



## **NAPD Policy on Active Supervision of the Representation of Clients**

All public defense systems - full-time, assigned counsel, contract - must actively supervise performance to ensure clients are properly represented

*(approved by the NAPD Steering Committee on October 15, 2020)*

Effective supervision provides the safety net for clients and systems. This policy sets a standard of supervision that expands on the 2017 NAPD Foundational Principle 7: *Appropriate Supervision of All Public Defense Lawyers and Other Public Defense Professionals Is Essential.*

This policy begins with the expanded Standard followed by Commentary which explains that all public defense systems - full-time, assigned counsel, contract - must actively supervise performance to ensure clients are properly represented, and this policy addresses:

- Markers of meaningful representation: national practice standards and ethical norms
- Active supervision as an ethical imperative
- Training as vital for quality representation
- Data collection and review are essential for systematic client-centered representation
- Client-centered theory of supervision which implements the guidelines of practice
- Reduced caseloads for supervisors and a minimum of one supervisor for every 10 lawyers
- Management of assigned counsel and public defense delivery methods
- In conclusion: assist defenders in helping clients

### **The Standard**

**Public defense providers must provide appropriate and consistent supervision of all lawyers, and other public defense staff to ensure competent representation of each client according to national performance standards and ethical rules.**

**The objective of supervision is to assure that all defense services provided by lawyers are 'competent' within the meaning of rules of professional conduct and 'effective' pursuant to prevailing professional standards.**

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**NAPD Policy on active supervision of the representation of clients:** All public defense systems - full-time, assigned counsel, contract - must actively supervise performance to ensure clients are properly represented (2020)

**Supervision should determine if sufficient time, thought, and resources are being devoted to a wide variety of defense tasks, such as interviewing and counseling clients; securing pretrial release of incarcerated clients; completion of fact investigations prior to formulating recommendations about plea agreements; formal and informal discovery, engaging in vigorous motion practice, strategic formulation of a defense theory; preparation for pretrial hearings, trials, and sentencing proceedings, responsibilities for direct appeals and collateral attacks consistent with the theory of defense. Supervisors should consider whether there are technological advances available to assist with these tasks and obligations, and if so, how they should be incorporated.**

**Supervision should include appropriate training and mentoring, in and out of court, along with ongoing training and education of all staff.**

**Supervision includes ensuring awareness of the obligations of staff at all levels including the supervisor him/herself.**

**Supervision should also include continuous monitoring of lawyer workloads to assure that that there is adequate time for counsel to perform all essential tasks of defense representation, and that those tasks are, in fact, being completed.**

**Public defense systems should have policies that provide for active and consistent supervision.**

**Supervisors should have reduced caseloads to allow for supervision.**

**Supervisors must regularly review case and performance information.**

**Public defense systems and supervisors must ensure that staff are properly trained.**

**Public defense systems should provide one supervisor for every 10 lawyers, at a minimum.**

## **Introduction**

Client-centered supervision is a primary value of public defense. As specified in the NAPD 2017 *Foundational Principles*, Principle 7: “Appropriate Supervision of All Public Defense Lawyers and Other Public Defense Professionals Is Essential.”<sup>1</sup> Because active supervision is indispensable, we further describe and expand on this necessary provision of client-centered practice.

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<sup>1</sup> “Principle 7: Appropriate Supervision of All Public Defense Lawyers and Other Public Defense Professionals Is Essential. Public defense providers must provide regular and timely supervision as needed of all lawyers and other professionals. The objective of supervision is to assure that all defense services provided by lawyers are competent within the meaning of rules of professional conduct and effective pursuant to prevailing professional standards. Accordingly, supervision should determine if sufficient time, thought, and resources are being devoted to a wide variety of defense tasks, such as interviewing and counseling of clients, securing pretrial release of incarcerated clients, completion of fact investigations prior to formulating recommendations about plea agreements, formal and informal discovery is conducted, and preparation for pretrial hearings, trials, and sentencing proceedings.

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As scholars have written, “A lack of supervision of defenders impairs the quality of representation afforded poor defendants, as does the failure to evaluate counsel to ensure that the lawyer’s training, experience, and ability appropriately match the complexity of the cases assigned.”<sup>2</sup>

Active supervision is a key method to ensure meaningful representation and compliance with national performance standards and ethical rules. The *ABA Ten Principles of a Public Defense Delivery System State* (2002): “Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.”<sup>3</sup>

The *ABA Eight Guidelines of Public Defense Related to Excessive Workloads* (2009) emphasize the need for supervision: “The Public Defense Provider has a supervision program that continuously monitors the workloads of its lawyers to assure that all essential tasks on behalf of clients, such as those specified in Guideline 1, are performed.”<sup>4</sup>

Supervision should be systematic and supported by policies that clearly describe responsibilities of the supervisor and the staff.<sup>5</sup> The supervision must be done for all attorneys and staff representing clients, including contract and assigned counsel delivery models. The supervision must be accompanied by robust training and reporting.

The *ABA Ten Principles of a Public Defense Delivery System* (2002), recognizes regular supervision as one of the “fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.” Principle 10’s Commentary is clear that assigned counsel and contractors doing public defense work must be supervised. “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

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Supervision should also include continuous monitoring of lawyer workloads to assure that all essential tasks of defense representation are being completed. National Association for Public Defense *Foundational Principles* (2017),” found at:

[https://www.publicdefenders.us/files/NAPD%20Foundational%20Principles\\_FINAL\\_March%2016%202017\(1\).pdf](https://www.publicdefenders.us/files/NAPD%20Foundational%20Principles_FINAL_March%2016%202017(1).pdf)

See also discussion of supervision in NAPD Policy Statement on Public Defense Staffing: Staff supporting public defense counsel must be adequate for meaningful representation (2020), found at:

[https://www.publicdefenders.us/files/NAPD\\_Policy%20Statement%20on%20Public%20Defense%20Staffing.pdf](https://www.publicdefenders.us/files/NAPD_Policy%20Statement%20on%20Public%20Defense%20Staffing.pdf)

<sup>2</sup> Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 *Hastings L. J.* 1031, 1090 (2006).

<sup>3</sup> Found at:

[https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_ten\\_principlesbooklet.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ten_principlesbooklet.authcheckdam.pdf)

<sup>4</sup> Available at [https://pdc.idaho.gov/wp-](https://pdc.idaho.gov/wp-content/uploads/sites/11/2016/06/ABAEightGuidelinesofPublicDefenseRelatedtoExcessiveWorkloads.pdf)

[content/uploads/sites/11/2016/06/ABAEightGuidelinesofPublicDefenseRelatedtoExcessiveWorkloads.pdf](https://pdc.idaho.gov/wp-content/uploads/sites/11/2016/06/ABAEightGuidelinesofPublicDefenseRelatedtoExcessiveWorkloads.pdf).

<sup>5</sup> One example of legal services policy is Supervision and Attorney Evaluation Guidelines for Florida Region VI Legal Services Programs, found at: <https://www.lsc.gov/sites/default/files/attach/resources/ManagementSupervision-FloridaLegalAid-SupervisionAttorneyEvaluationGuidelines.pdf>

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staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.”<sup>6</sup>

### **Markers of meaningful representation: national practice standards and ethical norms**

The right to counsel entitles a client to effective assistance of counsel. To have meaningful defense representation, the defense must put the prosecution’s case through the “crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656-57 (1984). There are clear traditional markers of meaningful representation. They include:

- Promptly meeting with and interviewing the client
- Continuously communicating with the client
- Seeking to have the judicial appointment decision made at first appearance prior to the consideration of pretrial release
- Seeking appropriate pretrial release for the client
- Investigating the case before any recommendation on plea
- Procuring expert analysis and integrating experts into the case testimony as necessary<sup>7</sup>
- Obtaining and reviewing discovery
- Conducting appropriate legal research
- Creating the theory of the case
- Filing and arguing motions and conducting evidentiary hearings as appropriate and respond to prosecutor motions<sup>8</sup>
- Communicating with the judge and prosecutor with appropriate negotiation with the prosecutor
- Creating sentencing plans<sup>9</sup>

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<sup>6</sup> Found at:

[https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_ten\\_principlesbooklet.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ten_principlesbooklet.authcheckdam.pdf)

<sup>7</sup> See, e.g., Chapter 11 “Integrating Experts into the Case: A Stepwise Process,” Monahan and Clark, *Tell the Clients Story: Mitigation in Criminal and Death Penalty Cases* (2017).

<sup>8</sup> Criminal defense lawyers are required to litigate through motion practice “whenever there exists a good-faith reason to believe that the applicable law may entitle the defendant to relief which the court has discretion to grant.” NLADA *Performance Guidelines for Criminal Defense Representation*, Guideline 5.1 The Decision to File Pretrial Motions. This includes “the suppression of evidence gathered as the result of violations of the Fourth, Fifth or Sixth Amendments to the United States Constitution, or corresponding or additional state constitutional provisions, ....” Evidentiary hearings on motions to suppress that are based on investigation of the law and facts are a primary tool criminal defense lawyers have to challenge the legitimacy of a client’s charge and its degree. Attorneys who have an aggressive suppression motion practice achieve better outcomes for more clients.

<sup>9</sup> NLADA *Performance Guidelines for Criminal Defense Representation*, Guideline 8.1 Obligations of Counsel in Sentencing, states“(a) Among counsel’s obligations in the sentencing process are: (1) where a defendant chooses not to proceed to trial, to ensure that a plea agreement is negotiated with consideration of the sentencing, correctional, and financial implications; (2) to ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed; (3) to ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court; (4) to develop a plan which seeks to achieve the least restrictive and burdensome sentencing alternative

- Addressing *Padilla v Kentucky*, 559 U.S. 356 (2010)<sup>10</sup> and the impact on immigration status of any admissions and of a conviction
- Addressing other numerous consequences of any admissions and of a conviction including housing, employment, licensing necessary for employment, medical assistance, custody, underlying issues of mental illness or addiction, student loans, expungement, gun ownership
- Addressing the various consequences, including the impact on immigration status, of any admissions and of a conviction
- Trying cases as desired by the clients.<sup>11</sup>

These duties are reflected in national standards of practice and in ethical rules. The *American Bar Association Criminal Justice Standards, Defense Function* (4th ed. 2015), provide best practices for litigators.<sup>12</sup> In determining prevailing professional norms, the United States Supreme Court has relied on *ABA Standards*.<sup>13</sup> An illustration of the *ABA Standards'* duties of counsel:

#### Standard 4-1.3 Continuing Duties of Defense Counsel

Some duties of defense counsel run throughout the period of representation, and even beyond. Defense counsel should consider the impact of these duties at all stages of a criminal representation and on all decisions and actions that arise in the course of performing the defense function. These duties include:

- (a) a duty of confidentiality regarding information relevant to the client's representation which duty continues after the representation ends;
- (b) a duty of loyalty toward the client;
- (c) a duty of candor toward the court and others, tempered by the duties of confidentiality and loyalty;

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that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision; (5) to ensure all information presented to the court which may harm the client and which is not shown to be accurate and truthful or is otherwise improper is stricken from the text of the presentence investigation report before distribution of the report; (6) to consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and warranted."

