in the number of cases handled by retained attorneys as opposed to the contract defenders. Given their heavy caseload and that attorneys are not promptly appointed, defenders may not have time to adequately prepare and investigate the facts of their appointed cases, nor have enough time to meet with their clients. We were told that defenders had quick and almost anytime access to the adult county detention center. The main issue was finding time to actually get there, given their caseloads and court schedules.

While the law firm's offices do have confidential space for meeting with clients who are on bond, attorneys expressed concern that the holding pens behind the courtroom are not adequate for confidential conversations with their in-custody clients.

According to one of the prosecuting attorneys, the contract defender office represents approximately 85-90 percent of the cases, and he sees some good felony attorneys who are criminal law specialists and who know the practice, procedures and the law. But the attorneys struggle to keep up with their caseload and to communicate with their clients in custody. Furthermore, the defenders are not as prepared at the pretrial conference date as he would like to see, and they do not always respond as quickly to discovery issues as they should. Case delays are also caused by things such as last minute interpreter issues.

The limited time to meet with clients has a direct impact on an attorney's ability to quickly develop the relationship and trust required to zealously advocate on behalf of each and every client, at every stage of the case. For example, we observed one preliminary hearing involving a felony matter in magistrate court. The defender arrived in the courtroom shortly after the district attorney, carrying all of his case files with him. His in-custody clients were all dressed in jump suits and had handcuffs and leg shackles. One-by-one, he brought them back to the holding area behind the courtroom to speak with them about their case. Yet no actual felony preliminary hearings were ever conducted, which we were told is fairly typical in this court system. Instead the defender spoke with the district attorney and "negotiated" dispositions. Often these were pleas to lesser, misdemeanor offenses with continuance for sentencing, or a waiver of the preliminary hearing in exchange for a reduced felony plea in district court. In one case, the prosecutor agreed to drop the charges to a misdemeanor for petty theft & restitution in exchange for a guilty plea. But the judge recognized the female defendant from a previous juvenile forgery/petty theft case, held that juvenile case against her, and sentenced her to 10 days in jail. She was unmarried, pregnant, and expecting her third child. The defender did not say much of anything to keep her out of jail.

We did observe a number of sentencing and probation violation hearings for which the defenders had clearly prepared, had their case files at counsel table, and offered appropriate comments and statements on behalf of their clients. The attorneys also spoke with and communicated with their clients, who were seated with them. For the most part, it was clear that counsel had some pre-courtroom contact (written or personal) with their clients to assist sentencing preparation.

The system is vertical representation, but, if the scheduling requires, lawyers may substitute where the assigned attorney is not available due to illness, on a jury trial assignment in another case, or some other acceptable circumstance. Major cases receive complete vertical representation.

Power County

The magistrate court judge screens all cases for public defender appointment using the eligibility form developed by Power County. Appointments are fairly quickly made for adult defendants in custody, usually within 24 hours. Defendants who have been bonded out of jail must wait until their arraignment date for an eligibility determination and appointment of counsel. The contract defenders do not staff these initial proceedings in magistrate court.

Under their contracts with the county, the defenders' scope of representation involves "all stages of the proceedings until completed." This description has been interpreted in Power County to require the actual filing of formal charges or a probation violation petition before counsel may begin the representation process. Therefore, the appointment of counsel is driven by when the prosecutor files charging documents rather than the actual arrest or placement of a discretionary hold on the defendant. This is in direct conflict with the U.S. Supreme Court's decision in *Rothgery*.

Client information presented for a determination of indigency is not kept privileged and may be disclosed to the judge and the prosecutor. Under the contract, the defender has no duty to investigate the client's financial circumstances or to disclose such information, unless specifically requested by the judge or prosecutor. It is highly problematic to give the judge or prosecutor a contractual right to "request" protected attorney-client privileged financial information offered by the client. No such right would exist for defendants who retained private counsel. Furthermore, such information can be used against the client by prosecutors in bail motions, release reviews, or as impeachment of the defendant's denial of a possessory interest in a real property location.

The defender's contract with Power County requires he meet with his in-custody clients for an initial interview, either in-person or by phone, within 24 hours "wherever possible" and no later than within two days of appointment. Though we did not visit the jail in Power County, we did find there was confidential space set aside in the courthouse for counsel to meet with a detained client. There is also space for defenders to meet with out-of-custody clients and family members.

All trial court representation in this county is vertical, unless a conflict arises during the course of representation and the case must be handed off to another attorney. But given the delay of appointment until formal charges by the prosecutor, the spirit of this standard is not met.

The Lack of Attorney Qualifications, Adequate Training & Supervision

All national standards, including ABA *Principle 6*, require attorneys representing indigent clients in criminal proceedings to have the appropriate experience to handle a case competently.¹⁶⁰ That is, policy-makers should not assume that an attorney who is newly admitted to the bar is skilled to handle any type of case or that even 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.¹⁶¹

ABA 6th Principle

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.

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.¹⁶¹

The systemic need to foster attorneys is the thrust of the call for on-going training encapsulated in ABA *Principle 9*. For

example, 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 indigent defense system, the prosecutor's office, the court system, and the probation and sheriff's departments, as well as any other corrections components. It makes use of role playing and other mock exercises and videotapes to record work on required skills such as direct and cross-examination and interviews (or mock interviews) of clients, which are then played back and critiqued by a more experienced attorney or supervisor.

As *Principle 9* indicates, training should be an on-going facet of a public defense system. 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 each day, even the most skilled attorney practicing criminal law must undergo training to stay abreast of such continually changing fields as forensic sciences and police eye witness identification procedures, while also learning to recognize signs of mental illness or substance abuse in a client.¹⁶²

Such training should 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. Moreover, 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*.

Without supervision, attorneys are left to determine on their own what constitutes competent representation and will often fall short of that mark. To help attorneys, an effective performance plan should be developed — one that is much more than an evaluation form or process for monitoring compliance with standards — and should include: a) clear plan objectives;¹⁶³ b) specific performance guidelines;¹⁶⁴ 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;¹⁶⁵ and d) specific processes for providing training, supervision, and other resources that are necessary to support performance success.

Ada County

The Ada County public defender office divides its attorney-staff into teams based on their level of proficiency, experience and ability. The capital case defenders are quite experienced. The chief criminal deputy prosecutor had recently spent four days in post-conviction depositions with some of them, and he had been impressed with the depth of knowledge one of the attorneys displayed. It appears that they are knowledgeable and dedicated lawyers who spend many weeks in trial and who prepare as fully as they can given their other caseload and supervisory responsibilities.

The office's supervising attorneys all have full caseloads. This makes it difficult for them to observe attorneys in court, confer regularly with attorneys, or evaluate them effectively. One defender with several years of felony experience noted that there is a "lack of mentoring," and a "sink or swim" approach to lawyers learning the job. "We all wish someone would have taken us under their wing." This attorney felt that the senior attorneys were not amenable to providing supervision, but also noted the time demands on them.

For example, one felony supervisor has been with the office for 27 years and supervises two attorneys on his team. His team covers two judges' courts. This team leader averages between 150 and 200 felony cases a year on his own caseload and assigns cases to the other attorneys, keeping the more serious cases for himself. He has two days a week when he has to be in court for motions and sentencings and other hearings. The chief investigator, a 28-year veteran of the public defender office, supervises four investigators for 35 lawyers. Having received an undergraduate degree in sociology and psychology, his only training has been "on the job." The office has never sent staff investigators to training conferences.

The lack of training available to all staff was a common complaint we received. The chief defender lamented that in-house training is "virtually non-existent." One felony supervising attorney told us that what training there is tends to be reactive to crises or new appellate decisions. Another said that training is "pretty much" learning on the job. There are no weekly attorney meetings in the felony practice. Instead, some attorneys have occasional informal meetings, but there is no formal system of sharing briefs and information within the office. The capital defenders routinely seek training in death penalty representation from the federal defender's office, but they do not complement that with other national training.¹⁶⁶

The new misdemeanor supervisor said there is no training system and "you got to do it to learn it." The misdemeanor division meets every few months. One misdemeanor attorney said the lack of training was a weakness in the office, noting a "dive in and do it" approach. One judge, while complimenting the defender attorneys as generally being the most prepared, suggested that they could benefit from training in cross examination, theme development, and use of technology. He said the attorneys do not use demonstrative evidence in misdemeanor court. One misdemeanor attorney said he would like training on how to read police and department of transportation reports.

ABA 9th Principle

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.

Power County

The county has no qualification standards for its attorneys who accept public appointments, though none of the contractors is expected to handle the county's death penalty caseload. The primary contract defender makes case assignments to the conflict and over-flow contract defenders based on their abilities and experience levels, keeping the most serious cases for himself.

The general consensus of the local criminal justice system stakeholders we spoke with was that the Power County contract defenders were all solid, capable attorneys. We witnessed the primary defender advocate effectively on behalf of his clients in one magistrate court hearing. And the conflict defender came to his current position with four years' experience as a public defender with the Bannock County Public Defender's Office, where he was a supervising attorney for the misdemeanor practice. But the defenders all operate entirely independent of one another. There is no mentoring between the attorneys. Nor is there any level of supervision, formal or informal, for the contract attorneys. What does exist is a very subtle courthouse process whereby the primary contract defender relies upon his actual observation of courtroom performance by the conflict and overflow attorneys. He may also hear representation comments made by courthouse personnel, probation, jail, law enforcement, clients, or any of the other stakeholders. In other words, he relies upon the gossip of a small, closed environment.

Finally, Power County does not have training requirements and does not provide funds for its contract attorneys to attend training events. Instead the attorneys maintain compliance with the Idaho Supreme Court's CLE requirements by seeking out the least expensive in-state programs, such as those provided by the Idaho Association of Criminal Defense Lawyers, all paid for out of their own pockets.

Kootenai County

The chief deputy public defender screens all cases as they come into the office, and in making individual assignments he works to match the complexity of the case to the experience of the attorney. The Kootenai County defender office helps its newer attorneys along with an effective mentoring system. The team atmosphere among the juvenile & misdemeanor staff further helps to provide direction for competent case handling.

For the last several years, the office has struggled with its attorney recruitment efforts. They use informal word of mouth and formal methods of recruitment through the Idaho State Bar, IACDL, and other outlets. The

ABA 10th Principle

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.

office recruits the best possible candidates, but it is increasingly difficult to find attorneys who want to do public defender legal representation. Lynn Nelson, the chief deputy, told us it is not easy to find lawyers who really want to do public defense representation, and they do not hire lawyers for just one specialized area, such as juvenile or Child Protection Act or murder, as all attorneys are expected to handle a mixed caseload. Those attorneys they do find are hired based on their qualifications and merits. Given the office's regional location, there is not much "diversity" among the pool of attorney professionals who either attend law school in Moscow or Spokane.

The office provides both in-house and external continuing legal education programs to its staff, and holds group meetings for issue discussion and education. The office sponsors CLE programs and trainings for its staff.¹⁶⁷ We observed an hour-long, mandatory lunch time meeting, complete with pizza service, lead by Lynn Nelson.

NATIONAL LEGAL AID & DEFENDER ASSOCIATION

All of the attorneys and staff investigators were presented a lesson on a number of issues, including representation in Child Protection Act cases. Staff attorneys raised and discussed some other practice and legal issues, and Nelson talked about the need for better “camaraderie” within the office. Newer, more recent attorney additions to the office asserted their “circle of trust” among one another. We were told that John Adams, the chief defender, had recently presented a seminar for the office on “How to Manage a Large Complex Case,” and regularly participates and leads the office trainings.

The office also sends attorneys to seminars offered by the Idaho Association of Criminal Defense Lawyers, and occasionally sends attorneys out-of-state to the National Criminal Defense College in Macon, GA and to death penalty training events. Within its operations budget, there is funding listed for seminars and professional education (\$11,900), airfare/mileage (\$4,800), and lodging (\$7,000).

The office still relies primarily on an informal, on-the-job learning process for its newest attorneys. There is no organized and well-articulated process for developing new defenders as they join the office. The on-the-job learning process applies to assistants, investigators and law interns as well. And though the chief deputy defender is assigned training responsibilities for the office, he has other significant tasks and responsibilities on a daily basis, including carrying his own caseload.

The office is now large enough to require mid-level supervising attorneys, particularly a team leader for the juvenile & misdemeanor staff, who along with an ordinary caseload would also be responsible for directly training and integrating new attorneys into the office. Though the supervision and mentoring shown in Kootenai County is of a higher quality than we observed in any other Idaho county, it is still informal and lacks adequate performance review for all staff in the office. When we spoke with the younger attorneys who handle the juvenile and misdemeanor case assignments, they indicated they did not have formal case review sessions or evaluation reviews with the chief or deputy chief. However, they were all clear that Lynn Nelson was available to them if they had a question that needed a response.

Kootenai County requires end of the year formal evaluations for the support staff, but we did not see or hear about attorney staff receiving the same type of yearly evaluation. If there is any attorney evaluation process, it is done in an informal manner as cases are discussed with the chief and the chief deputy.

Contract attorneys are not formally supervised or evaluated by anyone. They are observed in the courtrooms and during trials and hearings by defenders, judges, court personnel, and others. If there is a competency and effectiveness problem, it may be noticed and reported to the chief deputy, who may then intervene or even terminate the contract. But, the reality remains: who would they find to replace that contract defender? There are few qualified attorneys who wish to move into the contract defender system at such a low level of pay.

Bonneville County

We found considerable enthusiasm for the work among some of the defenders and the lead conflict counsel, leading us to believe there is a solid base of professionalism among the criminal justice system practitioners with whom we met. Our reaction to observing them in court is that there is no lack of talent among the attorneys. When they have time to devote to a client and otherwise notice an argument worth presenting, they put up a good fight.

Unfortunately, the attorneys have meager training resources available to them. The attorneys are invited to attend IACDL seminars once or twice each year and trainings offered by the local county bar to comply with their annual CLE requirements. But the office has no set training policy or expectation that its attorneys will seek out training opportunities on such things as challenges to eyewitness identification, DNA evidence, and flawed ballistics testing. Nor are attorneys expected to keep up with frequent changes in state and federal law that have significant consequences for their clients. Instead, the lawyers will meet as a group from time to time to discuss tough

cases, coverage or caseload issues, but not policy or changes in the law.

The county lacks any policy on minimum attorney qualifications, and is there no method of supervision for attorneys in the public defender's office. One of the felony lawyers said no one was in court to help him on his first trial at the public defender's office and he has no in-court supervision. One lawyer noted that the office is "compartmentalized" and "we don't spend a lot of time interacting with each other." The chief defender's full caseload means that he has limited time for supervision and office administrative tasks. The national standard is one full-time supervisor for each ten attorneys. Under this standard, the Chief should have no more than 60 percent of a full caseload if he is supervising four attorneys. As he also has administrative responsibilities, the caseload should actually be lower than 60 percent. The secretarial staff said that his caseload is somewhat lower than the other two felony attorneys' because the judge to whose court he is assigned comes to Bonneville County fewer days per month.

While each of the public defenders and conflict counsel came to their respective positions with a number of years' experience — many having in the past held positions both as prosecutors and defenders in neighboring counties — an attorney's practice model is what he sees from his peers in court. Without any measure of performance expectation, the standard of practice as demonstrated by those who have worked in the system longest is usually what passes for all who come later.

*Canyon County*¹⁶⁸

Recruitment of attorneys has become challenging. The Wiebe & Fouser firm advertises through the Idaho State Bar and through the University of Idaho School of Law. Two of the firm's newer attorneys had just graduated in May from the UI School of Law, finding the firm through the law school posting. The firm also relies upon word of mouth, as well as referrals from other attorneys for its lawyer recruits. Scott Fouser and Klaus Wiebe usually conduct interviews, but they do try and involve others in the hiring decisions, finding it important to bring on attorneys who will work well within their office structure.

The law firm attempts to match case severity and complexity with its attorneys' ability, experience and on-the-job training progress. Lawyers are assigned cases for their level of proficiency and experience off of an assignment wheel. Newer, younger attorneys start with juvenile, child protection cases and misdemeanor cases, moving up to lower level felonies and then more serious felony cases. In order to be eligible for capital case appointments, attorneys must be certified by the Idaho Supreme Court.

The office does not have any systematic or formal training programs for its attorney staff. Instead, all training is on-the-job. For new attorneys, Klaus Wiebe oversees the on-the-job training. The new attorney will shadow someone who is already doing the courtroom assignment and who "knows what they are doing." The new attorney receives instruction and suggestions from the more senior lawyer on how to represent and deal with clients, judges, files, etc. Learning the value of a plea offer is also part of this process, as is learning how to conduct a voir dire. One attorney told us that the office used to run "lunch and learn" sessions, but recently they have been happening with less frequency. However, as a small office, everyone is open to answering questions and sharing information. One judge commented that the defenders have an "awesome" team with "great" trial skills.

Attorneys must comply with Idaho Continuing Legal Education requirements, and they are on their own to do so without financial support from the office.¹⁶⁹ Most rely upon the Idaho Association of Criminal Defense Lawyers, which conducts programs throughout the year and which has a spring Sun Valley conference. For the most part, attorneys do not attend national training programs, unless financed on their own.

The lack of adequate training resources is cause for significant concern, particularly in death penalty representation. Mark Ackley, of the Capital Litigation Unit of the Idaho State Appellate Public Defender, expressed frustration that death-qualified attorneys (both in Canyon County and throughout the state) for the most part do not

travel out of state to attend the top national death penalty training programs, like NLADA's Life in the Balance conference, California Attorneys for Criminal Justice, or others — likely for lack of time and lack of resources. IACDL does some seminar work on capital representation, but “outside” ideas and strategies are especially needed in death litigation. Capital voir dire techniques could be improved, and attorneys should make better, timelier, and stronger objections. Mitigation has improved, but there are statewide problems in finding good mitigation specialists. Experts are increasingly necessary and more costly, especially since many must come from out of state. Even if qualified under the Idaho Supreme Court's death requirements, there is no independent quality review of capital defense attorneys by the Court or anyone else.

The office has not adopted any practice guidelines or standards. The only standards are those informally set and articulated by the two firm partners who drive the practice. There is no formal evaluation process for attorneys or staff. One named partner monitors and observes attorney performance, and he informally communicates as needed with his staff.

