



NAPD Policy Statement on Independence (May 2020)

Professional and Political Independence Must be Structurally Assured and Actually Honored for Public Defense Programs to Provide Systematically Meaningful Representation

Executive Summary

Jurisdictions provide structural and actual independence for public defense programs¹ that thrive and provide meaningful representation to clients according to national standards of practice. These Independent programs add value to communities at a high level. Tragically, in many jurisdictions, the public defense program is not independent, negatively impacting the individual meaningful representation of clients, the integrity of the legal system, and the community. Independence is essential. Independence produces a system of justice that enlarges us as a people who pride ourselves on fairness. The National Association for Public Defense (NAPD) issues an urgent call to advance the independence of all public defense systems.

Professional and political independence is essential for the meaningful representation of clients, the effective functioning of public defense programs, and assuring the legal adversary system works reliably and produces valid results. Independence is ethically and constitutionally required.

A “public defender is not amenable to administrative direction in the same sense as other employees of the State. . . . A public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client.”²

Without independence for public defense programs, the *National Association for Public Defense Foundational Principles* (2017), the *ABA Ten Principles of a Public Defense Delivery System* (2002), and all other national public defense standards cannot be attained or sustained. Without independence, effective representation for clients is threatened and can be severely undermined.

The law, national standards and professionally accepted norms provide clear guidance for states, counties and cities on how to provide public defense systems independence.

¹ Public defense counsel who represent accused persons who cannot afford a lawyer in criminal, juvenile offender, dependency, civil commitment, and children in need of supervision and at-risk youth proceedings. Independence of the public defense program is essential to their ability to protect the due process rights of their clients.

² *Polk County v. Dodson*, 454 U.S. 312, 321 (1981).

The primary structural method of ensuring independence is the creation of a nonpartisan Governing Board that oversees the delivery of defender services and does not interfere with the individual representation of clients. This Governing Board should not include active prosecutors or judges. It should have appointees who have staggered terms made by multiple appointing authorities. The majority of its members should be practicing attorneys and representatives of organizations concerned with the needs of clients. It should be nonpartisan. For more on the makeup of the Governing Board, see NAPD's *Qualifications of Those Selecting Public Defense Leadership* (2017).³ The Governing Board should appoint the Chief Defender to a term of years which is renewable with the Chief Defender subject to removal by the Governing Board only for good cause after being afforded due process.⁴

Independence is the cornerstone of public confidence in the system's outcomes. If the individual accused, their family members, or the larger community perceive the defender as anyway constrained by a judge, a prosecutor, or politician, respect for the outcome of individual cases, and for the system as a whole will be undermined. State, county and city governments must honor the independence of public defense systems and must create a Public Defense Governing Board that:

- Oversees the delivery of defender services;
- Does not interfere with the individual representation of clients;
- Does not include active prosecutors or judges;
- Has appointees who have staggered terms made by multiple appointing authorities;
- Has the majority of its members who are practicing attorneys and organizations concerned with the problems of the client community;
- Appoints the Chief Defender to a term of years which is renewable with the Chief Defender subject to removal only for good cause after being afforded due process;
- Is nonpartisan.

Now is the time for each jurisdiction to structurally assure the independence of public defense programs.

What is independence and why it is necessary

Independence is the ability of a professional to be able to make decisions based on what is right for their clients to whom they are ethically responsible without fear of adverse personal or program consequences.

Professional and political independence of public defender services is required to ensure that clients receive constitutional representation and that the results produced by the criminal legal system are valid and reliable.

³ Found at:

<https://www.publicdefenders.us/files/Qualifications%20for%20Selection%20of%20Public%20Defense%20System%20Leadership%20Position%20Paper.pdf>.

⁴ Some jurisdictions have the term of the chief defender be coterminous with that of the local prosecutor, which may have some advantages such as a recognition of equality of importance of the two roles.

In order to ensure the integrity of the service, a professional providing advice and services must give the assistance based on an independent judgment without control by others. The importance of independence is not unique to public defense. All of us place high value on independent professional assistance in the important matters of our lives.

When we send a loved one to the doctor, we want that loved one to receive testing, a diagnosis and a treatment plan that reflects the best professional judgment of the doctor. Because we want the best for our loved one we do not want an opinion dependent on third party pressure or influence, whether that is from an insurance company or a hospital administrator. The primary loyalty of the doctor that we find essential is to her patient.

Many people who seek to purchase a car turn to independent sources⁵ to determine the vehicle's reliability and fair market value in their locality as opposed to only relying on the car dealership which is seeking to sell the vehicle for as much profit as possible and has a profit bias that can influence the truthfulness and completeness of the information it provides.