<sup>10</sup> *Padilla* states, the "negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. *Hill*, 474 U. S., at 57; see also *Richardson*, 397 U. S., at 770–771. The severity of deportation—"the equivalent of banishment or exile," *Delgadillo v. Carmichael*, 332 U. S. 388, 390–391 (1947)—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation."

<sup>11</sup> As has been observed, no "hard and fast number of pretrial motions or trials is expected, but when the number of cases going to trial is both incredibly small (in absolute and comparative terms) and wildly out of line with the number of trials that occurred in nearby (and sometimes overlapping) jurisdictions, it may be, and in this case is, a sign of a deeper systemic problem." United States District Court, Western District of Washington at Seattle. Memorandum of Decision in *Wilbur v. Mount Vernon*, No. C11-1100RSL (December 4, 2013) at p. 7.

<sup>12</sup> Found at: [https://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/)

<sup>13</sup> *E.g. Padillia v. Kentucky*, 559 U.S. 356 (2010) "We long have recognized that '[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable ... .'"

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- (d) a duty to communicate and keep the client informed and advised of significant developments and potential options and outcomes;
- (e) a duty to be well-informed regarding the legal options and developments that can affect a client's interests during a criminal representation;
- (f) a duty to continually evaluate the impact that each decision or action may have at later stages, including trial, sentencing, and post-conviction review;
- (g) a duty to be open to possible negotiated dispositions of the matter, including the possible benefits and disadvantages of cooperating with the prosecution;
- (h) a duty to consider the collateral consequences of decisions and actions, including but not limited to the collateral consequences of conviction.

The NLADA *Performance Guidelines for Criminal Defense Representation* (1994) "provide guidance to criminal defense attorneys (by identifying potential options, actions, and relevant considerations) for the purpose of ensuring that all defendants receive the zealous and quality representation that should be their right."<sup>14</sup> One example, outlining the critical duty to investigate, indicates how these *Guidelines* inform practice:

#### Guideline 4.1 Investigation

(a) Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt.

The investigation should be conducted as promptly as possible.

(b) Sources of investigative information may include the following:

##### (1) *charging documents*

Copies of all charging documents in the case should be obtained and examined to determine the specific charges that have been brought against the accused. The relevant statutes and precedents should be examined to identify:

(A) the elements of the offense(s) with which the accused is charged;

(B) the defenses, ordinary and affirmative, that may be available;

(C) any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy.

##### (2) *the accused*

If not previously conducted, an in-depth interview of the client should be conducted as soon as possible and appropriate after appointment or retention of counsel. The interview with the client should be used to:

(A) seek information concerning the incident or events giving rise to the charge(s) or improper police investigative practices or prosecutorial conduct which affects the client's rights;

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<sup>14</sup> NLADA *Performance Guidelines for Criminal Defense Representation* (1994), Introduction, p. xi, found at: <http://www.nlada.org/defender-standards/performance-guidelines> For death penalty cases, see ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003), found at: [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/resources/aba\\_guidelines/2003-guidelines/](https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/2003-guidelines/) and *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (2008), found at: <https://www.in.gov/ipdc/files/2008%20Supplemental%20Guidelines.pdf>

(B) explore the existence of other potential sources of information relating to the offense;  
(C) collect information relevant to sentencing.<sup>15</sup>

(3) *potential witnesses*

Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the accused. If the attorney conducts such interviews of potential witnesses, he or she should attempt to do so in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator conduct such interviews.<sup>16</sup>

(4) *the police and prosecution*

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.<sup>17</sup>

(5) *physical evidence*

Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing.<sup>18</sup>

(6) *the scene*

Where appropriate, counsel should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).

(7) *expert assistance*

Counsel should secure the assistance of experts where it is necessary or appropriate to:

- (A) the preparation of the defense;
- (B) adequate understanding of the prosecution's case;
- (C) rebut the prosecution's case.

Just as national standards of practice require particular conduct, national ethical rules require particular conduct of every attorney. The *American Bar Association Model Rules of Professional Conduct* describe mandatory ethical responsibilities of a lawyer.<sup>19</sup> These responsibilities are substantial.

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<sup>15</sup> Additionally, ascertain immigration status to explore potential collateral consequences.

<sup>16</sup> Ideally a defense attorney should always have an investigator available to interview witnesses at any stage of the case. That should be the standard when possible. It can be a big mistake for defense attorneys to make themselves witnesses to anything in a case.

<sup>17</sup> There should be ongoing discovery and discovery requested and received should be documented in the record.

<sup>18</sup> Preservation of evidence should be requested.

<sup>19</sup> ABA *Model Rules of Professional Conduct*, found at:

[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/)

Competent,<sup>20</sup> diligent<sup>21</sup> representation of a client requires timely communication,<sup>22</sup> ensuring confidentiality,<sup>23</sup> maintenance of the knowledge and skills necessary for the competent representation of each client, avoidance of conflicts of interests,<sup>24</sup> and control of workload to be able to perform these professional responsibilities for every client.<sup>25</sup> The lawyer must exercise independent professional judgment and provide candid advice.<sup>26</sup> A lawyer must advance the client's objectives and the lawyer must consult with the client as to the means of implementation.<sup>27</sup>

Ethical rules include the obligation to stay current on the law. “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”<sup>28</sup>

These are some of the ethical responsibilities. We highlight several others.

Increasingly, representation of clients is being delivered by a defense *team* that includes the attorney, investigator, a social worker, and when appropriate, a mental health professional. This team approach is proving to assist clients better across the range of issues in the case and the subsequent consequences of a conviction. While this team method of representation provides substantial benefits, it has aspects that the defense team and its supervisor must ensure occur ethically and effectively. There must be a lead attorney on each defense team who has ultimate responsibility for the case. There must be a policy and practice concerning assistants. A “lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.”<sup>29</sup> It is especially important to address reporting by other

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<sup>20</sup> ABA Model Rules of Professional Conduct, Rule 1.1 Competence “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

<sup>21</sup> ABA Model Rules of Professional Conduct, Rule 1.3 Diligence

<sup>22</sup> ABA Model Rules of Professional Conduct, Rule 1.4 Communication

<sup>23</sup> ABA Model Rules of Professional Conduct, Rule 1.6: Confidentiality of Information

<sup>24</sup> ABA Model Rules of Professional Conduct, Rule 1.7, Conflict of Interest: Current Clients; see also, NAPD Formal Ethics Opinion 19-1 Re: Ethics of Conflicts Imputation Between and Within Public Defender Offices, found at: [https://www.publicdefenders.us/files/NAPD%20Ethics%20Opinion\\_19-1\\_FINAL.pdf](https://www.publicdefenders.us/files/NAPD%20Ethics%20Opinion_19-1_FINAL.pdf)

<sup>25</sup> ABA Model Rules of Professional Cond, Rule 1.16, Declining or Terminating Representation

<sup>26</sup> ABA Model Rules of Professional Conduct, Rule 2.1: Advisor

<sup>27</sup> ABA Model Rules of Professional Conduct, Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer

<sup>28</sup> ABA Model Rules of Professional Conduct, Rule 1.1, Competence, Commentary.

<sup>29</sup> See ABA Model Rules of Professional Responsibility, Rule 5.3 Responsibilities Regarding Nonlawyer Assistants; NAPD Formal Ethics Opinion 14-1, *Social workers and other healthcare professionals may not report child or elder abuse without the express contemporaneous permission of the lawyer for whom they are doing their work*; found at: [https://www.publicdefenders.us/files/NAPD\\_Formal\\_Ethics\\_Opinion\\_14-1.pdf](https://www.publicdefenders.us/files/NAPD_Formal_Ethics_Opinion_14-1.pdf)



professionals, such as social workers, who are working at the direction of an attorney but whose license may require reporting inconsistent with confidentiality.<sup>30</sup>

When a staff member is on leave or resigns resulting in temporary or permanent termination of representation, it is the responsibility of the Public Defense program and its managers to ensure that clients continue to receive high quality representation. This requires actions by the staff member and the supervisor to protect the client. “Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.”<sup>31</sup> The supervisor ensures compliance for the sake of the client.<sup>32</sup>

### **Active supervision as an ethical imperative**

The *ABA Model Rules* specifically provide that a “lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.”<sup>33</sup> This ethical responsibility includes the chief defender and intermediate managers.<sup>34</sup> “A partner in a law firm, and a lawyer who individually, or together with other lawyers, possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”<sup>35</sup>

Chief defenders and intermediate managers are responsible for one of their lawyers’ violations of the *Model Rules of Professional Conduct* if: “(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”<sup>36</sup>

The Comment to Rule 5.1 indicates that policies are required to meet this supervision responsibility. Lawyers “with managerial authority within a firm [must] make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all

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<sup>30</sup> *Id.*

<sup>31</sup> ABA Model Rules of Professional Conduct, Rule 1.16(d): Declining or Terminating Representation

<sup>32</sup> This is one reason why supervisors ensure in their performance reviews that files are complete, organized and legible.

<sup>33</sup> ABA Model Rules of Professional Conduct, Rule 5.1(b): Responsibilities of a Partner or Supervisory Lawyer

<sup>34</sup> See Norman Lefstein, ABA SCLAID *Securing Reasonable Caseloads: Ethics and Law in Public Defense* (2011), Chapter 3A. Supervision and mentoring, pp.56-60.

<sup>35</sup> ABA Model Rules of Professional Conduct, Rule 5.1(a): Responsibilities of a Partner or Supervisory Lawyer

<sup>36</sup> ABA Model Rules of Professional Conduct, Rule 5.1(c): Responsibilities of a Partner or Supervisory Lawyer

lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.” The larger the organization the more elaborate the need for policies.