Blaine County

Blaine County lacks a sufficiently large criminal defense bar to be able to match case type or severity with the experience level of the appointed attorney. The county's only policy on attorney-qualification is that the attorney “warrants” she is duly licensed to practice law in the state of Idaho, is a member in good standing in the Idaho Bar, and is “competent and qualified to represent criminal defendants at all levels of proceedings called for in this Agreement.”¹⁷⁰ Therefore, with the exception of death cases,¹⁷¹ all contract attorneys are expected to handle all levels of criminal, delinquency, child protection, Guardian ad Litem, involuntary mental commitments, post-conviction relief, appeals¹⁷² and probation violations. The county's contract attorneys, however, are not all equally skilled advocates. Clearly, the Roark Law Firm is identified as having the strongest and best attorneys in this system, but all the attorneys receive appointments in all levels of cases. There is no attempt to match the seriousness of the charges with the advocacy experience and quality of the lawyer, and the current system must rely upon the attorney to self-identify his/her shortcomings and either reject the appointment or seek second-chair assistance.

All the interviewed attorneys indicated that they work well together and that they share information about the contract negotiations as well as court/practice systems issues. But the contract attorneys are on their own when it comes to acquiring continuing legal education credits or on-going training. A number attend programs offered by the Idaho Association of Criminal Defense Lawyers, the Idaho State Bar, or make use of self-study programs. Nelson and Roark were the only lawyers who talked about having attended out of state training conferences, and these may be related to death penalty representation. Idaho does require attorney Continuing Legal Education, but the Blaine County attorneys must acquire this CLE for themselves. There is no funding in their contracts for training, education and development.

There is no supervision, evaluation, or review system for defense counsel by any entity in Blaine County. There is no contract defender program administrator. The attorneys pretty much work among themselves to provide self-oversight, and we did hear of examples of attorneys not receiving a contract assignment due to their observed poor representation efforts.¹⁷³

Nez Perce County

At F&V, the two named partners are assigned the most serious and complex cases. Due to the limited types of cases usually seen in this county, the partners do not believe that they have cases which they cannot competently handle. The youngest attorney, a little more than two years out of law school, receives juvenile and misdemeanor assignments, considered much less serious and not very complex. The conflict of interest attorneys take all types of public defender cases.

The F&V attorneys attend training programs offered by the Idaho Association of Criminal Defense Lawyers (IACDL), and other in-state training programs. New staff attorney training is mostly on the job through oral instruction by the partners. F&V does not fund or provide for the continuing education and development of its conflict lawyers. The only requirement under the contract with Nez Perce County is that the public defenders and the conflict lawyers maintain compliance with Idaho Continuing Legal Education.

There is nothing by way of attorney supervision in Nez Perce County. The F&V partners do not provide supervision for the conflict attorneys. If a conflict attorney demonstrates poor performance, the partners will hear about it from the judges, or the clients/client family, or the courthouse/justice community grapevine. Prior to our coming on site, one contract attorney was removed from the conflict practice due to poor performance attributed to personal issues and alcohol addiction.

The F&V associate attorney is not evaluated or directly supervised through meetings or case reviews. The staff attorney is free to ask the partners questions, and she openly admits her willingness to do so as needed. She is not shy. However, her practice model is what she sees from the partners and from other lawyers in the courtrooms, and that sets the standard for her practice. Fitzgerald and Van Idour do not use national standards or formalized attorney-performance guidelines; the standard of practice is their own, and she is measured, if at all, against that standard.

Vocabulary of Juvenile and Adult Justice Systems

The vocabulary of the juvenile delinquency system is different than that of the adult criminal justice system. Though the labels are different, the stages of the process for children all have a parallel in the stages of the process for adults.

Children	Description	Adults
Charged with committing a delinquent act or a status offense	A delinquent act is generally something that, if committed by an adult would be considered to be a crime. A status offense is something that is only wrong when committed by a child.	Charged with committing a crime, whether felony, misdemeanor, or infraction
Take into custody	A law enforcement officer takes control of your body and confines you.	Arrest
Detention hearing	A child will either be detained in custody or released to their parent or guardian – there is no right to bail for children. An adult will be released on some form of bail undertaking if they can afford it.	Bail hearing
Petition or Complaint	This is the charging instrument filed by the prosecutor to initiate the prosecution.	Indictment or Bill of Information
Admit-Deny hearing	The child or adult is informed of the nature of the charge against them, is advised of their rights, and is called upon to respond.	Arraignment
Evidentiary Hearing or Adjudication	A judge will decide whether a child has committed the delinquent act – there is no right to trial by jury for a child. An adult may elect to have a trial by either judge or jury.	Trial
Disposition	A child may be placed on probation or sent to a juvenile corrections facility; just as an adult may be placed on probation or sent to jail or prison.	Sentence

The Crisis in Representing Children

The central premise behind the creation of the juvenile courts system, beginning with the first established in 1899 in Chicago, was that through a separate court process wayward children could be developed into “productive adults.” With that aim, “the state’s role in both delinquency and neglect cases was to intervene ‘in the spirit of a wise parent toward an erring child.’”¹⁷⁴ Juvenile delinquency courts were considered

civil in nature, as opposed to criminal, so it would have been antithetical to provide procedural protections available to adults accused of crimes.

“[B]ecause the ostensible purpose of intervention was to rehabilitate rather than punish the child, the court and correctional system had virtually unbridled discretion in fashioning dispositions, unconstrained by the principles limiting criminal punishment.”¹⁷⁵ Despite the original intentions, juvenile courts afforded children “the worst of both worlds.”¹⁷⁶

Responding to *In re Gault*, 387 U.S. 1 (1967), holding that children have the right to an attorney in juvenile delinquency cases, states and courts adopted a new approach. They retained as a core premise the notion that “because of their developmental immaturity, most juveniles should be subject to a juvenile court proceeding (though one that was characterized by procedural formality and due process protections), and to more lenient punishment than adults in separate correctional facilities.”¹⁷⁷ Legislatures then began to establish statutory dispositions for juveniles based on the seriousness of the offense, rather than on the needs of

Ten Core Principles for Juvenile Delinquency Representation

To help policy-makers understand their responsibilities in the realm of juvenile representation, the prevailing standards are the *Ten Core Principles for Providing Quality Delinquency Representation through Indigent Defense Delivery Systems*, promulgated by The National Juvenile Defender Center and NLADA. The *Ten Core Principles* provide “criteria by which an indigent defense system may fully implement the holding of *In re Gault*” in areas specific to the welfare of children like educational advocacy and right to treatment.

1. The Public Defense Delivery System Upholds Juveniles’ Constitutional Rights Throughout the Delinquency Process and Recognizes The Need For Competent and Diligent Representation.
2. The Public Defense Delivery System Recognizes that Legal Representation of Children is a Specialized Area of the Law.
3. The Public Defense Delivery System Supports Quality Juvenile Delinquency Representation Through Personnel and Resource Parity
4. The Public Defense Delivery System Uses Expert and Ancillary Services to Provide Quality Juvenile Defense Services.
5. The Public Defense Delivery System Supervises Attorneys and Staff and Monitors Work and Caseloads.
6. The Public Defense Delivery System Supervises and Systematically Reviews Juvenile Staff According to National, State and/or Local Performance Guidelines or Standards.
7. The Public Defense Delivery System Provides and Requires Comprehensive, Ongoing Training and Education for All Attorneys and Support Staff Involved in the Representation of Children.
8. The Public Defense Delivery System Has an Obligation to Present Independent Treatment and Disposition Alternatives to the Court.
9. The Public Defense Delivery System Advocates for the Educational Needs of Clients.
10. The Public Defense Delivery System Promotes Fairness and Equity For Children.

The full text can be found at http://www.njdc.info/pdf/10_Core_Principles_2008.pdf.

How Children are Different From Adults

The law treats children differently because children are different. The U.S. Supreme Court agreed in *Roper v. Simmons* that there are important “qualities that distinguish juveniles from adults.”^a Therefore, public defense delivery systems must also recognize that kids are different from adults.

Research has demonstrated that children do not possess the same cognitive, emotional, decision-making or behavioral capacities as adults, and thus attorneys appointed to represent them must receive specialized training regarding the stages of child and adolescent development. The American Medical Association has argued that we know “intuitively that adolescents do not think or behave

like adults. These behavioral differences are pervasive and scientifically documented.... Their judgments, thought patterns, and emotions are different from adults’, and their brains are physiologically underdeveloped in the areas that control impulses, foresee consequences, and temper emotions. They handle information processing and the management of emotions differently from adults.”^b

Research has further suggested that “involvement in the juvenile court system increases the likelihood that a child will subsequently be convicted and incarcerated as an adult.”^c This is partly because “deficiencies in the adolescent mind and emotional and social development are especially pronounced when other factors — such as stress, emotions, and peer pressure — enter the equation.”^d With

the added stress of an arrest and detention in a juvenile facility, a child will likely have a diminished ability to understand the juvenile court proceeding, and the consequences — indeed, each decision — within each phase of the process. Cognitive issues are only compounded when one considers the overrepresentation in the juvenile justice system of kids with mental health and developmental disabilities and drug and alcohol dependencies and addictions. Further still, the percentage of girls in the nation’s delinquency systems is ever-increasing (now approximately 30 percent, on average). But girls’ issues are distinct from

boys’, particularly for those who have suffered frequent abuse and neglect.

Because of all these reasons and

more, it is of paramount importance that every child in a juvenile court proceeding have access to a lawyer who is prepared to competently represent the child’s interests.

“Under our Constitution, the condition of being a boy does not justify a kangaroo court.”

In re Gault, 387 U.S. 1 (1967)

^a *Roper v. Simmons*, 543 U.S. 551 (2005), at 20.

^b American Medical Association (AMA), *et al.*, Amicus Brief in *Roper v. Simmons*, at 4-5.

^c American Council of Chief Defenders and the National Juvenile Defender Center, *Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems* (December 2004), from the Preamble. Available at: http://www.njdc.info/pdf/10_Principles.pdf.

^d AMA brief, at 7-8.

the child.¹⁷⁸

Over the past 40 years since *Gault*, the specialized nature of juvenile procedures has steadily grown in scope. Juvenile defenders must be aware of the procedural rules and constitutional criminal procedures of both the juvenile and the adult court systems, as state governments have expanded the situations in which a juvenile may be tried as an adult in criminal court. At the same time, juvenile defenders must be aware of the developmental and mental abilities of their young clients, collateral consequences of conviction (including immigration, access to housing and jobs, admission into armed services, among others), and the complex procedures for children under federal and state law.

While it is often tempting to think of juvenile delinquency representation as simply mirroring adult criminal defense representation in a different courtroom or courthouse, to do so is an error. The vocabulary, procedures, policies, and even interpretation of constitutional rights are all different in the juvenile arena (see sidebar, page 74). The inadequacies of Idaho’s counties in meeting the ABA *Ten Principles* in adult representation all apply with equal force to juvenile representation across the state. Yet the unique nature of the juvenile delinquency system and juvenile clients themselves give rise to further inadequacies beyond those encountered in the adult defense system.

Representation in Delinquency Matters

The life of a case: Detention Hearings

A child is not “arrested.” She can, however, be “taken into custody” by a law enforcement officer on a charge of juvenile delinquency¹⁷⁸ or a status offense,¹⁸⁰ or by order of a court if it has reason to believe the child committed a crime.¹⁸¹ When a child is initially taken into custody she will be fingerprinted and photographed,¹⁸² and then the arresting agency and prosecutor will either release the child to her parent/guardian or seek to detain the child. If she is immediately released to her parent/guardian, then the child will return home, continue attending school, and life will be relatively normal while the prosecutor makes the decision about whether to file a complaint¹⁸³ against the child for a delinquent act.

The arresting agency may choose not to immediately release the child to her parent/guardian if it appears “contrary to the welfare of society or the welfare of the juvenile,”¹⁸⁴ in which case the child must be brought before the court within 24 hours for a detention hearing.¹⁸⁵ There is no right to bail for juveniles in the state of Idaho.¹⁸⁶ At the detention hearing a magistrate judge will determine whether the child will continue to be detained or released, and if released under what circumstances (e.g., electronic monitoring, in-home detention, or various other requirements under court-sanctioned alternatives to detention). There are specific conditions under which a judge is allowed to order continued detention: (1) the child has run away from her parent/guardian, and the judge believes returning the child to her parent/guardian’s custody would be harmful; (2) the judge does not trust that the child will appear at a later court hearing; (3) the judge believes that in releasing the child, she will be subject to an environment he deems harmful to her wellbeing; or (4) the judge has reason to believe the child would otherwise be a danger to society.¹⁸⁷

Under Idaho Juvenile Rules, the judge is required to notify the child and her parent/guardian of the right to counsel at public expense “at the earliest possible time... and at the outset of a detention hearing.”¹⁸⁸ So, at this hearing, the child must make the first decision about whether to request appointment of counsel or waive her right to counsel. As with adult court, the child’s waiver of the right to counsel must be knowing and voluntary. A judge may decide not to accept her waiver of counsel if he finds it is in the best interests of the child.¹⁸⁹ Many juvenile court judges have adopted a policy that children charged with felony delinquent acts are not permitted to waive their right to counsel. There is no such policy for children facing misdemeanor charges.

These first actions mark the beginning of juvenile delinquency proceedings under the Idaho Juvenile Corrections Act (JCA).¹⁹⁰ Two of the counties we visited — Kootenai and Ada — provide representation at detention hearings. At one such hearing we observed in Ada County, both the prosecutor and the public defender were present in the courtroom with files for all of the cases on the docket. As each child was brought into the courtroom, the judge first identified everyone in the courtroom, and then read the charges to the child before formally appointing the public defender. Once appointed, the defender entered a formal denial to the charges on behalf of his client and presented arguments on the issue of release or hold. A placement officer from the detention center, who had met with each child and her parent/guardian prior to the hearing, also offered a release/hold recommendation, as did the prosecutor and the child’s parent/guardian. If the child was already on probation, the assigned probation officer was in the courtroom and asked for his or her position. Once the judge made his release/hold decision, he then set several dates: (1) a release/detain review hearing, if the child would be held in custody; (2) a pretrial conference date; (3) an attorney-client meeting date,¹⁹¹ and (4) a trial date.

At a detention hearing in Kootenai County, the defenders spoke with their clients in the courtroom while at counsel table, and they also consulted with the parent/guardian who was in the courtroom for that child. Clearly these were not confidential discussions. In one case the defender actually asked the prosecutor and the judge to leave the court room while he spoke with his client, however, the court clerk, corrections officer, and bailiff could still hear what was being said.

When a child is ordered detained, the judge will allow defense counsel to return the child to the courtroom

on the next day for reconsideration, and may release the child as long as the prosecutor agrees to the release conditions. We observed detention review hearings in Kootenai County, where the prosecutor — not defense counsel — had filed the review motions. If there is no prosecutorial agreement, defenders file Motions for Conditional Release, and the judge will grant hearings on those motions.

No other county we visited provides early access to representation, and therefore many children are forced to appear at this critical hearing without the guiding hand of counsel. While adults have a difficult if not impossible time evaluating the legality of the state's charges against them and weighing the possible outcomes of a plea or trial, all without the help of a lawyer, this is even worse for children. Children are constantly told by parents and teachers and authority figures that they should tell the truth and be respectful of adults. When they are taken into custody by the police, they are scared — afraid of going to jail, afraid of angering their parents, afraid because they do not know what will happen to them next. Within 24 hours of this already traumatic experience, they are brought before a judge who asks them whether they admit to what the police say they have done or deny it. And unlike adults who have a right to bond out of jail if they can afford to do so, this same judge will decide whether the child will remain in juvenile detention or get to go back home while they wait for the outcome of the case against them. All of this occurs long before the child ever has an opportunity to talk to a lawyer. Faced with the societal, and often parental, pressure to “tell the truth,” children frequently give up the most basic right — the right to counsel — by admitting to what the police say they have done; and they do so within 24 hours of being picked up and without getting to talk to a lawyer first.

The life of a case: Admit/Deny Hearings

At some point after a child is taken into custody, the prosecution will determine whether and on what charge to file a “petition” charging a child with a delinquent act or status offense. The court will then schedule an “admit/deny hearing” and will summon the child and her parent/guardian to appear in court for the proceeding where several critical things will happen.

The admit/deny hearing is “in the nature of an arraignment in an adult criminal proceeding.”¹⁹² The child and her parent/guardians will be given a copy of the petition filed against her, but not necessarily prior to the admit/deny hearing.¹⁹³ She will also be informed of: (1) the right to further time to prepare for the hearing, if the court summons was not served within 48 hours of the scheduled proceeding; (2) the nature and elements of each allegation contained in the petition; (3) the right to retain or have counsel appointed by the court; (4) the right to a reasonable time to consult with counsel before entering a plea; (5) the potential consequences to admission of the alleged offense; (6) the right against self-incrimination; and (7) the state's burden to prove the allegations of the petition beyond a reasonable doubt at the evidentiary hearing before the court.¹⁹⁴ (There is no right to a jury trial for juveniles in the state of Idaho.) As with adult court, these rights are recited by video tape in many of the counties we studied.

The child will not be asked to plead guilty or not guilty as an adult would. Instead, the child will be asked to admit or deny the allegations.¹⁹⁵ If the child admits to the allegation, her admission must be knowing and voluntary and she must knowingly and voluntarily waive her right to counsel. The court must find a factual basis for the admission. Otherwise, the judge cannot accept the child's admission.¹⁹⁶ If the judge accepts the child's admission, the next court proceeding will either be an informal adjustment or a sentencing hearing. If the child denies the allegations, then the judge will set the matter for an evidentiary hearing or trial.

Juvenile case records and proceedings are open to the public unless otherwise closed by a judge. Under Idaho Juvenile Rule 52, the judge has discretion to make all proceedings confidential if: (1) the child is under the age of 14; (2) the child is 14 years or older and charged with an act that would not be a felony if committed by an adult; or (3) if there is a compelling reason to otherwise close the proceedings.¹⁹⁷ This critical decision is made at the admit/deny hearing.¹⁹⁸

For those children who were not immediately released to their parent, the court is instructed to combine the

admit/deny and initial detention hearings into one hearing “in the interest of judicial economy,” but only where doing so would not “[violate] the juvenile's right to due process.”¹⁹⁹ Therefore, where the judge deems it okay to do so, all of the critical steps in the juvenile court process described above can be combined into one proceeding, and the detained child will not have yet been appointed an attorney to argue on her behalf, in the counties studied other than perhaps Ada and Kootenai as described in the preceding section. But even for children not held in-custody from the outset, there are already serious problems due to the lack of early access to counsel.