An audit of a program such as a nonprofit must be independently conducted to be reliable. The Auditor must perform the scrutiny without undue influence and without conflicts to ensure full transparency and authentic accountability.⁶ How else would the public have confidence in the results? How else would donors be inspired to believe in a nonprofit's work? The primary loyalty of the audit is to the financial and program facts, not to the funder of the audit's preferred version of information.

Misinformation in matters of life and death is unacceptable. Imagine having a pandemic without communities being informed by public health medical professionals able to communicate their advice independent of political bias or agendas.

As a people, we declared our foundational value of independence on July 4, 1776 in our Declaration of Independence, "in the Name, and by Authority of the good People of these Colonies, [we] solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States." We became a country with independence as our bedrock against the tyranny of the day that undermined our individual liberties. Independence of major actors in a system, especially the criminal legal system, is essential. A prosecutor must have the discretion to decide, independent of political or financial influence, what to charge and how to prosecute cases. An independent judiciary is essential to decision-making that produces valid results. Alexander Hamilton observed that "The complete independence of the courts of justice is particularly essential in a limited Constitution."⁷ Being penalized—or even just fearing penalty—for doing what is right, what is ethical, what is responsible, destroys the integrity of the system.

⁵ See, e.g., Consumers Reports, Edmunds.Com, Kelly Blue Book. Each has information that seldom is communicated by a dealer eager for a sale at whatever profit is possible.

⁶ See, e.g., how an auditing firm views their responsibility. "Independence is integrity, professional skepticism, intellectual honesty, and objectivity—freedom from conflicts of interest. The people of Deloitte must remain unbiased and free from conflicts of interest with our clients, in fact and appearance. <https://www2.deloitte.com/us/en/pages/about-deloitte/articles/about-ethics-independence.html>

⁷ Alexander Hamilton, *The Federalist No. 78*, 28 (May 28, 1788).

Some states, counties, cities do not provide the public defense program with structural, actual, enforceable ways to ensure independence to guarantee that staff only represent the interests of the accused. Independence is undermined or nonexistent when the Chief Defender serves at the whim of their funding source, when the appointing authority can suspend and remove the Chief Defender from her position without cause or process. Without commonsense mechanisms to provide independence, a Chief Defender would rightly fear that she will lose her job, or be otherwise disciplined, if she runs afoul of the Funding Authority or the Appointing Authority. Without real independence, the Chief Defender might understandably be motivated to tend to the preferences of the funding or appointing authority rather than to the needs of the clients. When the Defender in that situation stands up for the clients, she risks losing her job.

Our criminal legal system is founded on the value that just outcomes for citizens whose liberty is at risk is best achieved through an adversarial system⁸ that ensures a fair process for all. To accomplish this justice, courts, prosecutors and defenders must be able to perform their separate functions independently.

State, county, city Appointing Authorities who appoint Chief Defenders do not select the prosecuting attorney. Therefore, prosecutors are not primarily dependent on the Appointing Authority for their continued employment. The Chief Defender must be no different. At-will employment is by definition antithetical to independence. You can be let go anytime for any reason, including providing vigorous representation against the government, seeking a justice public policy contrary to the wishes of your employer, communicating the inadequacy of your budget, or arguing a judge or prosecutor has acted illegally or unethically. If every day, your job is subject to the total discretion of an employer who is not bound by the same legal, professional and ethical responsibilities, your ability to act independently to advance your clients' interests is fatally undermined.

The lynchpin of public confidence in the system's outcomes is independence. When judges, prosecutors, and defenders all vigorously and independently serve their functions, the system is stable, steady, strong. No one actor, judge, prosecutor, or defender, can take advantage of another. Everyone can be secure in choosing to do what their professional ethics and interests require.

Threats to independent professional decision-making by the Chief Defender and the defender staff can come from judges, prosecutors, legislators, and law enforcement. But, "[p]robably the greatest risk to independence of the defense function is the pressure defenders receive from their funding sources."⁹

How will the number of requests for funds for investigation, expert services, additional expenses be interpreted by those who control the funding for the program? How will the kind and degree of advocacy influence the Appointing

⁸ See *United States v. Cronin*, 466 U.S. 648, 655-656 (1984) "The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. '[T]ruth,' Lord Eldon said, 'is best discovered by powerful statements on both sides of the question.' This dictum describes the unique strength of our system of criminal justice. The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.' *Herrin v. New York*, 422 U. S. 853, 422 U. S. 862 (1975). It is that 'very premise' that underlies and gives meaning to the Sixth Amendment."