Supervision policies must be client-centered. The organization’s framework must include vision, mission, and values statements.<sup>37</sup> These provide direction for everything that happens in an office. They keep everyone focused on where the office is going and what it is trying to achieve. They define the core ethics of the office and how people are expected to behave. They guide decisions and behaviors to achieve common client-centered ends. The core elements of mission, vision and values are key to the ability to communicate clearly and consistently with clients and staff.<sup>38</sup>

Ethical training is offered as one part of meeting this responsibility as the chief defender “may not assume that all lawyers associated with the firm will inevitably conform to the Rules.”<sup>39</sup> This requirement was an integral part of the reasoning of ABA Ethics Committee *Formal Opinion 06-441*. Supervisors “must, working closely with the lawyers they supervise, monitor the workload of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently handled by the individual lawyers.”<sup>40</sup>

Public Defense programs should have policies on supervision. “A firm's Prevention/Supervisory Program would also operate to inform supervising attorneys of their specific obligations and areas of responsibility to identified subordinate attorneys. Concrete firm policies and procedures will replace vague notions of supervisory duties. Actual methods and procedures for

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<sup>37</sup> “Without the individual foundations of strong values illustrated by a vision to be undertaken by a mission, an organization cannot become an overly successful organization. Without developing a mission, vision, and values to assist in developing a strategy, an organization cannot identify, distinguish or explain itself to its employees and customers alike.” James Tallant, 2009, *Importance of Vision, Mission, and Values in Strategic Direction*, Munich, GRIN Verlag, <https://www.grin.com/document/167258>

<sup>38</sup> “The more clearly you can articulate your high-level goals from the start, the less time and resources you will spend on trying to fix poor communication, alignment, employee engagement and unwanted cultural behaviors later. Your strategic goals and tactical plans will be more aligned, streamlined and easier to communicate to your stakeholders.” CellaConsulting, *Three Things You Can’t Do Without Mission, Vision and Values Statements*, <https://www.cellaconsulting.com/blog/three-things-you-cant-do-without-mission-vision-and-values-statements/>, February 19, 2013

<sup>39</sup> ABA Model Rules of Professional Conduct, Comment to Rule 5.1

<sup>40</sup> ABA Ethics Committee 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), found at: <https://pdc.idaho.gov/wp-content/uploads/sites/11/2016/06/ABAFORMALOPINION06-441.pdf> Supervisors “must, working with the lawyers they supervise, monitor the workload of the subordinate lawyers to ensure that the workloads are not allowed to exceed that which may be handled by the individual lawyers. If a supervisor knows that a subordinate’s workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, the supervisor is responsible for the subordinate’s violation of the Rules of Professional Conduct.”

implementation by individual supervising attorneys will result. Thus, individual supervising attorneys will know what is expected of them and how to fulfill the firm's expectations for the supervision of their subordinate attorneys."<sup>41</sup>

At the same time, each lawyer has ethical responsibilities independent of supervision.<sup>42</sup> An attorney lawyer is "bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person."<sup>43</sup> However, a subordinate attorney "does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."<sup>44</sup>

Some attorneys object to the supervisory process as improper interference with their professional independence required by Rules 2.1 *Advisor* and 5.4(3)(c) *Professional Independence of a Lawyer* of the ABA Rules of Professional Conduct and *Polk Co. v. Dodson*, 454 U.S. 312 (1981). Contrary to this concern, the Rules encourage review by other professionals and require supervisors to ensure the ethical performance of their attorney employees and staff.<sup>45</sup>

Due to overwork, public defense managers are sometimes lulled into thinking that these supervision responsibilities are discretionary or not required because as managers they do not have time to do all of their client representation which is a first duty. However, the "...Rules provide no exception for lawyers who represent indigent persons charged with crimes."<sup>46</sup> In fact, large workloads of staff attorneys require more, not less, supervision, monitoring, and support. Supervisors cannot assign more work to an attorney than the attorney can competently handle.<sup>47</sup> The failure to provide competent representation because of being assigned too much work is not a defense to an ethical violation.<sup>48</sup>

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<sup>41</sup> Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties* 70 Notre Dame L. Rev. 259, 322 (1994), found at: <https://scholarship.law.nd.edu/ndlr/vol70/iss2/2>

<sup>42</sup> ABA Model Rules of Professional Conduct, Rule 5.2: Responsibilities of a Subordinate Lawyer

<sup>43</sup> ABA Model Rules of Professional Conduct, Rule 5.2(a): Responsibilities of a Subordinate Lawyer

<sup>44</sup> ABA Model Rules of Professional Conduct, Rule 5.2(b): Responsibilities of a Subordinate Lawyer

<sup>45</sup> ABA Model Rules of Professional Conduct, Rule 5.1(b): Responsibilities of a Partner or Supervisory Lawyer A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

<sup>46</sup> ABA Ethics Committee 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).

<sup>47</sup> ABA Ethics Committee 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), found at: <https://pdc.idaho.gov/wp-content/uploads/sites/11/2016/06/ABAFORMALOPINION06-441.pdf>

<sup>48</sup> "Failure to perform such basic duties as researching the law, investigation, advising the client on available defenses, or other preparation, may constitute a constitutional violation, *State v. Felton*, 329 N.W.2d 161 (Wis. 1983), or warrant disciplinary sanctions, *Office of Disciplinary Counsel v. Henry*, 664 S. W. 2d 62 (Tenn. 1983). In the *Henry* case, the attorney had accepted employment to represent a client who was under indictment for first degree murder. The attorney had never handled a murder case before, or, for that matter, any felony. He did not associate any attorney with him in the defense, nor did he even consult with another attorney. The court, in affirming the attorney's two year suspension for this and other problems, noted that the lawyer 'made little, or no,

Ethical rules have been enforced against supervising lawyers who have failed to ensure compliance of staff with ethical rules.<sup>49</sup> Some examples of discipline from public reprimand and suspension to disbarment are discussed.

- Delegating work to an attorney does not relieve the supervisor of professional responsibility and resulted in disbarment.<sup>50</sup>
- A *sink or swim* approach is not an acceptable strategy. Failure to actively supervise an attorney whose behavior violates the rules subjects a supervisor to discipline.<sup>51</sup>
- There must be a systematic method of review, support and guidance.<sup>52</sup>

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investigation of the crime, nor did he talk with possible witnesses or to alibi witnesses, nor make any concerted effort to try to discover the case the State had against his client.' *Henry*, 664 S.W.2d 62, 62-63." Robert Boruchowitz, "Ethical Practice With Limited Resources," Washington Defender Association Seminar (December 17, 2004). See also, "Former public defender disbarred, accused of enriching self at poor clients' expense," Ken Armstrong, *Seattle Times* (May 8, 2004) Lawyer with excessive workload who solicited money from his indigent clients was disbarred; "Missouri Public Defender Disciplined for Neglecting Clients," Associated Press (SEP 12, 2017). Lawyer placed on probation for a year after failing to adequately communicate with six clients amidst excessive workload, see: <https://www.kbia.org/post/missouri-public-defender-disciplined-neglecting-clients#stream/0>; *In re: Karl William Hinkebein*, Missouri Supreme Court docket, found at: <https://www.courts.mo.gov/page.jsp?id=115187>

<sup>49</sup> For a fuller discussion of the ethical responsibilities of the supervisor and the subordinate attorney, see Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties* 70 Notre Dame L. Rev. 259 (1994), found at: <https://scholarship.law.nd.edu/ndlr/vol70/iss2/2>; and Chapter 23 Ed Monahan and James Clark, "Coping with Excessive Workload," *Ethical Problems Facing the Criminal Defense Lawyer: Practical Answers to Tough Questions* (Rodney J. Uphoff Editor 1995) "Forced ineffectiveness due to too much work is the most pernicious reality facing defenders today. Incompetent work that does not meet quality standards, even on behalf of the guilty, undermines the integrity of our criminal justice process and the reliability of its results, which necessarily depend on effective performance by prosecutor, judge, and defender."

<sup>50</sup> *In Re Weston*, 442 N.E.2d 236 (Ill. 1982) an estate matter was mishandled for three and a half years. The supervising attorney assigned the case to an associate in his office who became mentally ill and was arrested. The supervising attorney's "defense that he did not know of the problems [caused by his associate] until it was too late simply is not supportable. This court has held that '[a]n attorney cannot avoid his professional obligations to a client by the simple device of delegating work to others.' (*In re Ashbach* (1958), 13 Ill. 2d 411, 415.)." The supervising attorney was disbarred.

<sup>51</sup> *In KBA v. Devers*, 936 S.W.2d 89, 91 (Ky 1997) the Court held that "...a lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct," and suspended a supervising attorney for 3 years for, among other violations, failing to meet this ethical supervision duty.

<sup>52</sup> *In Matter of Yacavino*, 494 A.2d 801 (N.J. 1985) an attorney employed by a law firm in a satellite office was suspended for 3 years because he failed to properly handle an uncomplicated adoption and created two false orders. Significantly, the Court in *Matter of Yacavino* went out of its way to discuss the "disturbing" aspect of the lack of supervision of the attorney by senior attorneys in the firm. According to the disciplined attorney, he was "left virtually alone and unsupervised." The firm's partners rarely came to the satellite office, and nobody asked for status reports from him. The New Jersey Supreme Court said it would no longer tolerate this "sink or swim" attitude, citing the duties of supervisors under ethics Rule 5.1. The Court said supervising attorneys are expected to provide "collegial support and guidance." The Court also called for "a systematic organized routine for periodic review of a newly admitted attorney's files" citing *In re Barry*, 447 A.2d 923 (J.J. 1982) (Clifford, J. dissenting).

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**NAPD Policy on active supervision of the representation of clients:** All public defense systems - full-time, assigned counsel, contract - must actively supervise performance to ensure clients are properly represented (2020)

- A supervisor *merely being available* is not enough. *Actively* providing assistance to staff is necessary for a supervisor.<sup>53</sup>
- Assigning unmanageable cases to an attorney may result in sanctions.<sup>54</sup>
- An organization and its supervisors must have systematic control mechanisms, “such as tickler systems, cover letters for transmitting copies of pleadings to clients, periodic review of files, or diary systems, in order to monitor and direct control over their files.”<sup>55</sup>
- Managing a law office in a way that results in lawyers appearing in court unprepared is unethical.<sup>56</sup>
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## Training as vital for quality representation

A vital part of a public defense system’s duties is to provide robust training. As we stated in our *NAPD Foundational Principles*, “Principle 6: Training and Continuing Education are Essential for Providing Competent and Effective Defense Representation. To be competent and effective, lawyers and other public defense professionals must be well trained and providers must make available quality training and education as required. Regardless of their size, structure, or delivery system, the training and education provided by providers should extend to all lawyers, as well as investigators, mitigation specialists, social workers, administrators, and all others who support the defense function. Training and education should be provided on a regular basis at

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<sup>53</sup> *In re Ritger*, 556 A.2d 1201, 1203 (N.J. 1989). The “trial lawyer of thirty-eight years experience, was coping with a heavy, active trial calendar during much of the time that the events involved in these proceedings were pressing in on him.” He was suspended for six months for misrepresenting the status of the case, not keeping his client informed, and engaging in a pattern of neglect. The Court made particular note of the firm’s responsibility, “when lawyers take on the significant burdens of overseeing the work of other lawyers, more is required than that the supervisor simply be ‘available.’”