As with adult court, many problems are caused by the way that children are notified of their right to counsel, and by judges willingness to accept a child's waiver of that right. For example, we observed juvenile hearings in Bonneville County where the children appeared without counsel. There was neither a prosecutor nor a public defender present in the courtroom. The judge asked each child whether he had seen a video about constitutional rights and whether he had questions about it and understood the rights. The judge advised each child of the maximum sentence, but did not do a thorough inquiry to determine the child's ability to understand or to waive either right to counsel or right to trial. In one case, the child asked for and was appointed a public defender. In another case, the child said he wanted to admit to the charge but with an explanation, then the child explained that he and his mother had had a misunderstanding about his right to use the car. The probation officer told the child that an admission could affect his insurance, and the judge said he would allow the child to withdraw the admission. The court then advised the child that he could retain counsel or apply for a defender. Clearly, the child did not have a clear understanding of consequences of the charges against him *before* he initially waived his right to counsel. Despite the judge's cursory inquiry, it was left to the child to assert himself.

In Bonneville County, 1,014 juvenile delinquency cases were filed from December 2007 through November 2008.²⁰⁰ Yet in that time period, the defender office was assigned only 248 juvenile cases. This means that three-quarters of juveniles are not assigned counsel, presumably because most of them waive counsel.

Kootenai County public defenders usually appear in court for admit/deny hearings.²⁰¹ But they are not yet appointed, so they are only there for informal consultations with the child and the parent/guardian. It would be possible for a child to waive an attorney and enter an admission to the stated charge(s) without any attorney consultation, but we were told that this is very rare given the defender's presence at these hearings.²⁰²

In Ada County, however, the public defender office does not staff admit/deny hearings for out-of-custody clients. Many of these cases involve misdemeanor charges or even status offenses like running away or truancy. Children and their parents frequently decide to waive counsel in misdemeanor cases without ever first speaking to an attorney about the potential ramifications of doing so. The magistrate judge told us there is no official judicial policy regarding waiver of counsel in felony petitions or required access to an attorney before waiver or the proffering of a felony admission. Therefore, a child facing a felony offense petition could waive counsel and enter an admission at the admit/deny hearing. Further complicating the issue, there is a prosecuting attorney present at these hearings who discusses the juvenile's case with the child and her parent/guardian. Of critical importance, under Idaho Juvenile Rule 6(i), the prosecutor is allowed to enter into discussions directly with children appearing without counsel for the purpose of reaching a plea agreement. The prosecuting attorney, however, must first advise the child's parent/guardian and give them the opportunity to be present at the settlement negotiations. Therefore, unless the client or her parent/guardian specifically requests the appointment of counsel (and they are financially eligible), the public defender is not appointed to represent the child. Many of the children waive counsel and enter an admission to the charge. When we asked the public defenders about their limited involvement in these hearings, it was primarily attributed to lack of staff and to the relatively minor nature of most of the offenses involved.²⁰³

Again, the combination of a video recitation and language included in a court summons do not amount to a thorough explanation of the child's rights. And the validity of the courts' waiver practices are compromised: because there is no way in many cases for the judge to know the child's level of education and familiarity with English, and thus her ability to understand the complexity of the crime of which she is accused. Their inquiries are not complete enough to provide the information that is necessary to comply with state statute.²⁰⁴ The Idaho

courts are not always requiring written waivers, they are not always providing a lawyer to advise the juvenile before an in-court waiver is accepted, and they are not always conducting thorough inquiries of the child's ability to understand what is happening. Access to counsel at every stage of the juvenile process is absolutely necessary, particularly from the outset of proceedings in detention and admit/deny hearings. Even a misdemeanor offense may have negative collateral consequences that are unknown to a child or the parent, like access to federal housing or scholarships or even certain school programs. The parent and child may certainly have different interests, including the parents urging the child to "take responsibility" for bad, inappropriate behavior, even if all of the underlying facts may not be fully known. As the U.S. Supreme Court decision in *Roper v. Simmons* acknowledges (see side bar on page 76), children are developmentally different from adults, and they may not fully understand or comprehend complex information that is being presented to them at these hearings. An attorney for the child is really necessary to counsel, explain, and direct the outcome for the child...even on a misdemeanor or status offense, many of which lead to more serious encounters with the juvenile justice system, especially if the child violates the terms and conditions of the sentence.

Juvenile Transfer to Adult Court in Idaho

As in many states, children under the age of 18 may be tried as adults in the adult criminal justice system. Idaho has both "mandatory transfer" of juveniles into the adult criminal court system and "discretionary waivers."

Mandatory Transfer

A juvenile who is at least fourteen years of age and who is alleged to have committed certain crimes "shall be charged, arrested and proceeded against...as an adult." (I.C. Section 20-509.) These crimes are: murder of any degree or attempted murder; robbery; rape (excluding statutory rape); forcible sexual penetration by use of a foreign object; violent crimes against nature; mayhem; assault or battery with intent to commit any of these offenses; first degree or aggravated arson; and controlled substance manufacture, delivery, or possession with intent to deliver within 1000 feet of a school or school-sponsored activity. All lesser offenses included with these enumerated offenses follow with the case into adult court. A child 14 to 17 years old and charged with one of these crimes is automatically transferred to adult court as soon as the child is formally charged and indicted. Once a juvenile has been convicted in adult court, even if the eventual plea is to a non-waiver qualifying crime, the juvenile must be tried and sentenced as an adult for this and any subsequent violations of Idaho criminal law.

Discretionary Waiver

A child of any age, who is accused of one of the crimes listed above may be transferred to adult court. And a child 14 or older may be transferred to adult court for any misdemeanor or felony that is illegal when committed by an adult. (I.C. Section 20-508.) Any party or the court can file a motion requesting the waiver to adult court. There is a right to counsel and to a full hearing at which time any party may present evidence on the issue of waiver. The law specifies various factors that must be

considered by the court in making the waiver determination. The court may also consider an investigative report, usually completed by the probation department, certified court records from other states, and county probation records. The parties also have the right to enter into a written stipulation of waiver or to stipulate to the terms of one that is already on record with the court. The court shall make formal findings as to whether or not the juvenile shall be waived into adult court. Upon waiver, the prosecutor must file a criminal complaint within twenty-four hours, excluding holidays, Saturdays and Sundays, and the juvenile shall be remanded into the custody of the county sheriff, held without bond on a felony or held under Juvenile Court Rule 7(c) on a misdemeanor, pending initial appearance.

When a child has been transferred to adult court under the discretionary waiver laws and is convicted, the judge still has some options in sentencing. He may: impose a juvenile sentence; impose an adult sentence; or impose an adult sentence but suspend it or withhold judgement, and place the child under the custody and supervision of juvenile corrections. (I.C. Section 20-508(10).)

A waiver to adult court carries significant impact on a young person's life. Juveniles are exposed to the same penalties as adults, including a potential life sentence in a state prison and a permanent criminal record with all its potential collateral consequences. The U.S. Department of Justice points out, furthermore, that "juveniles criminally prosecuted and incarcerated in an adult facility have the same or higher recidivism rates," and are at a significantly heightened risk of being harmed while incarcerated in adult institutions. Children placed in detention through juvenile court proceedings, on the other hand, will usually be released not later than the age of 21, having been placed in juvenile detention centers designed to provide rehabilitative treatment programs as well as a safe environment, whereupon, in some cases, they may apply to have their records expunged.

The life of the case: Pretrial through Disposition

If a child denies the allegations and asks for an appointed attorney and the court finds her parent/guardian financially eligible to receive public counsel,²⁰⁵ then the actual appointment of counsel will be made at the admit/deny hearing. The court will then schedule the next set of hearings. The juvenile and her attorney may request a number of pretrial conferences²⁰⁶ leading up to the evidentiary hearing, but the statutory time limits imposed on the juvenile process minimize the practicality of scheduling even one, let alone multiple pretrial conferences. For a child held in custody throughout JCA proceedings, the evidentiary hearing must be held within 45 days of the initial appearance in court, and within 90 days for a child released to his parent/guardian.²⁰⁷

An evidentiary hearing is the juvenile court equivalent of a trial. Under Idaho law, juveniles are not entitled to a jury trial on delinquency charges other than for serious youthful offender cases that carry a potential blended sentence to be served in both the juvenile and subsequently adult correctional system. Given the severe life consequences that can attend a juvenile conviction, for example sex offender registration, juvenile defenders should be but are not strenuously raising constitutional challenges to the denial of the right to trial by jury. At the evidentiary hearing the entire proceeding is placed upon the record.²⁰⁸ The same rules of evidence and discovery as for adult court proceedings apply in juvenile court.²⁰⁹ The defense is allowed to call witnesses to testify on its behalf, and the state has the burden of proving beyond a reasonable doubt that the child committed the acts in question.²¹⁰

If as a result of the evidentiary hearing the court determines or “adjudicates” that the child did commit the delinquent act, the matter will be scheduled for disposition, which is a sentencing hearing.²¹¹ Leading up to the hearing, a county probation officer (PO) will draft a presentence report for the court’s consideration, which will usually include a mental health assessment and substance-abuse assessment.²¹² While the disposition hearing is meant to be “informal,” the court will hear evidence from the prosecutor, the child (with the guidance of her attorney), her parent/guardian, and the probation officer or any other “investigator having knowledge of the juvenile so as to enable the court to make a considered disposition of the proceeding.”²¹³ It is the defense attorney’s responsibility to review the PO’s presentence report²¹⁴ and come to the hearing prepared to advocate on the client’s behalf.

Part of the purpose of the PO’s presentence evaluation is to screen the child for potential alternatives to commitment to a lengthy term of detention.²¹⁵ Children under the age of 12 cannot be committed except for “extraordinary circumstances,” and children under the age of 10 cannot be committed under any circumstances.²¹⁶ For all other children, state statute lists specific criteria by which juveniles should be evaluated, including:²¹⁷

- The particular risk to public safety posed by the child;
- The child’s mental health and/or substance-abuse treatment needs, and the ability of her parent/guardian and other family in engaging with the child in counseling and treatment; and
- The availability of any community-based programs and alternatives that could address the child’s needs and risks.

Based on the PO’s written report, and the testimony presented at adjudication, the judge determines a proper disposition: detention, probation, or placement in a formal diversion program. If the child is to be detained, she will be committed to the Idaho Department of Juvenile Corrections, and the judge’s findings that guided such a decision will put into the record.²¹⁸ If placed on probation, she will be under the supervision of the county’s probation department. While many children will be committed to a detention facility, the vast majority are placed on probation. By and large, the judge’s final decision is based on what he deems is in the best interests of the community and the best interests of the child, from presentations by county probation, the prosecutor, family, and the court appointed special advocate (CASA). It is incumbent on the public defender throughout the proceedings, however, to ensure the child’s constitutional rights of due process are protected through zealous advocacy.

NATIONAL LEGAL AID & DEFENDER ASSOCIATION

But due to the overwhelming workloads and lack of resources available to attorneys appointed to represent children across Idaho, justice in the spirit of *Gault* is not met.

The defenders in Kootenai County handle a mixed caseload with too many cases and not enough resources to adequately represent their clients. In 2007, the bulk of the juvenile caseload was split among five of the office's newer attorneys (see caseload table). Together, they were handling the workload of what *nine* attorneys could reasonably be expected to carry. But out of that mixture the children represented by the office's attorneys will inevitably receive the least portion of its resources and time. This is due to the public defender's focus on serious and complex felony representation. Newer and less experienced lawyers are first assigned to adult misdemeanors and juvenile delinquency cases, and serve as second chair on some adult felonies. Defenders must do 20 misdemeanor jury trials before they are promoted to felony first-chair level. Therefore, even within the training period, attorneys focus their attention on their adult misdemeanor caseload — there is no reward for effective advocacy in juvenile court.

Exacerbating the issues created by the attorneys' heavy caseloads, the defenders in Kootenai County must prepare the delinquency cases on their own, and they lack the time and expertise to do so. The number of cases assigned, their mixture, and the number of courtrooms that need to be covered on a daily basis makes it difficult for the defenders to have sufficient time to meet with all of their juvenile clients.²¹⁹ Attorneys usually visit their

detailed juvenile clients once a week or every other week at the detention center, and the detention center director and staff officer knew two of these lawyers by first name. Defenders may also arrange

Kootenai County Juvenile Defender Caseloads

	Felony	Civil Commitment	Child Protection	Misdemeanor	Delinquency	Appeal
C. Schwartz	12	8	21	246	42	5
D. Cooper	4	13	32	380	80	4
M. Clapin	5	21	35	483	83	6
S. Anderson	89	5	21	290	22	5
S. Walsh	7	25	30	301	111	0

for phone meetings with their clients, which may not be completely confidential given the location of the particular detention center phone used. Even if an attorney letter is sent to an out-of-custody client, office meetings may still be problematic given the number of courtrooms that the attorneys must cover each day with their other cases. If kids are in school and dependent upon an adult to drive them to the public defender office, these factors also make it more difficult to have attorney-client meetings. The courthouses, in the courtroom or in the hallway, become the main meeting place to speak with a client, despite the lack of confidential space. And there is no confidential space behind the courtroom to talk with detained clients waiting that day's scheduled courtroom proceeding. The defenders rely on their administrative assistants to assist with case preparation as needed. The juvenile judge expressed frustration that the defenders did not actively and independently investigate their cases. He gave one case as example, where the condition of a door was at issue, and the defender asked him to go out to that location and to observe the door. The judge would have expected the defender instead to have submitted a photograph of the door for use as demonstrative evidence. The office's two staff investigators are only assigned to the more complex or serious adult criminal cases, particularly the office's murder caseload. Defenders admitted that they had little or no time to actually go on the street to investigate their cases, to observe a scene of the crime, or to take pictures. So juvenile clients are instructed to bring their witnesses to the courtroom, along with any other types of needed documents.

The juvenile judge expressed frustration that case resolution was delayed past the pre-trial conference date. Defenders told NLADA that they needed time to meet with their clients, to review discovery, and to prepare their cases. Despite their inability to separately investigate and present their own independent recommenda-

tions and programs, defenders do file pre-trial motions, such as motions to suppress evidence and statements, and will attack recommendations made by the probation officer. More senior juvenile lawyers told us that they have not used expert witnesses in their juvenile cases. And as the juvenile defenders expressed to us, the caseload was too heavy to really do a consistently top notch job on the juvenile cases.

Expert and litigation support services are rarely allocated to delinquency representation in Canyon County. Attorneys are expected to conduct their own investigations and to prepare dispositional arguments without the assistance of defense social workers. But they do not actively seek out or provide independent treatment placements or alternatives for their clients. They rely upon the probation officers to do this work, and as a result probation officers dominate dispositional hearings and outcomes. The office does not play an active community advocacy role in encouraging the community to seek alternatives to detention and to commitment that are gender responsive and culturally sensitive. The public defender office provides no post-disposition monitoring of their client's placement or commitment. There is little or no independent defense advocacy.

In Blaine County, there is very little litigation by the contract attorneys in the delinquency area. The juvenile caseload in Blaine County is minimal. Almost all cases result in an admission, even if it is to a reduced charge negotiated at a pretrial conference.²²⁰ Still, the magistrate judge for the Fifth Judicial District's juvenile matters told us he almost never receives requests for resources, such as an investigator or an expert, citing only two incidents where a contract defender requested an independent psychological evaluation for the client. There is no systemic litigation, such as challenging the denial of the right to a jury trial. There is no independent use of investigators or experts to challenge probation officers, mental health doctors, or state child welfare personnel. While it appears most of the lawyers meet with their clients in advance of the pretrial conference meetings,²²¹ the contract defenders rely on the county's probation officers for screening and evaluating their clients.²²² The lawyers have a good working relationship with the county probation department, and some will go the extra mile on their own to find community based treatment resources and alternative programs for clients.²²³ And while the lawyers do make solid disposition presentations, they lack enough information and resources to effectively challenge the PO's recommendations. It is rare for them to offer their own, independent witnesses at disposition. Most stakeholders we spoke with noted that the entire juvenile justice system relies heavily on probation as serving the "key" evaluation function — their disposition recommendations are almost always followed by the judge.

The Ada County public defenders have a separate juvenile unit located next to the juvenile court and detention facilities, away from the main public defender office in downtown Boise. At the time of our visit, the juvenile unit had a full time supervising attorney, two staff juvenile defenders, and one defender who rotated to juvenile court two days a week from the magistrate court unit in the downtown defender office. There is one administrative staff person.²²⁴

The juvenile office can make use of two investigators "as needed" who are housed in the downtown office. While we heard positive things about the two available staff investigators, it is clear that juvenile cases will receive a lower assignment priority for those investigators than the adult cases. Furthermore, when investigators are located out-of-office there is much less of a tendency to actually use or request these services. Personnel at the same office location are more quickly and easily integrated into the law practice and become active contributors to the preparation of the cases.

The Ada County juvenile public defender unit does not use social workers, paralegals, or other alternative disposition staff to assist with treatment or placement issues. The office relies upon psychologists and others that are provided to the court or by the detention center. There is no separate funding from downtown's budget for the use of experts by the juvenile unit, and it is doubtful that they are used with any great frequency.

The Ada juvenile defenders are handling on average over 450 delinquency cases per attorney per year in a jurisdiction that is experiencing significant growth. They are trying to keep up, but this kind of caseload growth takes its toll on the quality of representation offered. Other stakeholders in the courthouse agree that the defenders are understaffed and in need of immediate additional attorney and staff resources.

While the public defenders received high marks from the judges and prosecutors — they do maintain a pre-

trial motions practice, including suppression issues and motions to dismiss — their lack of resources and time affects the quality of representation provided to their clients. For example, they are unable to employ their own experts for sentencing. Instead, they prepare their arguments by reviewing all of the available reports from the court's experts and data on the child from probation officers and treatment programs. Furthermore, the Ada County defenders do not have sufficient time to challenge issues like the use of handcuffs and leg cuffs in the courtroom and how that impacts the child. They do not have the time to raise constitutional challenges to the denial of a juvenile jury trial. And attorneys lack time to prepare their cases for evidentiary hearings or sentencing or review hearings.

In Bonneville County, one public defender is assigned all the office's juvenile delinquency cases: about 250 per year. He also takes all of the city misdemeanors: over 1150 per year. National standards call for a maximum annual caseload of either 400 misdemeanors or 200 juvenile court cases. That means this defender alone is handling the work of four full time attorneys. Given his extremely high caseload, he estimated he can devote little more than one hour per client.