⁹ The Constitution Project, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (2009), p. 80.

Authority's future decisions about whether a chief defender should keep her position? What happens when the Funding Authority and its legal counsel are exasperated by the nature of an attorney's representation on behalf of a particular client? Will there be pressure for attorneys to meet clients and promptly plead them, not to aggravate the judge and prosecutor, not to file motions, not to interview witnesses or seek appointment of experts? What happens if the chief defender needs to file a writ against a judge or challenge jail conditions? Will less vigorous representation be more attractive for continued employment?

Legal ethics, the law and our constitution, and national standards are clear: the exercise of independent professional judgment on behalf of our clients is mandated

Client loyalty is the preeminent ethical value.¹⁰ The Chief Defender and staff must subordinate all other loyalties to the best interests of every client. All decisions, including those about what resources are reasonable and necessary to properly prepare a client's case, must be unaffected by political influence.

In the public defense context, independence requires that line attorneys have the ability to provide well-researched, reflective advice to clients upon specific knowledge of the relevant facts and law of the client's case and to make decisions based only on loyalty to the client. Attorneys engaged in direct client representation and other staff should not be subject to any influence to act inconsistently with these values by an office chief who is catering to other interests or any other outside pressures.

The criminal legal adversary system only functions if the accused have representation by attorneys who provide undivided loyalty. "Should there develop an unavoidable conflict between the duties, responsibility or allegiance of an institutional public defender as a county manager or department of county government, and the role of said Public Defender in representing an indigent client, the duty to properly represent the client supersedes all other loyalties."¹¹

The representation of clients must be independently provided to comply with constitutional requirements. No experts in the field of public defense dispute this preeminent principle. Constitutional law and national standards and practice reflect this obligation. The structure of a public defense program must ensure independence. There must be an independent method of selecting the chief defender, providing funding, overseeing defender work, ensuring adequate training, and reporting compliance with national standards of practice. The relevant authorities are clear and consistent on this subject.

Independence is especially critical for public defenders because the essence of the work is to represent individuals against the very government that employs and funds defenders. Caselaw recognizes the need for independence in this unusual relationship. A public defender's "principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance

¹⁰ American Bar Association Rules of Professional Conduct, 1.7, Comment 1 states: "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."

¹¹ The State Bar of California, *Guidelines on Indigent Defense Services Delivery Systems* (2006), p. 7.

of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.”¹²

In our criminal legal system, “a defense lawyer characteristically opposed the designated representatives of the State. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public not by acting on behalf of the State or in concert with it, but rather by advancing ‘the undivided interests of his client.’.... [A] defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, see *Moore v. United States*, 432 F.2d 730 (CA3 1970), a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client.... [T]he constitutional obligation of the State [is] to respect the professional independence of the public defenders whom it engages.... Implicit in the concept of a ‘guiding hand’ is the assumption that counsel will be free of state control.”¹³

In his concurring opinion in *Polk*, Chief Justice Berger emphasized that “in providing counsel for an accused, the governmental participation is very limited. Under *Gideon v. Wainwright*, 372 U. S. 335 (1963), and *Argersinger v. Hamlin*, 407 U. S. 25 (1972), the government undertakes only to provide a professionally qualified advocate wholly independent of the government. It is the independence from governmental control as to how the assigned task is to be performed that is crucial.” *Id.* at 327.

A state, county or city government “violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”¹⁴

The preeminent professional standards also recognize the need for independence. The *National Association for Public Defense Foundational Principles* (2017), “Principle 2: Public Defense Must Be Independent of Judicial and Political Control” requires:

- “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

¹² *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).

¹³ *Polk County v. Dodson*, 454 U.S. 312, 318-19, 321, 322 (1981).

¹⁴ *Strickland v. Washington*, 466 U.S. 668, 686 (1984) “See, e.g., *Geders v. United States*, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); *Herring v. New York*, 422 U.S. 853 (1975) (bar on summation at bench trial); *Brooks v. Tennessee*, 406 U.S. 605, 406 U.S. 612-613 (1972) (requirement that defendant be first defense witness); *Ferguson v. Georgia*, 365 U.S. 570, 365 U.S. 593-596 (1961) (bar on direct examination of defendant).”

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.”

The American Bar Association’s *Ten Principles of a Public Defense Delivery System* (2002) “constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.”

Principle 1 of the ABA *Ten Principles* charges governments to have independent public defenses systems with nonpartisan oversight boards. “The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.”