<sup>54</sup> *In Davis v. Alabama State Bar*, 676 So.2d 306, 307-308 (Alabama 1996) two partners imposed unmanageable caseloads on associate attorneys, many of whom were inexperienced... “[T]he evidence presented amply showed that the two attorneys, in an effort to turn over a huge number of cases, neglected their clients and imposed policies on associate attorneys that prevented the attorneys from providing quality and competent legal services.” Both lawyers were suspended from the practice of law for 60 days.

<sup>55</sup> *In KBA v. Weinberg*, 198 S.W.3d 595, 596 (KY 2006) attorneys were publicly reprimanded for failing to supervise or otherwise direct or monitor the progress of a case dismissed based on a statute of limitations violation. The attorneys “did not maintain institutional controls, such as tickler systems, cover letters for transmitting copies of pleadings to clients, periodic review of files, or diary systems, in order to monitor and direct control over their files.”

<sup>56</sup> *Attorney Grievance Comm'n of Md. v. Ficker*, 706 A.2d 1045, 1052 (Md. 1998) “What is apparent, not just from the facts of these particular incidents but also from the testimony by Ficker and his associates of how he conducted his practice generally, is that he was running a high-volume operation without adequate managerial safeguards and that, as a result, clients were not afforded competent representation.... There is no specific rule requiring lawyers to keep a tickler or calendar system. Such a system, however, is necessary to assure compliance with other rules, especially Rules 1.1 and 1.3. When a lawyer has responsibilities under Rule 5.1 for other lawyers, such a system becomes even more important. Proper law office management is more than just a matter of good business. It has a clear and important bearing on professional responsibility as well.”

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no cost to attendees and all providers should have a dedicated budget allocated for ongoing training and education.”

Principle 9 of the ABA *Ten Principles of a Public Defense Delivery System* (2002) reflects this same education responsibility, “Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.”<sup>57</sup>

Professional criminal law training, especially for newly employed attorneys, must be comprehensive and ongoing to ensure meaningful, ethical representation. There must be a structured, sustained education program led by a trainer whose primary responsibility is the education of all attorneys and all staff. The comprehensive training for newly hired staff and ongoing criminal law education particular to responsibilities of all staff are essential according to national public defense training standards.<sup>58</sup> Satisfactory completion of required training should be verified and recorded.

Research has shown that a common sense approach to increasing the transfer of learning includes supervisor support before a program, supervisor support after the program, post-program self-management with goals, and a satisfactory organizational climate.<sup>59</sup> In light of this research, supervisors have an important opportunity to advance the transfer of learning from a training program to the workplace by taking some common sense steps with staff attending training. Before an employee attends training, a supervisor should have a simple conversation with the employee about a self-assessment of needs, the opportunity the training offers for development and greater client assistance, any concerns the employee has about the training, and encourage the employee’s efforts in attending. After an employee completes training, a supervisor should discuss the educational experience with the employee, invite the employee to verbalize what was learned, ask the employee what support is needed to implement the learning, and mutually set new goals with the employee in light of the additional knowledge and skills.

Comprehensive training should include special attention to developing and maintaining client relationships, pretrial release advocacy, conflict management and resolution, and conducting effective motion practice and evidentiary hearings. A litigation practice guideline manual should be developed to ensure staff understands practice options and expectations. Formal case reviews and mock practice should be a standard exercise to ensure the attorneys and

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<sup>57</sup> See Norman Lefstein, ABA SCLAID *Securing Reasonable Caseloads: Ethics and Law in Public Defense* (2011), pp. 85-86.

<sup>58</sup> NLADA Defender Training and Development Standards (1997), found at: <http://www.nlada.org/defender-standards/training/black-letter>

<sup>59</sup> See, e.g., Hilbert, Preskill, Russ-Eft, *Evaluating Training*, Chapter 5, “What Works: Assessment, Development, and Measurement” (1997).

supporting staff have the guidance necessary to deal with litigation challenges and complexities.

“Despite the wide recognition of the common sense of providing adequate and ongoing training for defenders, jurisdictions all across the country fail to do so. This lack of training is often manifested by inadequate performance.”<sup>60</sup> Comprehensive training is not an aspirational responsibility. Robust training is required of assigned counsel in Massachusetts.<sup>61</sup> Other public defense programs have such training programs and practices, including D.C.,<sup>62</sup> Colorado,<sup>63</sup>

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<sup>60</sup> Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 *Hastings L. J.* 1031, 1093 (2006).

<sup>61</sup> See Chapter 3 “Certification” in the CPCS Assigned Counsel Manual at <https://www.publiccounsel.net/wp-content/uploads/Assigned-Counsel-Manual.pdf>

<sup>62</sup> Washington D.C.’s Public defender Services (PDS) engages in a multitude of training activities for its staff and for those who work on the cases assigned to panel attorneys. PDS is probably best known for the training it provides to new PDS trial attorneys as a group. The extensive ten-to-twelve-week program includes lectures on substantive and procedural law in criminal and juvenile delinquency cases, practical trial skills exercises, mock hearings, and a full mock trial before judges from the court in which the attorneys will practice. Attorneys in PDS’s other legal divisions also go through the training program in addition to receiving training specific to the division’s practice—*e.g.*, appeals, mental health, parole. PDS investigative specialists and PDS investigative interns (college students), like trial attorneys, train as a group in their first weeks at PDS. The investigative specialists and interns receive training on professional investigative techniques such as conducting field interviews, interviewing witnesses; taking written statements; collecting and assessing digital evidence, serving subpoenas, and preparing exhibits for trials and other hearings. The training includes mock exercises. The investigative specialists also conducts initial and ongoing training to court-certified investigative specialists on the court’s panel who provide investigation services to attorneys. PDS’s forensic social workers receive three weeks of initial training in producing mitigation reports and working with clients. Training outside of PDS is targeted primarily for members of the local court’s panels of attorneys and certified investigators. Small groups of attorneys new to the court’s trial panel can take a two-week, full-time trial skills training program modeled after the skills-based portion of the trial training program for PDS attorneys. It includes mock exercises and critique. PDS has also developed a one-week trial skills training program for more senior panel attorneys who want to be appointed to more serious cases. Both PDS and panel attorneys participate in PDS’s annual Forensic Science Conference, during which a combination of PDS staff and outside experts offer substantive and skills training on complicated forensic topics such as DNA science, blood spatter, and fingerprints. PDS coordinates a “Winter Series,” a “Summer Series,” and a “Fall Series”—continuing legal education training sessions for panel attorneys scheduled for one or two evenings per week over several weeks. The program covers a variety of criminal trial practice topics. PDS’s newest training opportunity is a first-ever program for attorneys on the local appellate attorneys panel. The initial training covers the basics of appellate issue identification, oral advocacy, and brief writing. The second phase of the training uses one-on-one and group sessions, mimicking the collaborative brief editing and moot court practices that are part of PDS’s appellate attorneys’ training and practice. PDS also offers other specialty training to panel attorneys: special education advocacy training for attorneys practicing in juvenile court and mental health law and procedure training for panel attorneys representing clients in civil commitment cases.

<sup>63</sup> To manage training for its approximately 1,000 employees, the Office of the Colorado State Public Defender (OSPD) has two full time legal training directors, a full time adjunct legal trainer (a rotating two year position), a full time Director of Criminal Investigation, a full time Director of Sexual Litigation, and an Executive Assistant to the Public Defender who, among other duties, oversees and coordinates core staff training. The Public Defender and Chief Deputies lead annual training in management, leadership, and wellness. The legal training program combines lecture and performance components to develop client-centered advocacy skills. Newly hired attorneys follow a proscribed set of mandatory trainings led by the state training unit beginning at the time of their initial placement:

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Wisconsin,<sup>64</sup> Kentucky,<sup>65</sup> Washington State Office of Public Defense, Washington Defender Association, New York State, and many others. The National Association for Public Defense offers webinars and online training for litigators and leaders.

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prior to beginning in their office, lawyers who did not intern with the OSPD attend Colorado Public Defending: County Court, a two and a half day orientation to the Colorado legal system including lecture, performance on a hypothetical misdemeanor case, and supervised in-court observation/appearance; all new lawyers, including those who participated in Colorado Public Defender: County Court, attend six sessions of Basic Lawyer Training. Basic Lawyer training consists of six full day sessions spread over six to eight months, the last four sessions are small group, half-day practice of learned skills on current misdemeanor cases and half-day lecture on new skills. The sixth session on representing clients charged with misdemeanor sexual offenses is taught by the State Director of Sexual Litigation. The Director of Sexual Litigation also offers training throughout the year on topics relating to sex crimes litigation, including a new Sex Bootcamp. Lawyers transitioning from misdemeanor to felony work are required to satisfactorily complete Bootcamp, a week long bring your own felony case combined educational and evaluative training. Bootcamp, taught by experienced felony public defenders from across the state, simulates trial and provides the lawyers immediate critique and feedback on their trial skills. Lawyers who have successfully completed Bootcamp attend Introduction to District Court, which is a one-and-a-half day lecture training, to orient them to felony practice, including specialized training on sex offense sentencing. OSPD treats the representation of children as a specialized area of practice. Core Juvenile Skills is a two-day training that is mandatory for all lawyers who represent children in any capacity. The program is designed to give lawyers the foundation they need to successfully and effectively represent children accused of crimes. Every other year the training unit offers a more advanced training on litigating direct file and transfer cases. OSPD provides training for Core Staff through initial training in their individual offices and a full day Core Skills training within the first six months to year of their employment. Additional trainings throughout the year introduce core staff to complex issues in the criminal justice system, and hone skill sets. Investigators receive mandatory introductory training through Core Investigator Skills (CIS). This 3-day training program occurs within 45 days of 5-6 new hires entering the system. In addition to the mandatory basic skills training, the various units of OSPD training also provide on-going elective trainings for all staff including advanced juvenile practice, complex litigation, forensic science, and mental health litigation. One of the Chief Deputies leads a wellness committee that offers trainings throughout the year on wellness including topics like self-care, secondary trauma, meditation, work efficiency, and financial health. The State office hosts two leadership conferences a year to provide supervisors additional support and tools to perform their job. OSPD hosts an annual multi-track, multi-disciplinary conference for all employees and private practitioners. All sessions are open to all employees regardless of their scope of work. Finally, each of the regional offices offers their own in-house trainings to further educate their staff.