The juvenile court judge in Bonneville County told us it had been “a long, long time” since he had had a juvenile trial on a case represented by a public defender and that he had not heard a motion to suppress in two years. The absence of social workers in the public defender's office, particularly for juvenile clients, hampers the defender's ability to provide effective sentencing advocacy and pre-trial release advocacy. Instead, as one court official described it, the juvenile court is a “probation-run court.” This opinion was shared by conflict attorneys and public defenders alike. But they argued that judges put a lot of juveniles on probation who do not need it, overburdening the probation officers while increasing financial burdens on clients, who will have to pay \$40-per-month for two years.

Probation is but one of many sentencing alternatives. Specialty courts, including drug and mental-health treatment courts for juveniles, and community-oriented diversion programs are also viable options. Any specific or combination of alternatives to detention may or may not be the right option for a given child. And the violation of one's terms of probation can come with stiff penalties, including commitment to a detention facility.²²⁵ Whether or not the public defenders are exploring alternatives to probation in the first instance depends on access to sentencing advocacy. Without funds for independent investigators and social workers, the public defender is unable to learn enough about the child to make a compelling and credible argument to the judge regarding an appropriate disposition on behalf of the client. When a child is allowed to waive counsel, however, there is no one to advocate on her behalf through sentencing and adjudication.

The Case for Making Juvenile Defense a Specialty and Not a Training Ground

Research developments in recent years have raised significant questions about adolescent brain development that require increased work by defenders who represent children. Greater understanding of family dynamics, mental illness, and cultural differences has led to recognition that lawyers representing clients in delinquency cases must devote many hours to learning about their clients and presenting evidence about their history in court. Further, juvenile defenders must have a foundational understanding of the available treatment modalities as well as the funding intricacies that may affect acceptance and eligibility for a child's program placement — services core to client-centered representation.

Given the complex nature of juvenile delinquency representation, the defender's services must be provided using a broad, community-based approach. The attorney's advocacy responsibilities have legal, clinical, and community components, and include: identifying community-based alternatives to confinement and incarceration; engaging in violence prevention efforts by linking at-risk youth with community based organizations and governmental services; conducting educational sessions about the rights and responsibilities of young people; and partnering with youth development organizations to enhance the delivery of services to children and families.

Such representation combines social services with legal services to better represent clients and incorporates contributions from a team including defense lawyers, education attorneys, social workers, psychologists, and community outreach specialists.

But, in most counties we visited, delinquency cases are assigned to the newest and least experienced attorneys.²²⁶ And throughout the state, children are represented by lawyers with crushing workloads, extremely limited access to adequate resources for experts, social workers and investigative support, and a complete lack of specialized training for the assigned task. Idaho's juvenile defenders lack the time, tools and training to provide effective advocacy for the clients of the juvenile courts.

In order to ensure that children have a meaningful opportunity to be heard in court, attorneys must be given the time to engage in painstaking relationship building and counseling with clients out of court. They must carefully explain to clients their rights, the proceedings, and the potential consequences of the case; effectively counsel the clients on their options; build trust; and elicit the clients' wishes that will guide each stage of the proceedings. Effective representation also requires understanding the client populations and the structural biases which can potentially impact them. Defenders must balance expert knowledge of criminal law and procedure and excellent written and oral advocacy skills, with an in-depth understanding of adolescent development, mental and physical health, and education issues. Equally important, they must possess cultural competency across racial, gender, and class lines. Only by understanding the varied backgrounds of their clients, insisting on the courts' respect of these backgrounds, and exposing the biases within the system can defense attorneys ensure that clients have a real opportunity to be heard in court.

Patricia Puritz and Katayoon Majd, *The American Bar Association's Youth at Risk Initiative: Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*. 45 Fam. Ct. Rev. 466 (July, 2007)

The current Power County system fails its juvenile clients. There is no delinquency specialization in representation, and no specialized training for these attorneys. There is no consistent, on-going representation at detention hearings or admit/deny hearings, and access to counsel for detained juveniles is problematic. There are no articulated, written or oral, practice standards for juvenile delinquency representation, and most certainly there is a complete over reliance upon the probation officers whose recommendations are followed by the judges and the defense counsel. Ancillary services, through investigation and experts, are not used or very infrequently requested, and there is no real independence in presenting treatment and disposition alternatives to the judge. The defense contractors are probably not even aware of the clinical assessment program in the juvenile detention center (in part because so few Power County juveniles remain in custody), or the self-incrimination problems created by pre-adjudication sharing of defendant information with probation staff and the judge. The educational needs of juveniles are not part of the advocacy effort undertaken either systemically or through work with the truancy court process which disproportionately impacts Hispanic children and families in Power County.

Likewise, in Canyon County there is no stated recognition that juvenile delinquency representation is a complex, specialized area of the law. Juvenile is treated as a training ground assignment for newer attorneys, and NLADA heard no particular advocacy concern expressed by the office leadership regarding the delivery of zealous and quality legal representation. Experienced felony attorneys do provide representation for juveniles tried as adults, but there is no specialization recognition involved in these assignments

The structure of the public defense system in Nez Perce County does not facilitate or encourage the fully competent and diligent representation of delinquent children. Although the assigned staff attorney personally cares about her clients, the outcome of the cases, and her representation efforts, her advocacy is nevertheless hampered in a number of ways. She has not been exposed to a strong juvenile delinquency practice model as it exists in other areas of the country, so that, for example, challenging the denial of a jury trial to a juvenile does not occur to her.²²⁷ She does not have access to the resources — investigators, expert witnesses, evaluators, etc. — necessary to fully and independently defend her cases. The structure of her law firm's contract with the county makes these resources "extraordinary," and it is not in the firm's interest to continually litigate these resource is-

The Straw that Breaks the Camel's Back: CPA Cases

Public defense systems are strained in Idaho's counties. They struggle, with lack of independence and resources and training, to provide constitutionally effective representation to adults in felony cases – as described in Chapters II to VI of this report. The extraordinary workloads in misdemeanor courts – described in Chapter III -- mean many adults go without counsel entirely. All of the problems found in the representation of adults are exacerbated in the juvenile delinquency courts, where children are used as a training ground for public defense attorneys. Each situation becomes worse than the one before, but the tipping point may well be in Child Protective Act ("CPA") cases.

Like the Manticore of Greek mythology, which may appear to be man or lion or shark or dragon depending upon which part is within view, CPA cases are hard to classify within the public defense system. They are civil, while all other public defense cases are criminal. They involve the welfare of a child, yet the public defense attorneys are appointed to represent only the adults in CPA cases. They may continue for up to eighteen years, while all other indigent defense cases end when the defendant is found either innocent or guilty of the charge. And they consume immense resources, often

requiring multiple appointed attorneys appearing for hearings every few months for years, while all other public defense system cases typically involve a prosecutor and a single defense attorney and are concluded in a matter of months. Because CPA cases are so different in so many ways from all other indigent defense cases, they create numerous problems for public defense systems in meeting the ABA *Ten Principles*.

Need for Training and Specialization. CPA cases are civil. Public defense attorneys are by and large criminal defense attorneys, who lack any training or expertise in civil law and procedure.

Caseloads. Though national caseload standards are silent on the number of CPA cases (often called dependency cases in other jurisdictions) that are allowable,³ 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 ad-

Understanding Child Protective Act Cases: A Child Needing Protection is Not a Delinquent

The purpose of the Child Protective Act is to protect the health and safety of children by preventing abuse, abandonment and neglect – for “the protection of any child whose life, health or welfare is endangered.” I.C. § 16-1601. These cases are most often situations where the state takes a child away from his parents and into foster care for some period of time. Children in these cases are not being charged with committing any sort of crime or delinquent act^a -- rather, the allegation is that the child has been or is being harmed in some way.

A CPA case begins when a prosecutor files a petition alleging that a child is: neglected, abused, abandoned, homeless, or her parents fail to provide a stable home environment. I.C. § 16-1610; 16-1603. After the petition is filed, a date will be set for an adjudicatory hearing and each parent and legal guardian of the child will receive a summons requiring them to appear at that hearing. I.C. § 16-1611.

All of the hearings held in a CPA case are closed to the public. Only people who have a direct interest in the case are admitted to the courtroom, and even the child who is the subject of the proceeding can be excluded from the courtroom. I.C. § 16-1613.

Parents, custodians, and guardians in a CPA case are told that they have a “right to retain and be represented by counsel.” I.C. § 16-1611(3). This may mean that there are several attorneys involved in a CPA case; for example, in a situation where parents are divorced or grandparents have partial custodial rights, each adult may have differing interests in custody of the child, and so each adult may have their own separate attorney. If the parents, custodians, and guardians cannot afford to hire their

own attorney, they are entitled to have an attorney appointed at public expense (for each of them where their interests diverge). I.J.R. Rule 37(d).

Additionally, though the child (or children) is not considered a party in the proceedings, the law nonetheless provides that each child *shall* be appointed a guardian ad litem.^b I.C. § 16-1614(1); I.J.R. Rule 36(1). And then, the court should appoint an attorney to represent the guardian ad litem. I.C. § 16-1614(1); I.J.R. Rule 37(a). And “in appropriate cases,” the court may also appoint a separate attorney to directly represent the child – this is an attorney different than the one appointed to represent the guardian ad litem for the child. I.C. § 16-1614(1); I.J.R. Rule 37(b). It is presumed that any lawyer for the child will be provided at public expense. I.C. § 16-1614(3).

From the time that the child's situation first comes to the attention of a governmental agency up through to the adjudicatory hearing, the child may be kept in shelter care – meaning the child is not allowed to live in their own parents' home. I.C. § 16-1608; 16-1611(4). If a child was initially taken into shelter care, then a shelter care hearing will be held relatively quickly. The parents from whom the child was removed will be given notice of when the shelter care hearing will occur, and the parents can present evidence about whether their child should be in their custody or in shelter care during the pendency of the proceedings. I.C. § 16-1615.

The adjudicatory hearing is to be held within thirty (30) days after the petition is filed. I.C. § 16-1619(1). At the hearing, the judge will decide whether the allegations in the petition have been proved by a preponderance of

the evidence. I.C. § 16-1619(4). If not, the court will dismiss the petition and the child will go home. I.C. § 16-1619(10). If so, then the child is under the jurisdiction of the court, and the judge will decide whether to place the child in his own (parents') home under protective supervision or give custody of the child to the Department of Health and Welfare (in essence placing the child in foster care). I.C. § 16-1619(5).

A judge's decision to place a child in the custody of the department does not terminate the parental rights to the child – instead it is a transfer of the physical custody and control of the child. All manner of additional proceedings will occur, including preparation of a written case plan and hearings on those case plans, and efforts to achieve either reunification of the family or permanent placement of the child. I.C. § 16-1621; 16-1622. Eventually there may be a final termination of parental rights. I.C. § 16-1624. But the court's jurisdiction over and the department's custody of the child can continue until the child's eighteenth birthday. I.C. § 16-1604(1); 16-1619(5), (7), (8).

^a It sometimes happens that, during the course of a juvenile delinquency case where a child is alleged to have committed a delinquent act, it may come to someone's attention that the child is also “neglected, abused, abandoned, homeless, or [has a] parent [who] . . . fails or is unable to provide a stable home environment.” When this occurs, the judge in the juvenile delinquency case can expand the proceeding into a CPA case. I.J.R. Rule 16(a). From that point forward, the delinquency case and the protection case can proceed either jointly & simultaneously or separately. I.J.R. Rule 16(e).

^b Guardian ad litem “means a person appointed by the court pursuant to a guardian ad litem volunteer program to act as special advocate for a child.” I.C. § 16-1602(18).

equately handled flows from the fact that dependency 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.

Conflicts. CPA cases can give rise to numerous, lengthy, and costly conflicts.

When the public defender office is appointed in a CPA case, the lawyer may remain in the case until the child who is the subject of the proceeding reaches eighteen years old. So, for example, where a public defender attorney is representing the father in a CPA proceeding, the entire public defender office may be conflicted out of representing the mother (and perhaps the step-father and grandparents and various witnesses in the CPA proceedings) in any criminal case or the child in any delinquency case. And because this conflict may begin when a child is just a few months or years old, any criminal prosecution of the mother (or step-father or grand-

parents or various witnesses) or delinquency proceeding against the child for well over a decade will have to be appointed to assigned counsel. Thus an ever-increasing number of assigned counsel attorneys become necessary, at an ever-increasing cost, to manage the overall caseload of the county public defense system.

Every parent, custodian, and guardian in a CPA case is entitled to have an attorney, and to have one at public expenses if they cannot afford to hire their own. It is often the case that if one party is deemed too poor to hire a lawyer the rest are as well, given that they are most often members of the same family. In CPA cases, then, commonly the entire cost of attorneys for all of the parties is borne through the public defense system budget.

^a By way of contrast, national caseload standards for juvenile delinquency cases are 200 cases per year.

Vocabulary of Child Protective Act and Juvenile Delinquency Cases

The law governing child protection cases is the Child Protective Act ("C.P.A.") found in the Idaho Code, Title 16, Chapter 16. I.C. § 16-1601 thru 16-1643.

The Idaho Juvenile Rules ("I.J.R.") set out the procedures to be followed in both juvenile delinquency cases under the Juvenile Corrections Act ("J.C.A.") and child protection cases under the Child

Protective Act ("C.P.A."). The rules that specifically apply to child protection cases are Rules 29 – 58.

Just as the juvenile delinquency system is different than the adult criminal justice system (see sidebar at page 74), so too Child Protective Act cases differ from juvenile delinquency cases.

Child Protective Act (CPA) cases	Description	Juvenile Corrections Act (JCA) cases
Child is alleged to be the victim of neglect, abuse, abandonment, homelessness, or parents who fails to provide a stable home environment.	In a CPA case, the child is the subject of the proceeding. In a JCA case, the child is the defendant in the proceeding.	Child is charged with committing a delinquent act or a status offense.
Prosecutor and Adults are only parties to proceeding.	In a CPA case, there may be multiple respondents in the proceeding, including: parents, guardians, legal custodians, and guardian ad litem. In a JCA case, the child is the defendant in the proceeding.	Prosecutor and Child are only parties to proceeding.
Preponderance of the evidence (civil) standard of proof.	The standard of proof by which the judge must be convinced of the allegations in the petition.	Beyond a reasonable doubt (criminal) standard of proof.
Closed hearings	In a CPA case, hearings are closed to the general public, and even the child may be excluded from being present at the hearing. In a JCA case, all hearings after the Admit/Deny hearing are presumed to be open to the public unless a judge makes findings and a written order closing the subsequent hearings.	Open hearings presumed
Child removed from parents and taken into shelter care by governmental actor.	Someone other than the parent takes physical custody of the child. In a CPA case, it is for the protection of the child. In a JCA case, it is for the protection of the public.	Child taken into custody by law enforcement.
Shelter Care hearing	In a CPA case, a child will either be maintained in shelter care or released to their parent or guardian. In a JCA case, a child will either be detained in custody or released to their parent or guardian – there is no right to bail for children.	Detention hearing
Petition	In a CPA case, this is the instrument filed by the prosecutor to initiate taking custody of the child away from the parents. In a JCA case, this is the charging instrument filed by the prosecutor to initiate the prosecution of the child.	Petition or Complaint
Summons	In a CPA case, the parents are informed in writing of the allegations in the petition, the date for the adjudicatory hearing, and of their right to be represented by counsel. In a JCA case, the child is brought into court and is informed of the nature of the charge against her, is advised of her rights, and is called upon to respond.	Admit-Deny hearing
Adjudicatory Hearing	A judge will determine whether the allegations in the Petition are true. In a CPA case, whether the child is : neglected, abused, abandoned, homeless, or her parents fail to provide a stable home environment. In a JCA case, whether the child has committed the delinquent act – there is no right to trial by jury for a child.	Evidentiary Hearing or Adjudication
Decree	In a CPA case, the child victim may be placed under protective supervision in his own parents' home or placed in foster care. In a JCA case, the child defendant may be placed on probation or sent to a juvenile corrections facility.	Disposition

sues before the magistrates, especially where it does not consider these cases serious enough for that type of effort.

The Ada County defender office has not made a commitment to the organized, continuous training and development of its attorney and non-attorney staff members. There is no formal training program or process for the new/rotating juvenile attorneys. All learning is on the job and through shadowing or mentoring. There are no juvenile training materials or sample motions, pretrial, trial or sentencing briefs or memoranda. This situation is not only a matter of the lack of resources or low priorities; it is also a reflection of a dated leadership model somewhat unconnected to what a 21st century public defender office should provide for its staff.

Though the Kootenai County public defender office has the most client-centered approach to representation of any defender program we visited as part of our project, its juvenile representation is triaged in favor of the adult felony and misdemeanor caseload. Juvenile cases are considered less serious and not real litigation. While the county prosecutor has assigned experienced attorneys to the juvenile courts, who have been handling delinquency cases for 15 years and five years, the public defender office rotates its new attorneys into delinquency court as part of the training process, and there is no designated supervising attorney for the juvenile unit. Once these defenders are ready for full time misdemeanor and lower level felony practice, they are moved out of the juvenile courtroom and their cases are handed off to another new lawyer. This lack of continuity of representation minimizes the level of rapport that an attorney may build with a client. It also hinders the defender's ability to really learn all of the systems that interface with their clients. The district attorneys, however, fully know the delinquency and child welfare systems and the players in those systems, and they use this knowledge and their relationships to their complete advantage. The defenders do not receive special training on juvenile issues. Instead, most of their training is on-the-job, watching and following a fellow attorney who has been doing these cases for a slightly longer period of time. As one of the defenders described it, delinquency practice is kind of "touchy feely" and "not really litigation."

One of the most disruptive barriers to an attorney's effective and zealous advocacy for juvenile clients is the cultural stigmatization of the juvenile courts. Defense attorneys may feel pressured to cooperate with the best-interest model supported by other players in the juvenile justice system in detriment to their proper adversarial role in protecting the due process interests of the client. Juvenile courts are seen as less important than adult criminal. And children, as a result, are inevitably processed through the juvenile system without access to the "guiding hand of counsel" promised to them. In as much as Idaho's counties fail to provide a constitutionally adequate level of representation in adult criminal cases, children are even more of an afterthought.

Conclusion

The National Legal Aid & Defender Association (NLADA) thanks the Idaho Criminal Justice Commission (CJC) and the Idaho Juvenile Justice Commission (JJC) for authorizing this detailed study of the right to counsel in the state of Idaho. Though we find systemic deficiencies in the delivery of right to counsel services, we do not offer specific recommendations for reform.

Our decision to exclude specific recommendations was made for two very specific reasons. First and foremost, Idaho is unique — any solution must necessarily take into account local cultures, court structures and other variances that are best debated by the citizenry of the state and their elected officials rather than outside observers. There is no single “cookie-cutter” delivery model (staffed public defender office, assigned counsel system, or contract defenders) that *guarantees* adequate representation. Rather, there are two primary factors that determine the adequacy of indigent defense services provided: (a) the degree and sufficiency of state funding and structure, and (b) compliance with nationally recognized standards of justice. So long as these two goals are met, Idaho policy-makers will have remedied the crisis.

Second, if NLADA drafted a list of recommended solutions, a political debate would most likely ensue around the validity of the recommendations. NLADA hopes instead for statewide debate to center on the soundness of our assessment of the system. We have no power to compel change beyond our ability to hold a mirror up to the present system, make the case that Idaho is falling short on its constitutional obligations, and hopefully convince citizens and policy-makers to want to act. If there is consensus agreement that Idaho is failing to uphold one of the fundamental constitutional rights, we are confident that Idahoans — with more intimate knowledge of the local variances and the state’s financial situation — can both construct an effective system and find the money to run it efficiently. In 2007, the Louisiana Legislature was able to quadruple funding for indigent defense services while overhauling their system despite the financial constraints of their post-Katrina reality.

NLADA stands ready to assist state policymakers by providing advice about what has worked, been tried and failed in other states, should such assistance be sought. However, we do not have standing or the desire to dictate a single path to reform. We are confident that the people of Idaho have the will, experience and knowledge to fix this problem in a way that makes sense before others file a class action lawsuit and a Court imposes an “off the shelf” solution.

Endnotes

¹ Brian W. Walsh, “Enacting Principled, Nonpartisan Criminal-Law Reform: A Memo to President-Elect Obama,” The Heritage Foundation (January 9, 2009). Available at: http://www.heritage.org/research/legalissues/upload/ObamaMemo_17.pdf.

² 372 U.S. 335 (1963).

³ *Gideon* established the right to counsel for felony trials. Subsequent cases afford that right to direct appeals, *Douglas v. California*, 372 U.S. 353 (1963); custodial interrogation, *Miranda v. Arizona*, 384 U.S. 436 (1966); critical stages of preliminary hearings, *Coleman v. Alabama*, 399 U.S. 1 (1970); misdemeanors involving possible imprisonment, *Argersinger v. Hamlin*, 407 U.S. 25 (1972); and misdemeanors involving a suspended sentence, *Alabama v. Shelton*, 535 U.S. 654 (2002).

⁴ 387 U.S. 1 (1967).

⁵ *Claremont School Dist. v. Governor*, 147 NH 499, 513 (2002).

⁶ *Cf. Robertson v. Jackson*, 972 F.2d 529 (4th Cir. 1992) (holding that although administration of a food stamp program was turned over to local authorities, “ultimate responsibility . . . remains at the state level.”); *Omunson v. State*, 17 P.3d 236 (Idaho 2000) (holding that where a duty has been delegated to a local agency, the state maintains “ultimate responsibility” and must step in if the local agency cannot provide the necessary services).

⁷ *Duncan v. State of Michigan*, No. 07-242 CZ, Transcript of Hearing on Motion to Dismiss, at 35 (May 15, 2007) (“While it’s true the defendants have delegated the responsibility for funding and administering the indigent defense programs to the counties, it does not mean that defendants are off the hook.”); *White v. Martz*, No. CDV-2002-133 Memorandum and Order (Mont. Dist. Ct. July 24, 2002).

⁸ 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 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), Guideline 2.4.

⁹ Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Louisiana, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Virginia, West Virginia, Wisconsin and Wyoming.

¹⁰ Kansas (state funds 77.3 percent of total \$23.4 million expenditure); Oklahoma (state funds 61.6 percent of total \$28.4 million expenditure); and South Carolina (created statewide circuit public defender system in the 2007 legislative session and state now funds 63.8 percent of total \$32.5 million expenditure). State expenditures and percentages are based on recent NLADA research and 2005 data collected by The Spangenberg Group under the auspices of the American Bar Association. See: *50 State and County Expenditures for Indigent Defense Services: Fiscal Year 2005*. (November 2006).

¹¹ 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 nearing 100 years. NLADA currently supports a number of public defender 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.

Recognizing that effective public policy depends upon the effective implementation and enforcement of that policy, NLADA has long played a leadership role in the development of national standards for public defense systems and processes for evaluating a jurisdiction's compliance with those standards. See: *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; 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). Also see: *A Race to the Bottom: Speed & Savings Over Due Process: A Constitutional Crisis* (2008); *Taking Gideon's Pulse: An Assessment of the Right to Counsel in Hamilton County, Ohio* (2008); *Justice Impaired: Report Cards on Upstate New York* (2007); *Justice Impaired: The Impact of the State of New York's Failure to Effectively Implement the Right to Counsel[Franklin County]* (2007); *An Assessment of the Idaho State Appellate Public Defender's Office* (2007); *A Strategic Plan to Ensure Accountability & Protect Fairness in Louisiana's Criminal Courts* (2006); *An Assessment of Indigent Defense Services in the State of Montana* (2004); *In Defense of Public Access to Justice: An Assessment of Trial-Level Indigent Defense Services in Louisiana 40 Years after Gideon* (2004); *Pilot Assessment in Santa Clara County, California* (2004); *Evaluation in Clark County, Nevada* (2003); *Indigent Defense in Venango County, Pennsylvania* (2002).

¹² NLADA, *An Assessment of the Idaho State Appellate Defender's Office* (June 2007), available at: http://www.nlada.org/Defender/Defender_Evaluation/Idaho_Appellate_Evaluation.

¹³ The country's two geographically smallest states - Rhode Island and Delaware - had established statewide public defender programs pre-*Gideon*. New Jersey and Maryland statutorily created statewide public defender programs in the years immediately after the *Gideon* decision.

¹⁴ Idaho Code § 19-860 states:

“(a) If the board of county commissioners of a county elects to establish and maintain an office of public defender and/or juvenile public defender, the board shall:

(1) Prescribe the qualifications of such public defender, his term of office (which may not be less than two (2) years), and his rate of annual compensation, and, if so desired by the board, a rate of compensation for extraordinary services not recurring on a regular basis. So far as is possible, the compensation paid to such public defender shall not be less than the compensation paid to the county prosecutor for that portion of his practice devoted to criminal law.

(2) Provide for the establishment, maintenance and support of his office. The board of county commissioners shall appoint a public defender and/or juvenile public defender from a panel of not more than five (5) and not fewer than three (3) persons (if that many are available) designated by a committee of lawyers appointed by the administrative judge of the judicial district encompassing the county or his designee. To be a candidate, a person must be licensed to practice law in this state and must be competent to counsel and defend a person charged with a crime. During his incumbency, such public defender may engage in the practice of civil law and criminal law other than in the discharge of the duties of his office, unless he is prohibited from doing so by the board of county commissioners.

“(b) If a court before whom a person appears upon a formal charge assigns an attorney other than a public defender to represent a needy person, the appropriate district court, upon application, shall prescribe a reasonable rate of compensation for his services and shall determine the direct expenses necessary to representation for which he should be reimbursed. The county shall pay the attorney the amounts so prescribed. The attorney shall be compensated for his services with regard to the complexity of the issues, the time involved, and other relevant considerations.”

¹⁵ The “degree” refers to the percentage of state funding, and “sufficiency” is whether, for those that provide 100 percent, the state funds services at an adequate level. The state must also provide an adequate structure for overseeing public defense services to ensure proper use of public funds.

¹⁶ 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 (4th 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 (9th 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, "[w]hile *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.)

¹⁷ Attached as *Appendix A*. American Bar Association. *Ten Principles of a Public Defense System*, from the introduction, at: <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.

¹⁸ 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., *Missouri ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981), *cert. den.* 454 U.S. 1142 (1982); *New Hampshire v. Robinson*, 123 N.H. 665, 465 A.2d 1214 (1983); *Corenevsky v. California Superior Court*, 36 Cal.3d 307, 682 P.2d 360 (1984); *Arizona v. Smith*, 140 Ariz. 355, 681 P.2d 1374 (1984); *Arizona v. Hanger*, 146 Ariz. 473, 706 P.2d 1240 (1985); *California v. Knight*, 194 Cal. App. 337, 239 Cal. Rptr. 413 (1987); *Kansas 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. Florida*, 561 So.2d 562 (Fla. 1990); *In re Order of Prosecution of Criminal Appeals by the Tenth Judicial Circuit*, 561 So.2d 1130 (Fla. 1990); *Oklahoma 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); *Louisiana 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.

¹⁹ The items following are just a partial list of ethical duties required under national and state performance guidelines. *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995) is available on-line at: www.nlada.org/Defender/Defender_Standards/Performance_Guidelines.

²⁰ For example: bail reduction motions; motion for preliminary examination; motion for discovery; motion for bill of particulars; and motion for initial investigative report. Also, motions to quash and motions to suppress.

²¹ Throughout our country, more than 80 percent 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 & De-Frances, 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). See also: Congressional Research Service, *Poverty in the United States: 2008* (October 6, 2009): "In 2008, 39.8 million people were counted as poor in the United States—an increase of 2.6 million persons from 2007, and nearly the largest number of persons counted as poor since 1960. The poverty rate, or percent of the population considered poor under the official definition, was reported at 13.2%; up from 12.5% in 2007, and the highest rate since 1997. The recent increase in poverty reflects the worsened economic conditions since the onset of the economic recession in December 2007. Many expect poverty to rise further next year, and it will likely remain comparatively high even after the economy begins to recover. The incidence of poverty varies widely across the population according to age, education, labor force attachment, family living arrangements, and area of residence, among other factors. Under the official poverty definition, an average family of four was considered poor in 2008 if its pre-tax cash income for the year was below \$22,025. This report will be updated on an annual basis, following release of U.S. Census Bureau annual income and poverty estimates." (Available at: <http://www.fas.org/sgp/crs/misc/RL33069.pdf>)

²² See *Indigent Defense Caseloads and Common Sense: An Update* (NLADA, 1992), surveying state and local replica-

tion and adaptation of the NAC caseload limits.

²³ 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. 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.

²⁴ The NAC numerical 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).

²⁵ American Bar Association, Standing Committee on Ethics and Professional Responsibility. *Formal Opinion 06-441: Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation*. May 13, 2006. Opinion can be found online at: www.abanet.org/cpr/pubs/ethicopinions.html.

²⁶ *Ibid.* (emphasis added).

²⁷ American Bar Association. *Eight Guidelines of Public Defense Related to Excess Workload*. August 2009. P. 11.

²⁸ NCJ 181344, February 1999, at 10.

²⁹ NSC Report, at 220, citing National Advisory Commission on Criminal Justice Standards and Goals (1973), commentary to Standard 13.9.

³⁰ Moreover, having judges maintain a role in the oversight of indigent defense services can create the appearance of partiality — creating the false perception that judges are not fair arbitrators. The Legislature 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 of the factual merits of the case and not on a public defender's desire to please the judge in order to maintain his job. When the public fears that the court process is unfair, people are less inclined to show up for jury duty or to come forward with critical information about crimes.

³¹ See generally, Lemos, Margaret H. “Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense.” *New York University Law Review* Vol. 75:1808 (December 2000), available at: <http://www.law.nyu.edu/journals/lawreview/issues/vol75/no6/nyu606.pdf>. See also *State v. Smith*, 681 P.2d 1374, 1381 (Ariz. 1984), in which the Supreme Court of Arizona found that the lowest bid system for obtaining indigent defense counsel in Mohave County violated the defendant's right to due process and right to counsel under Arizona and U.S. Constitutions. Citing NLADA's “Guidelines for Negotiating and Awarding Indigent Defense Contracts,” and other national standards, the court found a systemic failure in low-bid contracting as: 1. The system does not take into account the time that the attorney is expected to spend in representing his share of indigent defendants; 2. The system does not provide for support costs for the attorney, such as investigators, paralegals, and law clerks; 3. The system fails to take into account the competency of the attorney. An attorney, especially one newly-admitted to the bar, for example, could bid low in order to obtain a contract, but would not be able to adequately represent all of the clients assigned; and, 4. The system does not take into account the complexity of each case.

³² The same guideline addresses contracts which simply provide low compensation to attorneys, thereby giving attorneys an incentive to minimize the amount of work performed or “to waive a client's rights for reasons not related to the

client's best interests." For these reasons, all national standards, as summarized in the eighth of the ABA's *Ten Principles*, direct that: "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, and separately fund expert, investigative and other litigation support services."

³³ *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)

³⁴ Nez Perce's median household income is only seven percent below the statewide mean (\$39,859), and is actually 4.4 percent above the statewide median (\$35,414).

³⁵ For many of those years, the contract primary belonged to the law firm of Knowlton and Miles. In 1999, with the retirement of a key partner, the firm did not desire to continue. Two attorneys, Bill Fitzgerald and Bob Van Idour, merged their private practices to form the law firm of Fitzgerald & Van Idour (F&V). They bid for and won the county's new four-year contract for primary defense representation. The contract provided that F&V would provide all primary representation for an annual fee of \$258,000.00. The county had a separate contract with other attorneys to provide conflict representation.

³⁶ One model, weighed at the encouragement of the then-elected county prosecutor, was that of a staffed public defender office. The prosecutor argued that a full-time staffed office could cost the county as little as \$289,000 per year. Fitzgerald & Van Idour, after contacting offices in similarly sized jurisdictions, countered that it would actually cost approximately \$750,000 each year to fund a full-time office. As the discussions and disagreements continued, nearly everyone involved in criminal justice in Nez Perce County became frustrated and angry with everyone else.

³⁷ F&V was not the lowest bidder, and indeed they have never submitted the lowest bid during the 10 years (three contract terms) that they have held the contract. It is outside the scope of this evaluation to consider the other RFP responses received by the county in 2005, however the awarding of the contract to a bidder who was not the lowest cost provides some indication that the county commissioners are contemplating quality as well as cost in the contract decision.

³⁸ While F&V is required to include the original charges and the final disposition, the county is not actually tracking that information. Therefore, it is as though it doesn't exist.

³⁹ In a multi-defendant case or any case where additional attorneys are required beyond the number of conflict counsel presently contracted, F&V would have to pay for those additional attorneys out of the funding provided by the county under their contract — thus diminishing their own earnings.

⁴⁰ There is a clear breach of national standards in the handling of multi-defendant cases. F&V initially receives all of the files for all of the co-defendants who are joined together in a single case. They look at the actual content of all of the clients' cases to determine "if there is a real conflict." F&V define "real conflict" by: (1) whether there are conflicting defenses, such that if two co-defendants do not appear to them to have directly conflicting defenses, then F&V believe there is no conflict in them representing both defendants; and (2) what stage the case is at. In those cases where F&V determine that they do have a conflict, they have already gained confidential client information about the co-defendants whom they will no longer represent.

⁴¹ The conflict attorneys at the time of our visit were: Neil Cox, whose private office is in Clarkston, Washington, and is licensed in both Idaho and Washington; Ken Nagy, who replaced former conflict counsel Denton Andrews; and Rick Cudihy.

⁴² This is required under the contract with the county.

⁴³ See, e.g. *Overhead: You Know It When You Pay It!*, Kent M. Kasting, State Bar of Montana (August 2004) and *Legal Fees*, Rhode Island Bar Association (2007). In a 1998 survey by the State Bar of Wisconsin, the average law office overhead was reported as \$129,888, with a median of \$77,698. A 1995 comprehensive study conducted by The New York State Bar Association determined that the individual overhead costs for a single attorney in a law firm of five or fewer at-

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torneys averaged approximately \$55,000 per year. *Desktop Reference on the Economics of Law Practice in New York*, New York State Bar Association (1997).

⁴⁴ These include: court filing fees, actual fees for service of any pleading or document in the action whether served by a public officer or other person, statutory witness fees for each day a witness (not a party or an expert) testifies at a deposition or at the trial, travel expenses for witnesses traveling *less than* thirty miles to testify, charges for certified copies of documents admitted as evidence in a hearing or at trial, charges for reporting/transcribing depositions taken in preparation for a trial, whether or not read into evidence in the trial of an action, charges for one (1) copy of any deposition taken by any of the parties in preparation for trial, and the cost of a transcript necessarily incurred in representing a client.

⁴⁵ Section 19-861 is titled: "Public Defender's Office — Employees-Compensation-Facilities." Section 19-861(c) states: "A defending attorney is entitled to use the same state facilities for the evaluation of evidence as are available to the county prosecutor. If he considers their use impractical, the court concerned may authorize the use of private facilities to be paid for on a court order by the county board of commissioners."

⁴⁶ Interview with Mr. Van Idour and Mr. Fitzgerald by Phyllis Mann on June 10, 2008.

⁴⁷ Idaho Bar Commission Rule 402(a) states, in part: (1) Each active member of the Idaho State Bar shall complete a minimum of thirty (30) credit hours of accredited continuing legal education activity in each and every three (3) year period following the date of his or her admission to the practice of law in this state. (2) Beginning with those lawyers scheduled to report on December 31, 1993, and thereafter, at least two (2) credit hours of continuing legal education shall be in courses on legal ethics or professional responsibility approved by the Board of Commissioners or its designee. Idaho MCLE rules are available here: <http://www2.state.id.us/isb/rules/IBCR.doc>.

⁴⁸ Detailed information about these "treatment diversion court[s]," including applications and handbooks, may be found at the court's website at: <http://www2.state.id.us/2djudicial/Nez%20Perce%20County%20drug%20mental%20health%20Courts.htm>.

⁴⁹ This is a fairly unique type of treatment court that NLADA has not encountered widely. It was described as being a "family drug court" where the parents have some sort of criminal charge and the state has taken (temporary) custody of the children, the goal of the court being to reunify parents and children. The court typically has approximately 3 - 5 families as clients, of which 3 - 4 successfully graduate from the program within 1 - 2 years. They are hoping for outside funding, but to date at our site visit they had not secured any. The "treatment team" who staffed the court on the day we observed included: the magistrate judge, a prosecuting attorney, a public defender, a probation & parole officer, the clerk of court, Child Protection Agency social workers, Riverside Recovery employees, a Change Point employee, a CASA worker, and a program coordinator.