<sup>64</sup> The Wisconsin State Public Defender's Office (SPD) offers a variety of live training programs and on-demand training courses through its Training Division. Annual programs include a two-day multi-track conference for all staff and private bar, a three-day defense team basics for newly hired lawyers, investigators, social workers and paralegals, a five-day trial skills school, a five-day investigation institute where lawyers and investigators work as a team, and training programs specific to the work of social workers and core staff. The Training Materials page at the SPD's website (<https://www.wisspd.org/index.php/for-the-legal-practitioner/training/training-materials>) contains a variety of material, such as outlines, articles, sample motions, forms and checklists. The SPD's on-demand training site (<http://training.wisspd.org/>) includes videos of previously-recorded training programs as well as courses specifically created as on-line training. The SPD also provides certification training to private bar lawyers who wish to take SPD cases. Finally, the SPD has specialty practice coordinators whose role includes providing training and support to staff and private bar lawyers in specialty areas such as termination of parental rights and immigration.

<sup>65</sup> Training provided in Kentucky includes the Kentucky Public Defender College, Annual Conference, Online Educational Materials, and extensive trainings for new attorneys, investigators, alternative sentencing workers, mitigation specialists, administrative assistants, and all other members of the DPA defense team. As they assume

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Many additional training topics are necessary, too, *e.g.*, drug defenses; immigration status; sex offender registry issues; domestic, elder and sex abuse defenses; and death penalty education for attorneys, investigators, and mitigation specialists. In addition to litigation training, there should be leadership and management education that includes such topics as performance planning; coaching and review; communication; staff meetings; using workload reports to manage staff; and, working with investigators, paralegals, social workers, administrative staff. There should also be education on wellbeing, cultural diversity and inclusion, and litigating racial discrimination. Some examples of the training topics that should be required include:

Felony and Misdemeanor representation

Role of Public Defender

Agency Core Values

Overview of jurisdiction, types of cases, and basic criminal procedure

Individual Pre-Interview Research and Analysis

Initial Client Interviews

Preliminary Hearing Practice

Negotiation

Immigration consequences

Client Decision Interviews

Ethical responsibilities

Trial Law

Preserving the Record

Analyzing Cases and Evidence Law

Discovery

Client Relationships

Post-trial

Mental Health Defenses

Seeking funds for expert assistance

Use of Experts

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responsibility for case representation, Department of Public Advocacy (DPA) attorneys are regularly provided training throughout their first year of employment through a New Attorney Training Track. This consists of district court training, circuit court training, juvenile training, and a week-long immersive practice training where each student is taught each litigation skill of a district court trial. Advanced training continues for all attorneys with the agency after the first year. This includes in-depth trainings on various topics and a yearly Annual Conference. Training opportunities are also available for investigators, mitigation specialists, alternative sentencing workers and administrative professionals in the agency. The Investigator Track offered each year is an intensive week-long experience that offers a hands-on experience for criminal investigators. The Kentucky DPA Education Branch also offers online education to public defenders through the online database called The Trumpet. The Education Branch maintains and updates litigation manuals regularly to ensure that all public defenders in Kentucky are provided with consistent and reliable law updates, and suggestions on how to approach changes in the law to best protect clients. The Kentucky Public Defender College Course Catalog is found at: [https://dpa.ky.gov/who\\_we\\_are/Education/Documents/KPDC\\_Catalogue\\_FINAL\\_nodate.pdf](https://dpa.ky.gov/who_we_are/Education/Documents/KPDC_Catalogue_FINAL_nodate.pdf) An important resource for comprehensive continuing education materials is the National Association for Public Defense, which regularly provides webinars on many public defense issues.

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Working with Investigators  
Litigating Sentencing  
Search, Seizure, and Suppression  
Sentencing Law and Advocacy  
Litigating Probation and Parole Revocations

Juvenile representation<sup>66</sup>

Evolution in the Understanding of a Child's Rights  
Impact of Trauma on Children  
Impact of Detention, Seclusion, Encounter with Law Enforcement on Children  
Critical Role of Lawyer to Advocate Skillfully for Child Client  
Impact of Adolescent Brain and psycho-social development  
Communication  
Understanding Client within Context of Family  
Structure of the Juvenile Code  
Differentiating Basic Procedures with Public Offense, Status Offense and Youthful Offense Charges  
Decision-making when Representing a child  
Client's Safety an Ethical Issue  
Challenge to Implicit, Institutional and Explicit Bias  
Understanding Adolescent Development  
Ethical Duties in Communication with our Clients and our Client's Families, Other Witnesses  
Ethical Duties of Defense Team, Team's Obligations to Clients  
National Standards of Juvenile Practice  
Strength-Based Interviewing  
Motion Practice  
Competency, Capacity, Insanity defenses  
Suppression and Confession Issues  
Sex Offense Defenses  
Contempt and Revocations of Probation and Supervised Placement  
Law and Practice of Transfer Cases  
Filing Writs and Appeals

Litigation practice

Client Interviewing and Relationships  
Brainstorming  
Theory of the Case  
Voir Dire  
Opening Statements  
Cross-examination

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<sup>66</sup> See the *National Juvenile Defender Standards* (2012), found at: <https://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>

Impeachment  
Direct Examination  
Introduction of Exhibits  
Closing Argument

Appellate,<sup>67</sup> post-conviction, and death penalty<sup>68</sup> litigation require specialized training.

All training should include the opportunity for new attorneys to be, initially, fully supervised for court proceedings, client meetings and to second chair trials.

### **Data collection and review as essential for systematic client-centered representation**

The collection of public defense case data should include relevant performance metrics. For instance, the data collected should include the traditional information of the client identifying information, name, race, gender, immigration status, the charges, arresting agency and officer, staff representing the client, date of arrest, date of appointment of counsel, court, judge, court

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<sup>67</sup> See, e.g., *NLADA Standards and Evaluation Design for Appellate Defender Offices* (1980), 1 K. Training, "1. Training for attorneys.

- a. Each appellate defender office shall have an established training program for entry level attorneys which should be commenced prior to the attorney actually providing representation in any case. "On the job" training, based upon what the attorney will learn from individual cases is not adequate. Such training shall involve both appellate defender staff, court personnel, and others.
- b. The appellate defender shall have ongoing continuing legal education programs for attorneys, and specially designed ongoing training for all members of the staff, including support staff and the most senior attorney.
- c. The appellate defender shall make use of national programs which are of particular relevance to appellate defenders, and shall work with funding sources to ensure funding for both in-state and out-of-state continuing legal education programs.

<sup>68</sup> *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003), Guideline 8.1 Training: "A. The Legal Representation Plan should provide funds for the effective training, professional development, and continuing education of all members of the defense team. B. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the Responsible Agency, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas: 1. relevant state, federal, and international law; 2. pleading and motion practice; pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty; 4. jury selection; 5. trial preparation and presentation, including the use of experts; 6. ethical considerations particular to capital defense representation; 7. preservation of the record and of issues for postconviction review; 8. counsel's relationship with the client and his family; 9. post-conviction litigation in state and federal courts; 10. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science; 11. the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18. C. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the Responsible Agency that focuses on the defense of death penalty cases. D. The Legal Representation Plan should insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise."

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case number, disposition, status of case, client's social security number, date of birth or other identifier, and whether case was conflicted to other counsel.

The collection of other data will allow supervisors to review the work of those who provide and support the representation of clients.<sup>69</sup> All those providing the defense should record the date of the first client visit and its location, subsequent client visits and their locations,<sup>70</sup> the length of time the client remained in jail pretrial, requests for bail reduction and pretrial release, and requests for investigation and mitigation assistance should also be recorded. The data should also include motions filed, including discovery, suppression, and requests for evidentiary hearings. The data should indicate sentencing plans offered, trials conducted, appeals or writs filed.

Reports of information on the work of the staff that a supervisor is responsible for should be generated and reviewed regularly by the supervisor and staff as information to use in supervision and evaluation. The reports should include such information as number and type of cases assigned to staff, the number and type of cases open, the number and type of cases closed within the report period and also the yearly reporting timeframes, the number carried over from the previous yearly reporting period, number of motions filed, hearings conducted, trials, disposition, average length of time cases are open, cases pled at arraignment, clients released pretrial, and sentencing plans filed.<sup>71</sup>

### **Client-centered theory of supervision and supervisor tasks to implement the guidelines of practice**

Successful litigators provide representation with a compelling theory of the case that is implemented at a high level. Correspondingly, successful supervisors provide supervision with a compelling theory of supervision. Client-centered supervision focuses on helping the lawyer and defense team succeed with the representation of the client. Active management to help defenders help clients receive quality representation includes these tasks:

- Setting expectations;

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<sup>69</sup> To be clear, oversight of assigned counsel requires the same kind of data collection as done in a system where services are delivered by full-time staff. For instance, the Committee for Public Counsel Services (CPCS) reviews caseload and case event data elicited from billing data, as well as client complaint data, performance assessments by supervisors and self-reported data from attorneys seeking certification or recertification. Collection and use of data to provide oversight in programs that are not full-time systems should be the norm.

<sup>70</sup> Tracking and reviewing the number and type of client contacts is critical. Client communication is essential component of competent representation. Inadequate communication is a subject of complaints by clients. Client engagement is necessary to the ongoing operation of a holistic, team, client-centered model.