⁵⁰ So with three conflict attorneys that is 24 felony cases to each conflict attorney each year. At \$110,916 per year and 72 cases per year, this yields approximately \$1,540.50 per felony conflict case.

⁵¹ F&V was not able to report the number of other, less common cases coming into the system, such as mental commitments, termination of parental rights, etc.

⁵² Computed by taking 85 total felony cases, as of May, and divided by 5 to find the monthly average: 17. Then multiply that number by the total number of months in a year, 12, which yields 204 total felony cases per year. Or: $(85/5) \times 12 = 204$.

⁵³ Misdemeanor caseload is found by the same method as felonies: $(391/5) \times 12 = 938.4$.

⁵⁴ Juvenile delinquency caseload is found by the same method as felonies: $(73/5) \times 12 = 175.2$. The deputy prosecuting attorney in charge of the juvenile docket gave us the following juvenile delinquency cases number for total cases filed, whether with a private attorney or public defender or counsel waived: 2005 - 179 cases; 2006 - 172 cases; 2007 - 202 cases.

⁵⁵ If we take 37.69 percent of 204 total felonies, we're left with 77 cases $((72/191) \times 204 = 76.9)$. Divided equally among the three conflict attorneys, each handled approximately 25 or 26 cases $(76.9/3 = 25.63)$.

⁵⁶ Assuming 77 felonies were assigned to the conflict attorneys, then out of the total 204 felonies approximately 127 cases were handled by F&V. Divided among the two felony lawyers at the law firm, each handled about 63 or 64 cases $((204-77)/2 = 63.5)$.

⁵⁷ Such services have multiple advantages. As with investigators, social workers are not only better trained to perform these tasks than attorneys, but are 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 than an attorney; 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.

⁵⁸ See <http://www.in.gov/judiciary/pdc/docs/standards/indigent-defense-non-cap.pdf> at Table 1, p. 14.

⁵⁹ See *supra* note 20.

⁶⁰ It appears that the only caseload information the chief defender receives from his staff attorneys is the monthly reports given to the county that contain total numbers of cases for broad categories, such as felony, juvenile, conflicts, etc. The reports are kept by the office's two clerical assistants and the chief defender did not know what software was used, even though that software (ABACUS Law, a DOS-based application) has been in use at the office for 13 years. Though the software has report functions, none of the staff knows how to use them. The secretary with the most experience was unaware of what report functions the software has. Therefore counting files on the shelf is the only method the office uses to know how many cases each attorney has. By contrast, the conflicts counsel was able to produce a list of assignments for each of his attorneys and to count how many cases each has been assigned.

⁶¹ A judge noted that recently he had observed the chief defender handling a case in another county.

⁶² Based on the monthly reports we obtained, NLADA estimates the Bonneville County Public Defender Office has an annual caseload of 626 felonies, 66 civil commitments, 30 child protection act cases, 1951 misdemeanors (city and county), and 248 juvenile delinquency cases. Weighted as misdemeanor-equivalents, that is approximately 4,308 cases. Under the NAC standard of 400 misdemeanors per attorney per year, the office would require a staff of 11 attorneys to handle this caseload.

⁶³ *An Assessment of the Immediate and Longer-term Needs of the New Orleans Public Defender System*. Produced by the Bureau of Justice Assistance National Training and Technical Assistance Initiative at American University. (Grant # 2005-DD-BX-K053) April 10, 2006.

⁶⁴ From what we could learn, the defender case tracking system is often but not always used to check conflicts, and the secretaries do assist with conflict checking.

⁶⁵ While the use of a flat fee contract for conflict representation is an obvious concern, as described in the previous chapter, the Bonneville County contract for conflict attorney representation contains specific language that creates further independence issues. Particularly in the section relating to murder cases, it provides: "Determining whether a conflict exists between the Attorney and the client will be at the sole discretion of Bar Counsel for the Idaho State Bar Association." Elsewhere it requires the parties to use an independent mediator, which may include the state bar counsel, to determine whether a conflict exists if there is a question about it. It then requires the conflict attorney to obtain permission from the chief public defender before returning a client file to the public defender's office. These provisions raise questions about the independence of the conflict attorney and possible conflicts of interest for the Public Defender.

⁶⁶ The county will provide reimbursement for payment to additional counsel if there are more than three co-defendants in a single case.

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⁶⁷ Lead conflict counsel advised that he felt the subcontract attorney doing misdemeanor conflicts was most at risk of being overburdened.

⁶⁸ The firm is paid in twelve monthly installments of \$124, 745.84 each. The total three year payment is set at \$4,490,850. For comparison, under the original three-year contract, which ended in fiscal year 2000, the yearly payment was \$802,000.

⁶⁹ These could include divorce cases, child support, family law matters and other types of situations unrelated to criminal practices.

⁷⁰ There are two detention centers in Canyon County: Dale G. Haile Detention Center and Southwest Idaho Detention Center.

⁷¹ This is in compliance with Rule 44.3, Idaho Criminal Rules

⁷² Attorneys must be licensed in Idaho or hold a “limited license” from the Idaho State Bar, but the firm may only carry one “limited license” attorney on its staff

⁷³ This list did not reflect post-disposition work or probation violations cases. At the time of our site visit, there were a total of 15 attorneys (the 2 partners; 14 staff attorneys; and one Oregon attorney who was awaiting his Idaho license) and one open attorney position at the lawfirm. As with all lawfirms, attorneys leave the firm from time to time and new attorneys are hired to replace them. Additionally, some attorneys move up from misdemeanor representation to felony representation. The caseload numbers provided to us are as follow:

	FY 2006	FY 2007
Management/Reduced Felony:		
Wiebe	3	15
Fouser	8	5
Felony:		
Onanubosi	241	204
Briggs	240	212
Beabe/Smethers ^a	239	203
Sullivan ^b	222	226
Tilley	183 ^c	
Koonce		279
Glindeman		107 ^d
Mixed Fel/Misd/Juv/CPA: (the office cannot discern how many cases of each type)		
Bublitz	866 ^e	
Misd/Juv/CPA: (the office cannot discern how many cases of each type)		
Koonce	1145	
Glindeman	794	
Mills	1209	1226
Barrera	948	693 ^f
Stevenson/Dearing ^g	936	724
DeAngelo		876
Reynolds		782
Chesebra		126 ^h
Fuistig		115 ⁱ

^a Beabe left the firm July 2007; Smethers joined the firm July 2007.

^b Sullivan handles felonies, but additionally handles appeals and post-conviction cases.

^c Tilley left the firm August 2008, so this caseload is only for 10 months.

^d Glindeman left the firm July 2007, so this caseload is only for 9 months.

^e Bublitz left the firm Sept 2007, so this caseload is only for 11 months.

^f Barrera left the firm Sept 2007, so this caseload is only for 11 months.

^g Stevenson left the firm July 2007; Dearing joined the firm July 2007.

^h Chesebra joined the firm August 2007, so this caseload is only for 2 months.

ⁱ Fuistig joined the firm September 2007, so this caseload is only for 1 month.

⁷⁴ Average felony caseloads were calculated using only data for those attorneys who worked full time on felony dockets throughout the two-year period. See fn. 73.

⁷⁵ Average mixed-docket caseloads were calculated using only data for those attorneys who carried a mixed misdemeanor/juvenile/CPA caseload for a full calendar year. See fn. 73.

⁷⁶ ABA *Guidelines for the Appointment of Counsel in Death Penalty Cases* (1989, 2003), Guideline 6.1 — WORKLOAD: “The Responsible Agency should implement effectual mechanisms to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation in accordance with these Guidelines.”

⁷⁷ SPRC 2. http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=SPRC&ruleid=supsprc2.

⁷⁸ The 952 number reflects preliminary hearing assignments.

⁷⁹ It is necessary for any workload analysis to establish some baseline for a work year. For employees defined as nonexempt 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 40-hour workweek, the baseline work year is 2,080 hours (or 40 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 Don Fisk and 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 52 weeks of the year, presuming that national caseload standards take into consideration that an attorney will take vacation, have sick or personal days, and spend some amount of time on administrative work and training.

⁸⁰ As Jonathan Gradess, director of the New York State Defender Association, has written: “The teaching of client-centered representation is not an idealistic goal but a practical skill. . . . Representing a person, not a file, in every case keeps lawyers from inadvertently working to their clients’ detriment. For example, if lawyers do not find out that clients are noncitizens, they may urge as ‘the best possible deal’ plea bargains that result in deportation. If they do not know that a young client has suffered abuse, they may miss a winning defense. If lawyers do not take the time and effort to gain their clients’ trust, these and other important facts will not be disclosed. Gaining trust takes more than saying, ‘I’m your lawyer, trust me.’ Clients and others who see defense lawyers with an office in the same building as the prosecutor and court, who see lawyers greeting district attorneys and court officers with more warmth than they bestow on clients and their families, who learn that their lawyers talk to the prosecutor about a plea bargain before even speaking to a client, will doubt that the lawyers have their clients’ best interests in mind or at heart.” *From My Vantage Point*, Public Defense Center Backup Report, March-April, 2001, available at http://www.nysda.org/Publications/ClientsandtheCommunity_01_03.pdf.

⁸¹ Ada County Chief Public Defender, Alan Trimming notes in a communication with NLADA on July 31, 2009: “Felony assignments for calendar year 2008 totaled 2,635.... There are now five trial level teams covering ten district judges. Three attorneys are assigned to two judges. There is currently a woman on four of five teams.”

⁸² In December 2007, the unit had ten pending murder cases. On most of the cases there is a second chair; either another attorney from the unit or an attorney from the felony trial teams. Some did not yet have a second chair as the transition continued to this new approach. There also were four murder cases being handled by conflict counsel.

⁸³ These attorneys were promoted from the misdemeanor unit.

⁸⁴ One judge pointed out that littering is a misdemeanor and said he would support that being a violation instead. The new misdemeanor supervisor noted that “dog at large” is a misdemeanor. He said that DWP (Driving Without Privileges) is about 40 percent of the caseload and that is “ridiculous.” He noted that clients can be sentenced to more jail time for a second offense DWP than for a DUI.

⁸⁵ Trimming reports that this circumstance is shared by prosecuting agencies and courts.

⁸⁶ This judge said he would sign a letter to the commissioners asking for more defender funding if the chief defender asked, but he has not been asked. The trial court administrator, noting the heavy caseload, observed that the chief defender always seems to be in need of additional resources and to be scrambling. Because of that, the court agreed to postpone starting a new calendar with a new judge until after the fiscal year, when the defender’s office would have additional resources. The administrator said he had offered to the chief defender to support his request to the county board for more resources, but the defender had not asked him to do so.

⁸⁷ Trimming correspondence (1/31/09): Investigator staff is now up to six people.

⁸⁸ Available at <http://www.abanet.org/crimjust/standards/providingdefense.pdf>. See also Washington Defender Association Standards that specify a numerical formula for determining investigation staff. Standard Six: “Public defender offices, assigned counsel, and private law firms holding contracts to provide representation for poor people accused of crimes should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every four attorneys.” Available at <http://www.defensenet.org/resources/standards/wda-standards-for-public-defense-services/standard-six-investigators/>. Under the Washington approach, the Ada County public defender office should have nine investigators.

⁸⁹ The Child Protection Act practice involves representing respondents who are the parents, thus adults, of children in need of protection – it does not involve representing the children – and it relies upon the Idaho Department of Health and Welfare for services and program options.

⁹⁰ For example, to correct or reduce a sentence under Idaho Criminal Rule 35.

⁹¹ Under Idaho Code Title 66.

⁹² David Parmenter has a separate contract with the county to do capital defense at the rate of \$300 per hour for first chair representation and \$200 per hour for second chair. Non-death cases are billed at \$200 per hour.

⁹³ This means he is paid \$16,800 per year for handling up to 96 cases (24 felonies and 72 misdemeanors), or an average of \$175 per case no matter how serious.

⁹⁴ The contract states that these private cases may not conflict with Power County contractually represented cases, and private representation should not be undertaken where a conflict may present itself.

⁹⁵ The judges exercise no direct involvement in the awarding of the contracts, only in the assignment of cases based upon the monthly primary and conflict case assignment system.

⁹⁶ Blaine County Administrator Michael McNees informed us that this amount is around \$304K.

⁹⁷ The request for additional hours must outline the various factors that will require additional attorney time and effort. The attorney will still be paid at the \$100/hour rate.

⁹⁸ Doug Werth, Cheri Hicks, Dan Dolan and Chris Simms.

⁹⁹ Under Idaho Rule 44.3, *Standards for Qualification of Appointed Counsel in Capital Cases*, Doug Nelson and Keith Roark from The Roark Law Firm are qualified lead counsel in capital cases. No other Blaine County contract defenders are included in the Idaho Supreme Court's listing.

¹⁰⁰ The contract specifically states that, in post-conviction cases, the trial counsel will not receive the appointment given the assumed grounds of ineffective assistance of trial counsel.

¹⁰¹ Payment amounts are divided into twelve and sent each month to the attorneys.

¹⁰² The county retains the right to terminate the contract if the attorney fails to provide timely reports or if the reports' information is "inaccurate."

¹⁰³ Bill Douglas did not run for re-election as county prosecutor in November 2008.

¹⁰⁴ About four years ago Kootenai County was confronted with a nationally famous death penalty case: *State of Idaho v. Joseph E. Duncan*. Duncan was charged in a case involving four deaths and the kidnapping and sexual assault of an additional person. He was defended in Kootenai County by the chief and chief deputy public defenders. This case created a media frenzy in Coeur d'Alene and major systems problems for court administration, which built special courthouse services out at the adult jail in anticipation of a trial and its related media requirements. A plea bargain was eventually struck for life without parole, but not before the case cost the county many thousands of dollars. This case demonstrated the vulnerabilities of the court system and its inability to cope with anything out of the ordinary. The prosecutor's office was overwhelmed, and, although the Public Defender Office has experienced capital counsel, it too faced major resource issues.

¹⁰⁵ Chris Schwartz, Ed Lawlor, Larry Purviance, and Kevin Walker did not stay with the office for the entirety of 2007. Sarah Sears joined the office toward the end of the year.

¹⁰⁶ In capital cases, the PD staff investigators do all of the "client maintenance" and the fact investigation. They frequently work closely with the mitigation specialist hired on the capital case.

¹⁰⁷ At the time of our site visit, the jail was regularly overcrowded, in the sense of actually being beyond capacity. The jail had a capacity of 325, but on the day of our site visit there were 372 defendants booked into the jail (186 pre-sentence; 124 sentenced; 10 with holds; and 52 with some combination. Of the pre-sentence defendants, approximately 73% were on felony charges and 27% were on misdemeanor charges.). A sergeant advised that this was typical, and that some number of defendants had to be released or transported each day to make room for that day's new arrestees. The sheriff was seeking an expansion of the jail, which has since been realized.

¹⁰⁸ Lynn Nelson initially determines what constitutes a conflict of interest for the office. As cases develop, the staff deputy attorneys are required to bring their conflicts to Lynn for his consideration and a final outcome decision. Any disputes between the public defender and the conflict attorneys as to what constitutes a "conflict" for representation purposes are resolved by the Administrative Judge of the First Judicial District.

In *State v. Guy Michael Cook*, 144 Idaho 784 (Ct. App. 2007), a conflict of interest case from the Kootenai County Public Defender Office (active, concurrent representation of defendant and same case witness by the office), the Idaho Court of Appeals refused to adopt a "per se" conflict of interest rule for affiliated public defenders in the same office, especially where there is no indication the conflict would hamper an attorney's ability to effectively represent a client. The COA referred such conflict cases to the trial courts to determine on a case by case basis whether a defendant's right to counsel is threatened by competing interests. For public defender offices the courts would consider whether an office has set-up effective measures to prevent communication of confidential client information between lawyers employed on behalf of individual defendants -- in other words, a "Chinese wall."

¹⁰⁹ The conflict attorneys are required to provide for their own overhead, such as secretary, insurance and rent. They are also responsible for up to \$20 per month for long distance telephone expense, collect calls and photocopying; costs above

that amount may be submitted to the county for reimbursement. The county agrees in the contract to pay the costs of all transcripts of hearings, fees related to listening to tapes of court proceedings, and charges for copies of documents from court files.

¹¹⁰ In 2007, there was a mixed caseload of 372 cases going to conflict counsel. In 2008, Nelson expected to assign a total mixed caseload of between 400 and 500 cases to the three conflict defenders.

¹¹¹ <http://www.isc.idaho.gov/07annual/07prose.pdf>.

¹¹² See http://www.isc.idaho.gov/NewBondScheduleEffectiveFeb_1_2009.pdf.

¹¹³ *Argersinger v. Hamlin*, 407 U.S. 25, 33-36 (1972) (citations omitted).

¹¹⁴ *Alabama v. Shelton*, 535 U.S. 654, 658 (2002).

¹¹⁵ Examples of such conditions include attending drug treatment, observing a curfew, maintaining employment, or paying fines and court costs. The Court said: “Where the State provides no counsel to an indigent defendant, does the Sixth Amendment permit activation of a suspended sentence upon the defendant’s violation of the terms of probation? We conclude that it does not. A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense. The uncounseled conviction at that point ‘result[s] in imprisonment,’ it ‘end[s] up in the actual deprivation of a person’s liberty.’ This is precisely what the Sixth Amendment, as interpreted in *Argersinger* and *Scott*, does not allow.” *Alabama v. Shelton*, 535 U.S. 654, 662 (2002) (citations omitted).

¹¹⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹¹⁷ *Kirby v. Illinois*, 406 U.S. 682 (1972).

¹¹⁸ *Coleman v. Alabama*, 399 U.S. 1 (1970).

¹¹⁹ *County of Riverside v. McGlaughlin*, 500 U.S. 44 (1991).

¹²⁰ *ABA Defense Services*, commentary to Standard 5-6.1, at 78-79.

¹²¹ *Boykin v. Alabama*, 395 U.S. 238, 242-3 (1969).

¹²² In most jurisdictions we visited, the video was presented only in English.

¹²³ Decided May 20, 2002.

¹²⁴ *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972) (citations omitted).

¹²⁵ *Faretta v. California*, 422 U.S. 806 (1975).

¹²⁶ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

¹²⁷ *Tovar*, 541 U.S. at 88. While not purporting to prescribe a proper colloquy for waiver prior to entry of an uncounseled plea, *Tovar* acknowledges that the colloquy required may be less than that required for a waiver of counsel prior to representing oneself at trial, but is likely more than that required for preliminary matters such as a waiver of *Miranda* rights. *Tovar*, 541 U.S. at 90-92.