<sup>71</sup> See, e.g., the data collection and data reporting information to be reviewed regularly in Settlement Agreement, *Phillips v. California*, Fresno County Superior Court, Case No. 15CECG02201, found at:

[https://www.aclu.org/sites/default/files/field\\_document/phillips\\_v.\\_ca\\_county\\_settlement\\_executed\\_0.pdf](https://www.aclu.org/sites/default/files/field_document/phillips_v._ca_county_settlement_executed_0.pdf)

- Conducting performance coaching process (mutually setting performance criteria making implicit expectations explicit, ongoing feedback, and regular performance reviews);<sup>72</sup>
- Observing defenders perform;
- Conducting file reviews; file review, with any exclusion of privileged content consistent with state law, is a best practice not only for full-time systems but also for assigned counsel and contract systems.<sup>73</sup>
- Delegating and staff reporting;
- Doing mock presentations;
- Conducting staff meetings; and
- Brainstorming solutions to cases and conducting formal case reviews before the performance is done by the defense team.<sup>74</sup>

Case reviews are a particularly useful method of helping staff help clients. Case review is a method of “looking at, assessing, and analyzing an entire case from other professionals not directly involved in the case. Cases are comprehensively reviewed at a point in time when the defense team is ready for the next significant event in the case. Because case reviews invite defense teams to meet and share extant case facts and theories with attorneys and other professionals who are not representing the client, the review provides ‘multiple vantage points

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<sup>72</sup> A public agency should have a system of performance agreement, regular coaching and written evaluations. It should provide a particular individual performance agreement with performance criteria and when and how evaluation is documented. This may be informed by collective bargaining agreements which should be negotiated with these principles in mind. These measures are used in Massachusetts for assigned counsel using contracted supervising attorneys and paid mentors.

<sup>73</sup> Review of files should include indications, where appropriate for the case, of the client interview; contacts and communications; police report; charging document; immigration status; client’s criminal history; legal research; defense; investigation; expert assistance; discovery; motions; witnesses; mitigation; negotiations; sentencing plan, and disposition. In Massachusetts, the supervising attorneys conducted file reviews under the agency’s statutory duty to “monitor and assure the quality of representation” of all cases in which CPSC provided counsel. In Massachusetts, assigned private counsel provide representation in 80% of the cases. The quality of lawyering cannot be assessed without file review, even if file is sanitized to protect client communications. For example, file review can show that defense counsel conducted a substantial interview with the client or a witness, even if the content of the interview is blacked out in the material reviewed. In Massachusetts, the supervising attorney asks the attorney being assessed to bring 3 files to the review, either chosen by the supervisor from a case list provided by CPCS, or by category, such as a case assigned last month with a client in custody, a case that went to trial within the last year, a case that the defender wants help with.

<sup>74</sup> See, e.g., Chapter 6 “Creating and Leading the Mitigation Team,” Monahan and Clark, *Tell the Clients Story: Mitigation in Criminal and Death Penalty Cases* (2017). “One of the most robust discoveries in the scientific literature concerning decision making and judgment is that decision makers routinely select quick-and-easy, shoot from the hip approaches to making important decisions instead of using approaches that are thoughtful, deliberate, and demonstrably most fruitful according to experience and national standards....This shortcut approach is known as *satisficing*, which is neologism that combines *satisfy* and *suffice*. It values speed and closure over the delay required to deliberate and achieve optimal results.” Excessive workloads push defenders towards quick and easy solutions. Formal case review is a practice that encourages a deliberate methodology to address the pull to *satisfice*.

from which to view reality.”<sup>75</sup>

The Public Defender and intermediate managers should be trained in leadership and management skills and intermediate managers should be evaluated on their supervision performance. Like the requirement to maintain litigation knowledge and skills, supervisors are required as a matter of competence “to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject”<sup>76</sup>

### **Reduced caseloads for supervisors and a minimum of one supervisor for every 10 lawyers**

Supervisors should have reduced caseloads to allow for active supervision. “Until empirical studies are further able to determine the number of staff necessary to support the lawyer, public defense systems, at a minimum, should provide ...one supervisor for every 10 lawyers.”<sup>77</sup> A supervisor who is supervising more than ten attorneys must nevertheless meet these standards as the standards are a minimum.

### **Assigned counsel and public defense delivery methods must be managed**

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<sup>75</sup> Chapter 6 “Creating and Leading the Mitigation Team,” Monahan and Clark, *Tell the Clients Story: Mitigation in Criminal and Death Penalty Cases* (2017), p. 155. Persons providing the reviews who are not representing counsel should sign a confidentiality agreement.

<sup>76</sup> ABA Model Rules of Professional Conduct, Rule 1.1, Competence, Commentary. The National Association for Public Defense conducts leadership institutes and maintains recordings of that training on its web page under MYGideon.

<sup>77</sup> NAPD *Policy Statement on Public Defense Staffing: Staff supporting public defense counsel must be adequate for meaningful representation* (2020), found at:

[https://www.publicdefenders.us/files/NAPD\\_Policy%20Statement%20on%20Public%20Defense%20Staffing.pdf](https://www.publicdefenders.us/files/NAPD_Policy%20Statement%20on%20Public%20Defense%20Staffing.pdf)

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**NAPD Policy on active supervision of the representation of clients:** All public defense systems - full-time, assigned counsel, contract - must actively supervise performance to ensure clients are properly represented (2020)

Public defense systems must provide active supervision, training,<sup>78</sup> and reporting on contracted representation and assigned counsel.<sup>79</sup> To fully meet this responsibility, contract and assigned counsel systems must have professional and political independence<sup>80</sup> for their operations, including selection and appointment of counsel. Judges should not appoint counsel.<sup>81</sup> Assigned counsel systems must be managed.

There should be mechanisms for qualifying to be appointed and for evaluation of performance. Conditions of taking an assigned case and contracts should include a comprehensive set of

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<sup>78</sup> See NLADA Standards for the Administration of Assigned Counsel Systems (1989) Standard 4.3.1 Entry-Level Training

(a) The Administrator shall be responsible for preparing, in accordance with Board specifications, an entry-level training program.

(b) Entry-level training shall be mandatory for all attorneys unless they come under exceptions specified by the Board, or the Administrator acting at its direction.

Standard 4.3.2 In-Service Training

(a) The Board shall establish regulations requiring attorneys to attend a specified number of training units per year in order to remain on a Program roster.

(b) The Administrator shall be responsible for preparing, in accordance with Board directives, periodic in-service training programs to provide systematic, comprehensive instruction in substantive law and courtroom skills. He or she shall also determine, upon request, whether training offered by entities other than the Program may be counted toward the training units required by the Board.

(c) The Administrator shall ensure that attorneys remaining on a Program roster have attended the number of training units required by the Board.

(d) The Board and Administrator shall encourage attorneys to participate in training sessions beyond the mandatory units.

<sup>79</sup> See NLADA *Standards for the Administration of Assigned Counsel Systems* (1989), Standard 4.4 Supervision of Attorneys:

(a) The Board shall establish policies regarding supervision of assigned counsel working within the Program. These policies shall include a procedure for handling complaints from clients and others.

(b) The Administrator shall be responsible for supervision.

<sup>80</sup> NAPD *Policy Statement on Independence: Professional and Political Independence Must be Structurally Assured and Actually Honored for Public Defense Programs to Provide Systematically Meaningful Representation* (2020); found at: [https://www.publicdefenders.us/files/NAPD\\_Policy%20Statement%20on%20Independence.pdf](https://www.publicdefenders.us/files/NAPD_Policy%20Statement%20on%20Independence.pdf)

<sup>81</sup> NAPD *Foundational Principles* (2017), Principle 2: Public Defense Must Be Independent of Judicial and Political Control. The fair administration of justice requires that representation by lawyers be free from real or perceived inappropriate influence. Representation should be without political influence and subject to judicial supervision only in the same manner and to the same extent as are prosecutors and attorneys in private practice. The selection and payment of lawyers should be independent of the judiciary. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged by administrators of defender, assigned-counsel or contract-for-service programs. Except in jurisdictions in which public defenders are locally elected, the policy-making function, choice of the chief public defender, and oversight of defense programs should be vested in a commission or board of trustees selected by diverse authorities, including but not limited to, officials from executive and legislative branches of government, heads of bar associations and law school deans. All persons chosen for a board or commission should be committed to high quality public defense and members should include one or more persons who previously were represented by a public defense lawyer. Commissions or boards should not include active public defense practitioners, judicial office holders, and active law enforcement officials of any kind such as prosecutors, police, sheriffs, or their staffs. All systems for defense representation should include both full-time public defenders and private public defense lawyers serving as assigned counsel or pursuant to contracts.

specific minimum performance standards for the delivery of the representation that promote meaningful representation to every client, and these standards must be enforced. Performance of the individual representation of clients through these delivery models must be monitored and supervised. Data collection and regular review and use of reporting to manage performance must be done.

Principle 8 of the ABA *Ten Principles* describes the essential components of a contract that systematically provides attorneys with the ability to provide meaningful counsel to their clients and requires performance standards. “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.”

NLADA *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services* (1984), Guideline III-16: Supervision and Evaluation, states, “The contract should establish a procedure for internal systematic supervision and evaluation of the performance of the Contractor's staff based upon publicized criteria. Supervision and evaluation efforts should include monitoring of time and caseload records, review and inspection of transcripts, an evaluation of attorney case activity, in-court observations, and periodic conferences. A system of performance evaluations should be based upon personal monitoring by the Contractor's Director or Chief Attorney and should be augmented by regular, formalized comments by judges, prosecutors, other defense lawyers and clients. The criteria of performance employed should be those of a skilled and knowledgeable criminal lawyer.”

Unfortunately, too many contractors and assigned counsel are wholly unsupervised. “If effectively supervising public defenders within an office is sometimes problematic, holding appointed counsel and contract attorneys accountable for their performance presents an even greater difficulty. Without an independent supervisory check on defense attorneys, incompetent lawyers can be appointed repeatedly, even in the face of multiple bar suspensions or disbarments.”<sup>82</sup> However, there are models nationally that provide oversight, monitoring, supervision, training and reporting with contract provisions of performance standards that are enforced.<sup>83</sup>

### *Massachusetts*

The Massachusetts Committee for Public Counsel Services (CPCS) provides representation of

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<sup>82</sup> Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 *Hastings L. J.* 1031, 1092 (2006). See, e.g., Sixth Amendment Center's *The Right to Counsel in Wayne County, Michigan: Evaluation of the State Defender Office of the Metropolitan Justice Center of Southeastern Michigan* (2018) found at: [https://sixthamendment.org/6AC/6AC\\_MI\\_waynecountyreport\\_2018.pdf](https://sixthamendment.org/6AC/6AC_MI_waynecountyreport_2018.pdf)

<sup>83</sup> NLADA *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services* (1984), found at: <http://www.nlada.org/defender-standards/guidelines-governmental-contracts>



clients by a full-time staff and also by a managed assigned counsel system. CPCS has Criminal Trial Support Unit responsible for overseeing the private criminal trial counsel. District and superior court attorneys are supervised by contracted “Supervising Attorneys” who provide oversight of private attorneys handling CPCS assignments through the bar advocate programs. This supervision includes evaluations of compliance with CPCS Performance Standards, complaint investigations, mentoring, and input into the periodic recertification of private counsel. CPCS contracts with Supervising Attorneys, on a part-time basis, usually 5 or 10 hours per week, so that they maintain their skills as practitioners and can use those skills to assess and assure the quality of services provided by assigned private counsel. The level of supervision allows for a performance evaluation of each panel attorney once approximately every 2 years.