¹²⁸ Idaho Code § 19-857.

¹²⁹ Toward this end, the Sixth Circuit United States Court of Appeals has suggested an extensive colloquy for every federal district judge to follow whenever a defendant desires to waive their right to counsel and represent themselves at trial. *U.S. v. McDowell*, 814 F.2d 245, 249-50 (6th Cir. 1987). When a defendant states that he wishes to represent himself, you [the judge] should ... ask questions similar to the following: (a) Have you ever studied law?; (b) Have you ever represented yourself or any other defendant in a criminal action?; (c) You realize, do you not, that you are charged with these crimes: (Here state the crimes with which the defendant is charged.); (d) You realize, do you not, that if you are found guilty of the crime charged in Count I the court must impose an assessment of at least \$50 (\$25 if a misdemeanor) and could sentence you to as much as ___ years in prison and fine you as much as \$___? (Then ask him a similar question with respect to each other crime with which he may be charged in the indictment or information.); (e) You realize, do you not, that if you are found guilty of more than one of those crimes this court can order that the sentences be served consecutively, that is, one after another?; (f) You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case; (g) Are you familiar with the Federal Rules of Evidence?; (h) You realize, do you not, that the Federal Rules of Evidence govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?; (i) Are you familiar with the Federal Rules of Criminal Procedure?; (j) You realize, do you not, that those rules govern the way in which a criminal action is tried in federal court?; (k) You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony; (l) (Then say to the defendant something to this effect): I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself; (m) Now, in light of the penalty that you might suffer if you are found guilty and in light of all of the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?; (n) Is your decision entirely voluntary on your part?; (o) If the answers to the two preceding questions are in the affirmative, [and in your opinion the waiver of counsel is knowing and voluntary,] you should then say something to the following effect: "I find that the defendant has knowingly and voluntarily waived his right to counsel. I will therefore permit him to represent himself;" (p) You should consider the appointment of standby counsel to assist the defendant and to replace him if the court should determine during trial that the defendant can no longer be permitted to represent himself. *Guideline For District Judges from 1 Bench Book for United States District Judges* 1.02-2 to -5 (3d ed. 1986).

¹³⁰ *U.S. v. Akins*, 276 F.3d 1141, 1144 (9th Cir. 2002). *Tovar* suggests that the overall recommendations of *Akins* may be at the far end of the spectrum of what is required.

¹³¹ As Justice Engel observed in his concurrence in *McDowell*, a detailed colloquy is "consummate good sense and usefulness as a tool for avoiding the least useful and productive of all grounds for appellate review: procedural error which can easily be avoided [I]t would probably be useful for a judge to inquire as to the extent of any defendant's education and training, and particularly whether he has observed other criminal trials either as a defendant or as a witness. The point is, of course, that the more searching the inquiry at this stage the more likely it is that any decision on the part of the defendant is going to be truly voluntary and equally important that he will not be able to raise that issue later if he does then decide to represent himself. It is simply a question of taking enough time at the moment to make a meaningful record and thus to avoid the very real dangers of reversal should the defendant not prove himself up to the task of his own self-defense." *McDowell*, 814 F.2d at 252.

¹³² The "Application for Public Defender" form in Bonneville County is written in both languages, whereas in Power County (a county with a similarly large Spanish-speaking minority population) it is not.

¹³³ NSC commentary at 72-74.

¹³⁴ Cost recovery from partially indigent defendants was first authorized by the National Advisory Commission on Criminal Justice Standards and Goals, Defense Standard 13.2 (promulgated in 1973 pursuant to directions of the 1967 President's Crime Commission), with the caveat that the amount should be "no more than an amount that can be paid without causing substantial hardship to the individual or his family." The concept was subsequently fleshed out in the *Guidelines*

for *Legal Defense Systems in the United States* (National Study Commission on Defense Services, 1976), Guideline 1.7:

“If the accused is determined to be eligible for defense services in accordance with approved financial eligibility criteria and procedures, and if, at the time that the determination is made, he is able to provide a limited cash contribution to the cost of his defense without imposing a substantial financial hardship upon himself or his dependents, such contribution should be required as a condition of continued representation at public expense . . .

“1(b) The amount of contribution to be made under this section should be determined in accordance with predetermined standards and administered in an objective manner; provided, however, that the amount of the contribution should not exceed the lesser of (1) ten (10) percent of the total maximum amount which would be payable for the representation in question under the assigned counsel fee schedule, where such a schedule is used in the particular jurisdiction, or (2) a sum equal to the fee generally paid to an assigned counsel for one trial day in a comparable case.”

Later standards further clarified the limitations of such plans. The American Bar Association’s Criminal Justice Standards, Providing Defense Services, Standard 5-7.1 directs that “[c]ounsel should not be denied because of a person’s ability to pay part of the cost of representation.” Cost recovery after the representation has been provided (see below) is unconditionally prohibited (with one exception, where the client committed fraud in obtaining a determination of financial eligibility) under ABA Standard 5-7.2. However, pre-representation “contribution” is permitted if: 1) it does not impose a long-term financial debt; 2) there is a reasonable prospect that the defendant can make reasonably prompt payments; and 3) there are “satisfactory procedural safeguards,” so as not to chill the exercise of the right to counsel. Such safeguards include: a) right to notice of the potential obligation; b) right to an evidentiary hearing on the imposition of costs of counsel, with an attorney present and with the opportunity to present witnesses and to have a written record of the judicial findings; c) right to a determination of present ability to pay actual costs of counsel and related fees, such as investigative or clerical costs; d) right to all civil judgment debtor protection; e) right to petition for remission of fees, in the event of future inability to pay; f) notice that failure to pay will not result in imprisonment, unless willful; g) notice of a limit, statutory or otherwise, on time for the recovery of fees; and h) adequate information as to the actual costs of counsel, with the right not to be assessed a fee in excess of those actual costs.

¹³⁵ The lone exception is in instances where the client committed fraud in obtaining a determination of financial eligibility.

¹³⁶ *James v. Strange*, 407 U.S. 128 (1972) (Kansas recoupment statute; equal protection); *Rinaldi v. Yeager*, 384 U.S. 306 (New Jersey statute requiring repayment of the cost of a transcript on appeal; equal protection); *Giacco v. Pennsylvania*, 382 U.S. 399 (1966) (recoupment statute; due process/vagueness); *Olson v. James*, 603 F.2d 150 (10th Cir. 1979) (Oregon recoupment statute; due process); *Fitch v. Belshaw*, 581 F. Supp. 273 (D. Or. 1984) (recoupment statute; due process and Sixth Amendment).

¹³⁷ *Bearden v. Georgia*, 461 U.S. 660 (1985) (imprisoning an indigent defendant who tried and failed to pay restitution violates equal protection and the fundamental fairness guaranteed by the Fourteenth Amendment).

¹³⁸ *Containing the Cost of Indigent Defense Programs: Eligibility Screening and Cost Recovery Procedures* (National Institute of Justice, 1986), at 34-35.

¹³⁹ The most effective cost recovery programs ask defendants to contribute a modest fee to help offset the costs of representation, generally between \$10 and \$50, at the time they are being screened.

¹⁴⁰ Courtrooms #5 and #6 are set up for video hearings.

¹⁴¹ Annual reports of the Idaho Supreme Court can be found at http://www.isc.idaho.gov/annual_cov.htm.

¹⁴² Emphasis original.

¹⁴³ Emphasis original.

¹⁴⁴ 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 “Stan-

dards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State” (NYSBA 2004); “New York State Bar Association Standards for Providing Mandated Representation” (NYSBA 2005); and “Client-Centered Representation Standards” (NYSBA Client Advisory Board 2005).

¹⁴⁵ NSC, Guideline 5.10

¹⁴⁶ *Id.*, and commentary at p. 460.

¹⁴⁷ NSC at 470.

¹⁴⁸ ABA *Defense Services*, commentary to Standard 5-6.2, at 83.

¹⁴⁹ 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).

¹⁵⁰ Trimming correspondence (7/31/09): “regarding attire and presentation of attorneys at arraignments, there are clear guidelines. This has been made abundantly clear to the attorney mentioned.”

¹⁵¹ Trimming correspondence (7/31/09): “My staff informs me that clients do not uniformly appear in shackles and handcuffs at initial magistrate division in-custody proceedings. The determination of whether restraints are in place is driven by custody classification and is more common when inmates from the state pen are arraigned. I have no reason to question the observations of the site visit team, but simply note what my staff tells me.”

¹⁵² One female attorney in misdemeanors said that men had gone to felonies since she had qualified to be a felony attorney, that she had not been asked to go, and that “professionally, it would be good for me to go.” By December 2007, four women attorneys had transferred to the felony team.

¹⁵³ According to the 2006 Census Bureau estimate, of the 359,035 people in Ada County, 11.5 per cent were people of color, including Hispanic, Black, Asian, and Native American people. <http://quickfacts.census.gov/qfd/states/16/16001.html>.

¹⁵⁴ <http://www.law.uidaho.edu/default.aspx?pid=97348>. There were 12 Hispanic, five Native American, and four African American students out of 314 students at the school in the 2006-07 year. 130 were women. See, NALP Directory, at http://www.nalplawsonline.org/ndlsdir_search_results.asp.

¹⁵⁵ Very few cases are ever brought before a grand jury. A senior prosecuting attorney could only recall three or four grand juries in 10 years. The county does not maintain a sitting grand jury; rather the prosecutor must file a motion with the court to convene a grand jury.

¹⁵⁶ One prosecutor told us there is a very good working relationship between the prosecuting attorneys and the public defenders. She said they have an “open file policy” where the public defenders can come to the office, look at the entire prosecuting attorney’s file, and copy whatever they want. When a defender files a motion for discovery, the prosecutor has 14 days to respond. The defenders say the prosecuting attorneys are “pretty good” about responding to discovery; “about 80 percent of what it should be,” also they have had some “disconnects” about getting audio-visual discovery. Public defenders told us it is very rare that a Motion to Compel is necessary to get the discovery to which they are entitled.

¹⁵⁷ It should be noted, however, that this judge proudly claims the title of “most DQ’d [disqualified] judge in the state.” Idaho has an interesting criminal court rule that allows each party in a criminal prosecution the right to “disqualify” the judge to whom the case is allotted once in every case, without having to state any reason at all. Idaho Criminal Rule 25. This is sort of a “peremptory challenge” of the judge. This means, for example, that when a case is allotted to a judge, the prosecutor can disqualify that judge; then the case will be reallocated to one of the remaining judges, and the defense

can disqualify that judge; then the case will be reallocated to one of the remaining judges. If there are multiple defendants, under certain circumstances each defendant can disqualify one judge. In felony cases, both parties have the right to disqualify the magistrate at the preliminary hearing level, and then to disqualify the district judge at the district court level. The judge advised that most of his disqualifications come from the public defender office, and he frankly admitted that in his opinion “the public defender staff attorneys who do not DQ me are the very good attorneys.”

He says that he has made efforts to try to mend fences with the public defender attorneys whom he is on the outs with, and he expressly stated that there were four public defender staff attorneys in particular with whom he was cross-wise. He gave a specific named example of one of these public defender staff attorneys and said that this attorney “comes to court and sits in the courtroom reading until his case is called, while his client is sitting in the box, but when the case is called the attorney has still not met with his client.” He said this same attorney is “a good trial attorney, but is very reactionary, and for example *always* files a request for a transcript of the preliminary hearing.” This judge seemed to feel that a request like this was an unnecessary expenditure of court reporter time and of money, when perhaps a transcript was not truly needed following every preliminary hearing. A public defender might well argue that one must always expect that a transcript will be needed unless and until a case is resolved, and that a standard practice of requesting such a transcript is just good preparation and good advocacy.

¹⁵⁸ The jail provides for a direct toll-free phone line from defendants to the public defender office. Defendants can also contact their conflict public defense attorney on a toll-free line. Clients represented by private retained attorneys must call their attorneys collect from the jail phones.

¹⁵⁹ In 2007, there were 6,104 total misdemeanor cases filed in Bonneville County. Of those, 3,290 defendants waived their right to counsel -- almost 54 percent. See: <http://www.isc.idaho.gov/07annual/07prose.pdf>.

¹⁶⁰ 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.

¹⁶¹ 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 generally assign misdemeanor charges, traffic 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.

¹⁶² 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.

¹⁶³ 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.

¹⁶⁴ 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.

¹⁶⁵ 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.

¹⁶⁶ Trimming Correspondence (7/31/09): “Training is a valid concern. A program is being developed by senior attorney staff. This will be in-house and in addition to Continuing Legal Education classes. It will range from basic skills to specialized forensics issues.”

¹⁶⁷ Internal e-mails are also used to provide important information to attorney and non-attorney staff.

¹⁶⁸ At the time of our site visit, the lawfirm of Wiebe & Fouser held the public defense contract with Canyon County. That contract has since been terminated (see sidebar in Chapter III, page ____), and Mark Mimura now holds the contract with the county effective October 1, 2009. The information contained in this section explains the hiring, training, and supervision practices as they had been implemented by Wiebe & Fouser. It is not possible for NLADA to know in what ways these practices may have been followed or changed by Mark Mimura.

¹⁶⁹ There are no training funds allocated in the contract with Canyon County, and that contract does not contain any language with regard to training.

¹⁷⁰ If the attorney is unable to practice law due to actions affecting his/her license, then the county may terminate the contract. It may also terminate the contract if either the magistrate or district court advises the county that the attorney is “providing inadequate” representation.

¹⁷¹ Under Idaho Rule 44.3, *Standards for Qualification of Appointed Counsel in Capital Cases*, Doug Nelson and Keith Roark from The Roark Law Firm are qualified lead counsel in capital cases. No other Blaine County contract defenders are included in the Idaho Supreme Court’s listing.

¹⁷² Those appeals that are not the responsibility of the Idaho Appellate Public Defender Office, e.g., appeals from magistrate to district court. The contract specifically states that, in post-conviction cases, the trial counsel will not receive the appointment given the assumed grounds of ineffective assistance of trial counsel.

¹⁷³ There is a very, very informal, off the record process whereby Judge Elgee might go to the county if he believed that one of the contract attorneys was poor or incapable of handling the caseload. There is also the very, very informal process whereby defense counsel speak with the county commissioners and let them know about a poor performer.

¹⁷⁴ Scott, Elizabeth S. “The Legal Construction of Adolescence,” 29 *Hofstra L. Rev.* 547 (Winter, 2000) at 581. “The Progressive reformers at the turn of the century had an ambitious agenda for improving the lives of children and promoting their development into productive adults. Juvenile justice reform was only one part of a far-reaching initiative that included compulsory school attendance laws, restrictions on child labor, and the creation of a child welfare system.... The reformers pursued this goal by emphasizing the similarity between young delinquents and neglected children, and by advocating similar treatment. Judge Mack’s famous challenge is representative: ‘Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities?’”

¹⁷⁵ Scott, Elizabeth S. “The Legal Construction of Adolescence,” 29 *Hofstra L. Rev.* 547 (Winter, 2000) at 589-590.

¹⁷⁶ *In re Gault*, 387 U.S. 1 (1967), at 18 (quoting *Kent v. United States*, 383 U.S. 541, 556 (1966)).

¹⁷⁷ Scott, Elizabeth S. “The Legal Construction of Adolescence,” 29 *Hofstra L. Rev.* 547 (Winter, 2000) at 588.

¹⁷⁸ Scott, Elizabeth S. “The Legal Construction of Adolescence,” 29 *Hofstra L. Rev.* 547 (Winter, 2000) at 587.

¹⁷⁹ A delinquent act is an act committed by a child which would be a misdemeanor or felony if committed by an adult.

¹⁸⁰ Status offenses are “crimes” only because of the child’s status as a minor. Examples include: truancy; drinking alcohol or smoking cigarettes as a minor; running away from or being beyond the control of one’s parents, guardian, or legal custodian; and curfew violations.

¹⁸¹ Idaho Juvenile Rules, 7(b).

¹⁸² Idaho Code section 20-516 (3)

¹⁸³ The “complaint” in the juvenile system is the equivalent of the bill of information in the adult system, and is the mech-

anism by which formal prosecution begins.

¹⁸⁴ Idaho Juvenile Rules, 7(a).

¹⁸⁵ Excluding weekends and holidays. Idaho Juvenile Rules, 7(c). Under Idaho Juvenile Rule 22, detention hearings (along with motion hearings) may be held via video-conference or conference call between the judge, the juvenile in question (and her retained counsel, if any), her parent/guardian (if available) and the prosecutor.

¹⁸⁶ Idaho Juvenile Rules, 23.

¹⁸⁷ Idaho Juvenile Rules, 7(c).

¹⁸⁸ Idaho Juvenile Rules, 9(d).

¹⁸⁹ Idaho Juvenile Rules, 9(a).

¹⁹⁰ Idaho Juvenile Rules, 7(d). If a judge orders that a child remain in custody of the state for the protection of the child's own wellbeing, the Idaho Child Protective Act (CPA) is also invoked.

¹⁹¹ NLADA was particularly struck by the formal way in which an attorney client meeting date is incorporated into the child's schedule of date requirements. The Ada County Public Defender office submits to the judges available attorney-client meeting dates, and these are then assigned at the detention hearings with notice going to the child and his parent/guardian. This process provides the child with a structure for meeting with his attorney, and it avoids the problem of failure to meet and resulting continuances that exist in other county juvenile systems. If the client is in custody, the attorney will visit with that client at the detention center on the stated date and time.

¹⁹² Idaho Juvenile Rules, 6(a).

¹⁹³ Idaho Juvenile Rules, 6(d): "Each party shall be given a copy of the petition at, or before, the admit/deny hearing."

¹⁹⁴ Idaho Juvenile Rules, 6(d).

¹⁹⁵ Idaho Juvenile Rules, 6(e)(1).

¹⁹⁶ Idaho Juvenile Rules, 6(f). Under Rule 6(g), the court can amend the petition to a charge of a lesser degree, to which the child may tender an admission to the lesser offense.

¹⁹⁷ Idaho Juvenile Rules, 52(b).

¹⁹⁸ Idaho Juvenile Rules, 6(a). While under Rule 6(c) the admit/deny hearing in its entirety will be placed on the record, the general public can be admitted to the hearing only after the court makes a determination as to the confidentiality of each child's case proceedings.

¹⁹⁹ Idaho Juvenile Rules, 6(b).