Five experienced trial attorneys comprise the Criminal Trial Support Unit and each of those attorneys oversees 2-3 counties by communicating with the Supervising Attorneys in the counties, by overseeing a stringent, but fair, complaint process, reviewing certifications, and monitoring attorney billing. These attorneys each answer client calls one day per week, giving them direct insight into clients’ perception of their representation and, if a formal complaint is warranted, the attorney opens the complaint, which is investigated by a Supervising Attorney.

CPCS has an extensive set of policies and procedures for assigned counsel.<sup>84</sup> The Manual informs attorneys representing indigent clients through the Committee for Public Counsel Services of the scope of services, qualifications, training and performance requirements, the billing process, audit<sup>85</sup> and evaluation procedures, complaint about performance process, and other policies and procedures related to assignment and compensation. Attorneys who accept assignment of cases are required to follow these policies and procedures.<sup>86</sup>

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<sup>84</sup> Committee for Public Counsel Services Assigned Counsel Policies and Procedures Manual ( January 1, 2019 - Version 1.9 Subject to continuous online revision) <https://www.publiccounsel.net/assigned-counsel-manual/>

<sup>85</sup> Auditing is an important procedure to ensure government funds are properly used. See, Debra Cassens Weiss, Contract lawyer described as 'superb advocate' is suspended for overbilling state public defender, ABA Journal, May 19, 2020, found at: <https://www.abajournal.com/news/article/contract-lawyer-described-as-superb-advocate-is-suspended-for-overbilling-public-defender> “Meyer provided services to the state public defender as a contract attorney. She billed the agency for more than 24 hours in a day on 30 different days, according to an audit spanning four years. During the same period, Meyer had duplicated reimbursement requests for mileage, attributing trips to a location to multiple clients 147 times. Meyer was among 14 lawyers audited. Two other Iowa lawyers were suspended for overcharging the state public defender last term.”

<sup>86</sup> “Massachusetts, despite its serious problems in compensating and retaining lawyers, has established an excellent system for ensuring that attorneys have the knowledge, skills and experience to handle the cases they are assigned. The Committee for Public Counsel Services (CPCS) created a tiered certification process. Attorneys seeking appointment must verify their trial experience and CLE compliance. They must also provide recommendations from practicing criminal defense attorneys. In order to be certified as eligible to accept cases in superior court, an attorney must have tried at least six jury or six superior court criminal trials to verdict in the last five years as lead defense counsel. The applicant must fully describe the cases, including names, indictment numbers and charges, names of judges and prosecutors, dates of trials, and the major issues of each case, and offer as reference three criminal defense practitioners familiar with the applicant's work. The chief counsel of CPCS

### *Colorado*

The Office of the Alternate Defense Counsel of the State of Colorado (OADC) has written Guidelines on Indigent Defense.<sup>87</sup> They set out performance standards. “These guidelines are intended to encourage the lawyers accepting appointments on behalf of the Alternate Defense Counsel of the State of Colorado (ADC) to perform to a high standard of representation and to promote professionalism in the representation of clients.” The OADC has a set of forms and procedures that include case management, appellate and post-conviction and juvenile specific forms along with payment and billing and travel procedures.<sup>88</sup> It also has a complaint and compliment process and an application for seeking to be eligible for appointments. The OADC’s contract with appointed counsel requires that they adhere to the Guidelines and attend juvenile or defense specific continuing legal education.

According to the contract, “Representation shall commence upon OADC appointment and continue in all matters arising from the appointment through the filing of a notice of direct appeal and related documents or the filing and ruling on a motion for reconsideration of sentence. If the appointment is for the appeal of an adverse decision of the trial court, then the representation shall include the opening brief and all other legal functions through the filing of the Petition for Writ of Certiorari and any motion to reconsider sentence.”

### *Wisconsin*

The statewide public defender program in Wisconsin has an Assigned Counsel Division (ACD) The ACD is in the central administrative office in Madison, and is responsible for contracting with outside counsel to represent eligible clients. It has procedures and standards for applying to be certified, a written certification process, billing procedures, and Attorney Performance Standards.<sup>89</sup> Attorneys certified to take SPD appointments are called on a rotational basis per Wisconsin statute 977.08(3). Attorneys may accept or decline cases when they are contacted. The program provides access to investigators and experts. Billing is online and the program requires contractors to detail their work, including client communications. The Division has a program manager and four auditors. Program data is collected by the Division Director providing a source of fiscal and quality control.

### *Connecticut*

Connecticut’s statewide public defender program has an Assigned Counsel Unit (ACU). The

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must individually approve each applicant. Attorneys seeking appointment in the district court in misdemeanor and concurrent felony cases must be admitted into a county bar advocate program and complete a five-day training seminar entitled "Zealous Advocacy in District Court." Attorneys must be reevaluated and recertified every four to five years.” Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 Hastings L. J. 1031, 1090 (2006).

<sup>87</sup> Found at: <https://www.coloradoadc.org/images/OADCUpload/GuidelinesIndigentDefense.pdf>

<sup>88</sup> Found at: <https://www.coloradoadc.org/public-information/forms-and-procedures>

<sup>89</sup> See: <https://www.wisspd.org/index.php/for-the-legal-practitioner/spd-assigned-counsel-division>

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**NAPD Policy on active supervision of the representation of clients:** All public defense systems - full-time, assigned counsel, contract - must actively supervise performance to ensure clients are properly represented (2020)

assigned counsel program is a complicated and involved process that requires constant attention. Assigned counsel are attorneys who have been vetted on their qualifications by the ACU, then approved by the ACU for a contract in a chosen practice area with the Office. The ACU assigns cases according to approved practice areas and court locations. Once an assignment is accepted the ACU pays the attorney to handle the case.

The Connecticut Office has a Standing Committee made up of several members chosen by the Director of Assigned Counsel, the Chief Public Defender and the Deputy Chief Public Defender. The Standing Committee makes decisions as to who has a contract with the ACU, which court locations each attorney/firm has, and which practice areas they are approved for. The Committee makes decisions when there is a concern or problem regarding an assigned counsel or assigned counsel firm. *In such situations*, committee action includes but is not limited to removing problematic court locations or practice areas from assigned counsel, suspending assignments in one or more locations, and terminating a contract. The standing committee meets several times a year and makes other decisions as a group throughout the year as needed.

In the assignment of cases efforts are made to avoid special treatment and favoritism. While law firms may ask to add attorneys to their list of assigned counsel approved attorneys, or remove them, they will not receive more cases from rotations for additional staff. This is to prevent “empire building” and to maintain the integrity of rotations. Solo practitioners and firms have the same access to appointments through rotations. One contract for every firm/solo means one position in the rotation of their court location.

Assigned Counsel are independent contractors who have their own firms/offices. When accepting a case from the ACU they have some limited malpractice coverage from the agency, but are expected to independently follow the rules and requirements for attorneys licensed to practice in the State of Connecticut. The ACU may provide or require some training when possible, but assigned counsel are expected to manage their caseloads and represent their clients in an independent and ethical manner ideally without interference or advice from the ACU.

The program audits the financial transaction data *prior to payment*. Modern technology and an active and engaged Standing Committee, as well as ultimate oversight from the Chief Defender, assists greatly in managing the tasks required to have an effective, accountable unit.

### *Texas*

The Texas Indigent Defense Commission (TIDC) has described the benefits and operations of

managed assigned counsel programs (MAC) in two recent publications.<sup>90</sup> The Commission sees managed, as opposed to unmanaged, assigned counsel programs as an important delivery model because the managed system puts in place mechanisms to ensure quality representation, mechanisms that do not exist in the unmanaged assigned counsel and contract defender systems. Such mechanisms include assignment and payment of cases independent of the judiciary; tracking and payment of expert witnesses and interpreters assisting defense counsel outside of court; improved provision and coordination of support services to attorneys and clients like investigators, social workers, mitigation specialists, and immigration consultations; data collection and analysis; training; mentorship; caseload controls; and supervision.

MACs have been or will soon be established in four Texas counties: Lubbock, Travis (Austin), Collin, and Harris (Houston).<sup>91</sup>

### *Michigan*

The Michigan Indigent Defense Commission (MIDC) has promulgated statewide minimum standards for 120 locally based indigent defense systems in Michigan.<sup>92</sup> Under the MIDC Act, every funding unit must submit an annual plan for delivering indigent defense services in accordance with the minimum standards.

In 2016, in anticipation of the MIDC minimum standards being approved and to assist local systems in identifying an appropriate model, the MIDC authored a guide to indigent defense delivery systems.<sup>93</sup> The guide noted that a managed assigned counsel system (MAC) could be used either in coordination with the public defender office or alone to engage the private bar in the delivery of indigent defense.<sup>94</sup>

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<sup>90</sup> TIDC, *Primer on Managed Assigned Counsel Programs* (Sept. 2017), [http://www.tidc.texas.gov/media/57815/tidc\\_primer2017.pdf](http://www.tidc.texas.gov/media/57815/tidc_primer2017.pdf); *Managed Assigned Counsel Programs in Operation* (Feb. 2018), [http://www.tidc.texas.gov/media/57919/tidc\\_primersup2017.pdf](http://www.tidc.texas.gov/media/57919/tidc_primersup2017.pdf).

<sup>91</sup> For more information about Texas' MAC programs, see the Lubbock Private Defenders Office (<https://www.lpdo.org/>), Capital Area Private Defender Service (CAPDS; <http://www.capds.org/>); and the Collin County Mental Health Managed Counsel Program ([https://www.collincountytx.gov/indigent\\_defense/Pages/default.aspx](https://www.collincountytx.gov/indigent_defense/Pages/default.aspx)). The Harris County misdemeanor courts were still in the process of setting up their MAC at the time of this writing.

<sup>92</sup> Michigan Indigent Defense Commission (MIDC) Minimum Standards for Indigent Defense are available here: <https://michiganidc.gov/standards/>. Four additional standards have been approved by the MIDC and are pending final approval by the Michigan Department of Licensing and Regulatory Affairs. The pending standards cover qualification and review of counsel.

<sup>93</sup> Michigan Indigent Defense Commission, *Delivery System Reform Models: Planning Improvements in Public Defense*, p. 16-18 (Dec. 2016), <https://michiganidc.gov/wp-content/uploads/2015/04/Delivery-System-Reform-Models-Final-Dec-2016.pdf>.

<sup>94</sup> *Id.* See also MCL 780.991(b) ("If the caseload is sufficiently high, indigent criminal defense services may consist of both an indigent criminal defender office and the active participation of other members of the state bar.")

In 2019, the first year of minimum standards implementation, more than 40 systems introduced a managed assigned counsel system model to deliver indigent defense.<sup>95</sup> This includes an eight-county MAC that utilizes one administrator to oversee all indigent defense services.<sup>96</sup>

In Michigan, the emergence of the trial-level MAC model has been an effective mechanism for ensuring compliance with the MIDC standards. Although the responsibilities of MAC administrators vary from system to system, they may include the assignment, billing and payment for indigent defense cases, monitoring timely meetings with clients, assigning and payment of experts and investigators, managing the list of eligible roster attorneys to ensure compliance with training requirements, monitoring attorney caseloads and tracking and reporting compliance data to MIDC.

Like public defender offices, MACs can also serve as incubators for innovation and best practices. One county-based MAC implemented a grant-funded program in which a social worker partnered with assigned counsel to provide representation to indigent defendants in an effort to reduce jail and prison sentences and increase collaboration with social service providers.<sup>97</sup> The above-referenced eight-county system in Mid-Michigan is coordinating a 2<sup>nd</sup> chair/mentoring program in anticipation of the MIDC's pending standard for qualification and review of counsel.

### *New York*

Like many states, New York has a county-based public defense system. In a 2006 report, a commission convened by then-Chief Judge Judith Kaye found that this county-based system led to severe under-funding of mandated defense services, and as a result several deficiencies in the quality of representation, including insufficient quality oversight and supervision of attorneys.<sup>98</sup> In 2014, New York State initiated steps to improve mandated representation in five counties by settling the *Hurrell-Harring v. New York State* litigation ("HH settlement").<sup>99</sup> The HH settlement required several quality reforms, including improved supervision of all attorneys

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<sup>95</sup> *Michigan Indigent Defense Commission 2019 Impact Report: Indigent Defense Transformation Begins Statewide*, p. 26 (June 2020), <https://michiganidc.gov/wp-content/uploads/2020/06/2019-Annual-Impact-Report.pdf>.

<sup>96</sup> *Id.* at p. 30.

<sup>97</sup> *Id.* at p. 27.

<sup>98</sup> See The Commission on the Future of Indigent Defense Services, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK, June 2006. The Kaye Commission report is available at: [http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission\\_report06.pdf](http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf).

<sup>99</sup> The *Hurrell-Harring* settlement can be found here: <https://www.ils.ny.gov/files/Hurrell-Harring%20Final%20Settlement%20102114.pdf>.

providing public criminal defense representation.<sup>100</sup> The NYS Office of Indigent Legal Services (ILS), which had been established in 2011, was charged with implementing the settlement. In 2017, ILS's authorizing statute was amended to add a new subdivision which extended the HH settlement reforms to the entire state.<sup>101</sup>

Thus, for the past several years ILS has been working with all counties and New York City to develop infrastructures for meaningful supervision of public criminal defense attorneys. For institutional criminal defense providers, this has meant creating supervisory positions and hiring additional attorneys to reduce supervising attorney caseloads so they have the time to engage in substantive supervision. It has also meant enhanced access to training and second chair opportunities so attorneys can build their skills and have meaningful avenues to address deficiencies their supervisors identify.

For Assigned Counsel Programs (ACPs), supervision can pose a challenge because panel attorneys are independent contractors and not employees. Additionally, ACP panel attorneys often practice in isolation and in multiple counties. But meaningful supervision is still possible through several components, which are identified in ILS's *Standards for Establishing and Administering Assigned Counsel Programs* ("ACP Standards), promulgated in 2019.<sup>102</sup> These components are:

1. A sound ACP infrastructure that includes an ACP Administrator who is an experienced defense attorney. (ACP Standards Section 3, Required Structure).
2. An assessment process to determine the case types appropriate for each attorney, a recertification process, as well as performance review and remediation policies. (ACP Standards 10.2, 14.1, and 14.3).
3. Procedures for receiving, investigating, and addressing complaints about panel attorneys. (ACP Standard 14.2).
4. A mentoring and resource attorney program which enlists high-quality attorneys, preferably paid, to whom other attorneys can turn for support and assistance. (ACP Standard 4.2.b).
5. A second-chair program that provides trial experience to attorneys. (Standard 4.2.e).
6. Access to training, including lecture style and multi-day skills-based trainings. (Standard 4.2.d).
7. The technology that allows the ACP to collect, analyze, and report on data; track attorney caseloads; and effectively communicate with clients, courts, and attorneys. (Standard 4.1.b).

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<sup>100</sup> Section V of the HH settlement requires implementation of plans to ensure that all attorneys "receive effective supervision and training in criminal defense law and procedure and professional practice standards."

<sup>101</sup> See NYS Executive Law § 832(4).

<sup>102</sup> The ILS ACP Standards can be found at: <https://www.ils.ny.gov/content/assigned-counsel-program-standards>.

Notably, components #1-#3, and #7 provide quality oversight and opportunities to identify deficient performance, while components #4-#6 ensure that panel attorneys have a path for support, improved performance, and means of addressing identified deficiencies.

In accordance with these principles, ACPs in the HH settlement counties and across the state are hiring ACP administrators, supervising attorneys, and other essential executive level attorney staff necessary for a well-managed program. They are recruiting mentors and resource attorneys, encouraging the use of second chairs, and facilitating training with state funding. Likewise, institutional defenders statewide are adding layers of supervision and revamping staffing structures to ensure appropriate oversight and support.

### *San Mateo County, California*

Unlike most other counties in California that have a Public Defender's Office, San Mateo County has a managed assigned counsel program known as the Private Defender Program comprised of a panel of private attorneys committed to handling criminal cases.<sup>103</sup> The Private Defender Program is a program of the San Mateo County Bar Association and employs a Chief Defender, Assistant Chief Defender, Managing Attorneys for Juvenile and Adult operations, a Head of Investigations and a support staff.

The management team oversees caseloads, attorney performance, trainings and client satisfaction. The Private Defender Program offers monthly lunchtime training sessions, as well as quarterly training events each year. The Private Defender Program has an Officer of the Day present and available to receive calls or visits regarding any questions or concerns that may arise during the pendency of a case.

Eligibility for representation by the Private Defender Program is established by the court at the time of the first appearance on eligible cases. Private Defender representatives are present at the arraignment calendars to accept appointments and provide representation. Once the court appoints the Private Defender Program, the PDP representative in court will begin acting as the attorney for the accused. The appointments are then processed by the PDP staff and a specific lawyer with the appropriate training, experience and skill will be assigned for the remainder of the case.

Private Defender attorneys are experienced criminal lawyers, licensed to practice in California. Each lawyer runs their own private law practice and maintains an office within the County of San Mateo. The average PDP lawyer devotes 79 percent of his or her time to the representation of clients assigned by the Program. There are some lawyers who choose to devote all of their time to their PDP cases. Others choose to make the representation of PDP clients a part of their larger criminal defense practice. Every lawyer on the panel is required to fill out an Annual Survey, detailing their work on PDP cases for the year. This report includes

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<sup>103</sup> <https://www.smcba.org/for-the-public/criminal-defense/>.

their trials, motions, hearings and trainings for the year. A review of these surveys is conducted by the management team to oversee the quality of each attorney's work.

The Private Defender Program attorneys work with a panel of well-trained, experienced investigators. The investigative services available to every PDP client include, but are not limited to, locating and interviewing witnesses, serving subpoenas on witnesses for trial, photographing and documenting crime scenes. Investigators can also help obtain evidence, such as medical records, cell phone records, camera footage and business records. Our investigators work closely with the assigned attorney to develop the most effective strategy for each case. They are a part of the defense team and will maintain the confidentiality of every aspect of the case. A complex case could have two to three investigators assigned to assist the lead investigator with a variety of tasks.

The work of both the attorneys and investigators is billed through a case management system. The investigators bill hourly and must give detailed descriptions of their work and the time spent on each task. The cases assigned to the attorneys fall into different categories with some being paid by a flat fee amount and others being paid hourly, depending on the type of case and the amount of work typically required to provide high quality representation. The hourly bills are reviewed by management as well as a special fee committee prior to payment.

Attorneys are also encouraged to add interpreters, doctors and experts in a variety of fields to their case teams, allowing them to provide the most complete approach to a defense possible. All requests to use experts in any case require prior approval. This allows management to both exercise some control over Program spending, but also monitor attorneys' use of experts for the best outcomes in their cases.

Oversight of the Program is conducted both by the San Mateo County Bar Association's Board of Directors and the County's Board of Supervisors. The Program prepares an Annual Report setting forth compliance with the County contract for Program services, including detailed budget reports and case counts. The Annual Report is prepared and submitted within 90 days of the end of each fiscal year.

### *Washington*

In the state of Washington, attorneys certify their familiarity with Washington's Performance Guidelines.<sup>104</sup>

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<sup>104</sup> See: [https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/perf-guidelines-for-criminal-def-rep-060311.pdf?sfvrsn=c2e43cf1\\_3](https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/perf-guidelines-for-criminal-def-rep-060311.pdf?sfvrsn=c2e43cf1_3) ; and see: [https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/performance-guidelines-for-juvenile-offense-representation.pdf?sfvrsn=f0207f1\\_6](https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/performance-guidelines-for-juvenile-offense-representation.pdf?sfvrsn=f0207f1_6)



## **In conclusion: assist defenders in helping clients**

The traditional markers of meaningful representation, including developing client relationships, appropriate investigation, accessing expert assistance, routine suppression motions and evidentiary hearings, trials by jurors in the community, and defense-generated sentencing plans are significant indicators of a well-managed public defender, assigned counsel, and contract delivery model. These result from well-managed public defense systems.

Public defense systems must strive for high quality representation of all clients. Effective supervision involving regular coaching of defenders is key to achieving this duty across the system. The value of active supervision is found in its helping defenders help clients. “In the simplest, day-in, day-out terms, masterful coaching involves expanding people’s capacity to take effective action. It often comes down to making it possible for people to succeed in areas where they are most stuck or ineffective.”<sup>105</sup> Active supervision helps defenders help clients.

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<sup>105</sup> Robert Hargrove, *Masterful Coaching* (1995) at 15.