²⁰⁰ These caseload numbers include probation violation charges. One defender estimated that about 20 per cent of his assignments are probation violations. There appears to be no way in the defender office to track probation cases separately from new charge cases. The juvenile judge reported that most juveniles who have probation violation hearings waive counsel, and he does not require a written waiver of rights. In the handful of juvenile hearings we observed, there was neither a defender nor a prosecutor present.

²⁰¹ One attorney told us that more children are held than released at arrest. So, more go to a detention hearing than the separate admit/deny hearing.

²⁰² There is no formal or informal court rule or policy that mandates attorney consultation with the child prior to the entry of either a felony or misdemeanor admission. There is also no court rule or policy regarding refusal to accept a waiver for a certain level of charge.

²⁰³ Trimming Correspondence (7/31/09): “The office does not staff out of custody admit/deny hearings at juvenile court unless previously appointed to represent a given client. This is a problematic area as the office is not technically on a case until appointed by the court, subject to a determination of eligibility. As noted in the report, there are a number of procedural issues, and the additional considerations of staffing. It is noteworthy that a number of long-standing procedures at juvenile court have been changed over the years due to efforts of my office, in conjunction with the prosecutor office.”

²⁰⁴ *In Interest of Kinley*, 108 Idaho 862 (Idaho Ct. App. 1985) states: “Rule 3(c), Idaho Juvenile Rules, provides that any waiver of the right to counsel by an accused in a YRA proceeding must be ‘intelligent.’ This term appears to embody the constitutional principle that a waiver of counsel is invalid unless it is made knowingly, intelligently and voluntarily. E.g., *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). In addition, Rule 3(c) requires a waiver to be accompanied by a magistrate’s determination ‘that the best interest of the child does not require the appointment of counsel.’” Idaho Code § 19-857 further provides: “A person who has been appropriately informed of his right to counsel may waive in writing, or by other record, any right provided by this act, if the court concerned, at the time of or after waiver, finds of record that he has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise according to law. The court shall consider such factors as the person’s age, education, and familiarity with the English language and the complexity of the crime involved.”

²⁰⁵ Most juveniles are indigent as they attend school and do not generate sufficient, self-sustaining income. However, they and their parent/guardian/custodian must still complete the eligibility screening form to have a public defender appointed to their case.

²⁰⁶ Idaho Juvenile Rules, 12. “At any time prior to the J.C.A. trial (evidentiary hearing), the court, upon motion of the juvenile, the juveniles parent(s), or upon its own motion, may order one or more conferences to consider such matters as would promote a fair and expeditious trial. At the conclusion of the conference, the court shall file a memorandum of the matters agreed upon. No admission made by the juvenile or the juvenile’s attorney at the conference shall be used against the juvenile unless the admissions are reduced to writing and signed by the juvenile and the juvenile’s attorney.”

²⁰⁷ Idaho Juvenile Rules, 15(a).

²⁰⁸ Idaho Juvenile Rules, 15(e).

²⁰⁹ Idaho Juvenile Rules, 15(f).

²¹⁰ Idaho Juvenile Rules, 15(h).

²¹¹ If the defense consents, this hearing can be held immediately following the evidentiary hearing. Idaho Juvenile Rules, 17(a).

²¹² Idaho Juvenile Rules, 19(d).

²¹³ Idaho Juvenile Rules, 17(b).

²¹⁴ Idaho Juvenile Rules, 17 (f): “If, pursuant to I.C. Section 20-523, a written screening team report is compiled, it shall be presented to the court and be made available to the parties at least 48 hours prior to the sentencing hearing, excluding Saturdays, Sundays, and holidays.”

²¹⁵ Idaho Juvenile Rules, 19(c). The screening team shall consist of representatives from the County Juvenile Probation

Office, the Idaho Department of Juvenile Corrections and the Idaho Department of Health and Welfare. In addition, the screening team may consist of the prosecuting attorney, the defense attorney, local school officials, and any other persons that the court may deem appropriate including parents, custodians or guardians of the juvenile. Participants shall share relevant information concerning the juvenile offender with other screening team members. All such information shall be maintained as confidential pursuant to I.C.A.R. 32.

²¹⁶ Idaho Juvenile Rules, 19(b).

²¹⁷ Idaho Juvenile Rules, 19(d).

²¹⁸ Idaho Juvenile Rules, 19(f): “Before commitment to the custody of the Department of Juvenile Corrections, pursuant to I.C. Section 20-520, the court must make findings on the record that the juvenile meets any of the criteria:

(1) The juvenile has been adjudicated for a crime that would be a felony if committed by an adult and two or more of the following circumstances are present:

- (A) The crime is a crime of violence, or is a crime of a sexual nature, or is a crime involving the manufacture, sale or other delivery of a controlled substance;
- (B) The crime either did or reasonably could have resulted in serious bodily injury or death to others;
- (C) The crime demonstrates that the juvenile has exhibited such wanton and reckless disregard for the property rights of others that release of the juvenile could constitute substantial risk to the community;
- (D) Other than the charges presently before the court, the juvenile has been adjudicated or convicted of two or more felonies or three or more misdemeanors within the past 12 months and is presently or has been on probation or committed to the custody of the Department of Juvenile Corrections within the past 12 months;
- (E) A community-based program is not available or not appropriate;
- (F) The juvenile has failed in a less secure out of home placement;
- (G) The juvenile has failed to comply with the terms of a home detention order.

OR

(2) The juvenile has been adjudicated for a crime that would be a misdemeanor if committed by an adult and three or more of the following circumstances are present:

- (A) Other than the charges presently before the court, the juvenile has been adjudicated or convicted of two or more felonies or three or more misdemeanors in the past 12 months and is presently or has been on probation or committed to the custody of the Idaho Department of Health & Welfare or Department of Juvenile Corrections, within the past 12 months;
- (B) The crime demonstrates that the juvenile has exhibited such wanton and reckless disregard for the property rights of others that release of the juvenile could constitute a substantial risk to the community;
- (C) The crime either did or could have reasonably resulted in serious bodily injury or death to others;
- (D) The crime is a crime of violence, or a crime of a sexual nature;
- (E) A community based program is not available or not appropriate;
- (F) The juvenile has failed in a less secure out of home placement;
- (G) The juvenile has failed to comply with the terms of a home detention order.

²¹⁹ There are rooms with doors that close set aside for attorney-client meetings at the juvenile detention center. The detention center also has phone lines for attorney-client consultations, but the phones are not in a space guaranteed to be confidential.

²²⁰ In Blaine County there are few, if any, waivers of juveniles to the adult court system. Most juveniles are kept in the community. Admit/deny and detention hearings are not covered by the defenders, who technically are not yet appointed. Judge Ingram will appoint the public defender in all “serious” cases, but he has not articulated an across the board policy that requires appointment in all felony or misdemeanor cases.

²²¹ This according to the juvenile magistrate judge.

²²² Blaine County probation uses a special assessment tool called the P.A.C.T.: Positive Achievement Change Tool. PACT looks at both risk and protective factors, but it also considers the child’s static and dynamic life circumstances. It doc-

uments through oral interviews, including the use of motivational interviewing techniques, the following: history of relationships, record of referrals, current relationships, family history, mental health history, current living relationships, attitudes/behaviors, school history, current school status, historic use of free time, current use of free time, employment history, current employment, alcohol and drug history, current alcohol and drugs, current mental health, and aggression.

²²³ For example, during our site visit we spoke with a 17-year-old child who was held at the Snake River Juvenile Detention Center. He had been at the Center for twenty-five days as a result of probation violations. His attorney was working to get treatment options for him, in the hope that he would not have to be sent to the Department of Juvenile Corrections. This child said he talks to his lawyer one or two times a week.

²²⁴ Trimming correspondence (7/31/09): “There are now four full time attorneys assigned to this division, one of which is a woman. Three of the four have extensive experience and have been in place for a number of years. The newest member is expected to remain in place in this division...”

²²⁵ Idaho Juvenile Rules, Rule 18.

²²⁶ This is not true of Blaine County, where cases are assigned on a monthly rotation. Therefore, no matter the attorney’s experience or level of skill, she will be assigned all manner of case-types. In Power County, there is one primary contract defender who accepts all case types; there just is not a heavy juvenile caseload sufficient to warrant selectivity.

²²⁷ See, *In the Matter of L. M.*, *Supreme Court of Kansas*, No. 96, 197, Opinion filed June 20, 2008, in which the Kansas Supreme Court found that, because the Kansas Juvenile Justice Code had become more akin to an adult prosecution, eroding the former benevolent, child-cognizant rehabilitative, *parens-patriae* character of the Code, juveniles had a constitutional right to a jury trial under the Sixth and Fourteenth Amendments. www.kscourts.org/Cases-and-Opinions/opinions/supct/2008/20080620/96197.htm.

ABA Ten Principles of a Public Defense Delivery System

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

2 **Where the caseload is sufficiently high,⁶ the public defense delivery system consists of both a defender office⁷ and the active participation of the private bar.** The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services.⁸ The appointment process should never be ad hoc,⁹ but should be according to a coordi-

nated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.¹⁰ Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.¹¹

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

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

5 Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.¹⁸ National caseload standards should in no event be exceeded,¹⁹ but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.²⁰

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

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

8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support

staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.²³ Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.²⁴ Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases,²⁵ and separately fund expert, investigative, and other litigation support services.²⁶ No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system.²⁷ This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

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

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

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

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

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

⁴ Judicial independence is “the most essential character of a free society” (American Bar Association Standing Committee on Judicial Independence, 1997).

⁵ ABA, *supra* note 2, Standard 5-4.1

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

⁷ NAC, *supra* note 2, Standard 13.5; ABA, *supra* note 2, Standard 5-1.2; ABA Counsel for Private Parties, *supra*

note 2, Standard 2.2. “Defender office” means a full-time public defender office and includes a private non-profit organization operating in the same manner as a full-time public defender office under a contract with a jurisdiction.

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

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

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

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

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

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

¹⁴ NSC, *supra* note 2, Guideline 1.3. 15 American Bar Association Standards for Criminal Justice, *Defense Function* (3rd ed. 1993) [hereinafter “ABA Defense Function”], Standard 4-3.2; *Performance Guidelines for Criminal Defense Representation* (NLADA 1995) [hereinafter “Performance Guidelines”], Guidelines 2.1-4.1; ABA Counsel for Private Parties, *supra* note 2, Standard 4.2.

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

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

¹⁸ NSC, *supra* note 2, Guideline 5.1, 5.3; ABA, *supra* note 2, Standards 5-5.3; ABA Defense Function, *supra* note

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

¹⁹Numerical 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”].

²⁰ABA, *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.

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

²²NSC, *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).

²³NSC, *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).

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

²⁵NSC, *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*.

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

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

²⁸NAC, *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).

²⁹NSC, *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.

NLADA Site Team Biographies

Robert Boruchowitz graduated from Northwestern University School of Law in 1973. He is visiting clinical professor and director of The Defender Initiative at Seattle University School of Law, teaching in the Youth Advocacy Clinic and a seminar on *Law and the Holocaust*. He was director of The Defender Association in Seattle from 1978 through 2006. He was president of the Washington Defender Association for 20 years. He is a member of the Washington State Bar Association Committee on Public Defense and served as the chair of the American Council of Chief Defenders (ACCD) Committee on Emerging Systems, of which he now is a member. He led an ACCD committee that drafted a statement on caseloads and workloads. He is qualified to be counsel in capital appeals and post-conviction proceedings. He co-counseled the first King County "sexual predator" commitment jury trial and the subsequent appeals and retrial and led the eventual argument in the U.S. Supreme Court. He established The Defender Association's Racial Disparity Project with a federal grant, and the Death Penalty Assistance Center funded by the state Office of Public Defense. He has participated in state and national efforts to develop public defender standards and a model defender services contract and helped to draft state law requiring local governments to develop standards for public defense. He has been an expert witness on effective assistance of counsel in death penalty cases and in a habeas corpus proceeding challenging a persistent offender conviction, and in the recent Grant County systemic ineffectiveness litigation.

Boruchowitz has served on site visit and evaluation teams for the National Legal Aid & Defender Association in Louisiana; Las Vegas; Washington, D.C.; Ada County, Idaho; and Michigan. He has served on the boards of NLADA and the ACLU of Washington. He has written several articles on the sexual predator law and on public defense issues. He was a *Soros Senior Fellow* addressing the denial of counsel in misdemeanor and juvenile cases. He has received the WDA *Gideon Award*, the Washington Association of Criminal Defense Lawyers *Douglas Award*, the ACLU *Civil Libertarian Award*, the NLADA *Reginald Heber Smith Award*, the King County Bar *Friend of the Profession Award*, the WSBA *Professionalism Award*, and the Mothers for Police Accountability *Paul Robeson Peace and Justice Award*. He also is the player-manager for the Defender Softball Team.

David Carroll is the director of research for the National Legal Aid & Defender Association (NLADA). Carroll has conducted assessments of the right to counsel in Montana, Idaho, New York, the District of Columbia, Clark County (Las Vegas) Nevada, Santa Clara County (San Jose) California, and Venango County Pennsylvania. Carroll has consulted with numerous public defender organizations and state Supreme Courts, and he co-authored a report for the U.S. Department of Justice on the Implementation and Impact of Indigent Defense Standards.

In 2004, NLADA released *In Defense of Public Access to Justice*, a comprehensive report detailing the impact Louisiana's systemic deficiencies had on one judicial district — Avoyelles Parish. A legislative Task Force on Indigent Defense subsequently retained Mr. Carroll to advise them on different models for delivering indigent defense services. The Louisiana State Bar retained NLADA to document issues in post-Katrina New Orleans and to create a road map for a legislative fix to the state's systemic deficiencies. The report, primarily authored by Mr. Carroll and released in September 2006, was the starting point for a legislative advisory group put together by the Chair of the

House Criminal Justice Committee that eventually led to the passage of the Louisiana Public Defender Act of 2007.

For five and a half years, Carroll worked as a senior research associate & business manager for the Spangenberg Group (TSG). TSG is a national and international research and consulting firm specializing in criminal justice reform. Since 1985, TSG has been the research arm of the American Bar Association on indigent defense issues. Mr. Carroll directed numerous projects on behalf of TSG, including: a jail-planning study for Pierce County (Tacoma) Washington; a study of indigent defense cost recovery efforts in Jefferson and Fayette Counties (Louisville and Lexington), Kentucky; a statewide assessment of West Virginia's Public Defender Services; and principal analysis on a statewide public defender, court, and prosecutor case-weighting study in Tennessee. He provided analysis and re-design of the New York Legal Aid Society's Criminal Defense Division and Criminal Appeals Bureau's case management information systems. Carroll also was chosen to provide on-site technical assistance to statewide Task Forces in Illinois, Nevada, Alabama, and Vermont under the auspices of the American Bar Association and the U.S. Department of Justice, Bureau of Justice Assistance.

Phyllis Mann is the director of the National Defender Leadership Institute, within the National Legal Aid & Defender Association. Prior to joining NLADA, she was a consultant in criminal defense, providing expert testimony in both state and federal courts in capital defense, research and writing in systemic areas of criminal defense, and serving as the curriculum coordinator for NLADA's *Life in the Balance* capital defense training. Before returning to her home state of Texas, where she still resides, Phyllis practiced exclusively criminal defense — trial and appeal, state and federal — in Louisiana. At various times in her career she served as a public defender for Rapides Parish, as an appellate public defender for the Louisiana Appellate Project, as a court appointed capital defender certified by the Louisiana Indigent Defender Assistance Board, and as a court appointed CJA attorney for the Western and Middle Districts of Louisiana. In 2005, Phyllis secured the unanimous opinion from the Louisiana Supreme Court in *State v. Citizen & Tonguis*, establishing the authority for trial court judges to halt capital prosecutions in Louisiana where there is no funding for the defense of the accused. Following Hurricane Katrina, she established and led an *ad hoc* group of criminal defense attorneys in their *pro bono* efforts to interview, counsel, and document the approximately 8,500 prisoners and detainees evacuated from south-eastern Louisiana jails and to represent them where appropriate in *habeas corpus* and bond proceedings. She received the 2006 *Arthur von Briesen Award* from NLADA for her contributions as a private attorney to indigent defense in Louisiana. Phyllis is a past president of the Louisiana Association of Criminal Defense Lawyers and was the recipient of LACDI's 2005 *Justice Albert Tate Jr. Award* for lifetime achievement in criminal defense.

Jon Mosher is research associate for the Research & Evaluations division of the National Legal Aid & Defender Association. He assists in the direction of NLADA's numerous standards-based assessments of indigent defense systems, including: a statewide evaluation of trial-level right to counsel systems in Michigan; an evaluation of public defender services in Hamilton County (Cincinnati), Ohio; a study of public defense in Orleans Parish (New Orleans) Louisiana; an evaluation of the Idaho State Appellate Defender's Office; and a study of public defender services in the State of New York. He joined NLADA in 2003 as resource coordinator with Defender Legal Services, serving as primary staff liaison to the American Council of Chief Defenders. He is a graduate of George Washington University.

Phyllis Subin completed two gubernatorial appointment terms as the chief public defender for the state of New Mexico in 2003. In that capacity, she was the leader of New Mexico's largest statewide law firm, the New Mexico Public Defender Department, which had a budget of more than \$30 million and employed 320 staff members (160 attorneys) with more than 100 contract attorneys. At the time of her first appointment, Subin was an assistant professor at the University of New Mexico School of Law and the director of the Criminal Defense Clinic. She has a long history in the teaching and training of law students and public defender attorneys. Following years as a trial and appellate public defender, Subin was the first director of training and recruitment at the Defender Association of Philadelphia (PA), a large county public defender system, where she developed and taught a nationally recognized training program for lawyers and law interns.

Subin served as chair of NLADA's Defender Trainer's Section, was instrumental in writing and developing NLADA's national training and development standards and assisted in the creation of NLADA's *Defender Advocacy Institute*. Subin has consulted privately for a number of indigent defense programs, including the Kentucky Department of Advocacy.

The National Legal Aid & Defender Association (NLADA), founded in 1911, is the oldest and largest national, nonprofit membership organization devoting all of its resources to advocating equal access to justice for all Americans. NLADA champions effective legal assistance for people who cannot afford counsel, serves as a collective voice for both civil legal services and public defense services throughout the nation and provides a wide range of services and benefits to its individual and organizational members.

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1140 Connecticut Avenue, NW, Suite 900 • Washington, D.C. 20036

Phone: (202) 452-0620 • Fax: (202) 872-1031

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