Justice Denied: America’s continuing neglect of our constitutional right to counsel, Report of the National Right to Counsel Committee (2009) counseled states to “establish a statewide independent non-partisan agency headed by a board or commission responsible for all components of indigent defense services.”¹⁵ The Report said this recommendation “embodies the fundamental cornerstones for establishing a successful program of public defense.”¹⁶

In short, independence is the primary principle needed for a public defense system to render meaningful representation for all clients. This is recognized in national standards by both the American Bar Association, the largest voluntary association of attorneys and legal professionals in the world whose membership includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students, and by the National Association for Public Defense, the largest association of public defense programs and public defenders. Independence is essential for there to be meaningful assistance to clients across the system.

Resolution to the lack of independence: create an independent Governing Board

¹⁵ *Justice Denied: America’s continuing neglect of our constitutional right to counsel*, Report of the National Right to Counsel Committee (2009), p. 185. “Recommendation 2—States should establish a statewide, independent, non-partisan agency headed by a Board or Commission responsible for all components of indigent defense services. The members of the Board or Commission of the agency should be appointed by leaders of the executive, judicial, and legislative branches of government, as well as by officials of bar associations, and Board or Commission members should bear no obligations to the persons, department of government, or bar associations responsible for their appointments. All members of the Board or Commission should be committed to the delivery of quality indigent defense services, and a majority of the members should have had prior experience in providing indigent defense representation.”

¹⁶ *Id.*

There is a readily available solution to the foundational problem with the structure of state and county and city public defense programs that do not have institutional independence. State legislatures or county governing boards can legislate or delegate the appointing and supervision authority to an independent Governing Board. The Governing Board should have members appointed according to national standards and have the authority to employ a chief defender for a term of years who can only be removed for good cause with process.¹⁷

There must be a Governing Board which serves as a firewall for independent representation of clients

The *National Association for Public Defense Foundational Principles* (2017), Principle 2 which mandates independence requires that “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.”

The ABA *Ten Principles of a Public Defense Delivery System’s* Principle 1 which mandates independence is supported by a footnote which refers to the National Study Commission on Defense Services’ (NSC) *Guidelines for Legal Defense Systems in the United States* (1976). The NSC *Guidelines* were created in consultation with the United States Department of Justice (DOJ) under a DOJ Law Enforcement Assistance Administration (LEAA) grant.¹⁸ These NSC *Guidelines* state that “a special Defender Commission should be established for every defender system, whether public or private,” and that the primary consideration of appointing authorities should be “ensuring the independence of the Defender Director.”¹⁹

“The importance of establishing an independent indigent defense system cannot be overstated. Experience demonstrates that defense counsel will not fully discharge their duties as zealous advocates for their clients when their compensation, resources, and continued employment depend upon catering to the predilections of politicians or judges. Even when political or judicial oversight of the defense function does not actually impact the performance of counsel, clients and the general public may still have doubts about the loyalties of those providing defense services.”²⁰

The Governing Board, similar to a literal firewall in a physical building or a technological firewall in an information technology system, protects the Chief

¹⁷ When, for instance, a public defense agency is housed in a particular branch of government, a Memorandum of Agreement can assist in the important practicalities of the legal relationship. For example, there is a Memorandum of Agreement between the Kentucky Department of Public Advocacy and the Kentucky Justice and Public Safety Cabinet that addresses the responsibility of the Cabinet to honor the independence of the state public defense program. Its provisions include sections on the constitutionally required independence of counsel, how independence will be assured, the administrative relationship, potential lawsuits, budget and public policy work. A copy of the MOA is available on National Association for Public Defense’s MyGideon.

¹⁸ Governing board ensures independence and selects chief defender. NSC Guideline 2.11 states that the “primary function of the Defender Commission should be to select the State Defender Director.”

¹⁹ NSC Guideline 2.10.

²⁰ *Justice Denied: America’s continuing neglect of our constitutional right to counsel*, Report of the National Right to Counsel Committee (2009), p. 158, found at:

<https://archive.constitutionproject.org/wp-content/uploads/2012/10/139.pdf>

Defender and public defense program from influences that would undermine the proper functioning of the delivery of services.

Chief Defender and staff must be selected on the merits by the Governing Board

Ensuring justice in our adversarial system in a way that has the confidence of the public requires this independent delivery of public defender services. To accomplish this independence and confidence the Governing Board of a state, county, city, nonprofit public defense program must appoint the Chief Defender who must be hired on the merits. That is the longstanding national standard.²¹

The American Bar Association Standards for Criminal Justice *Providing Defense Services* state: "Selection of the chief defender and staff should be made on the basis of merit....The chief defender should be appointed for a fixed term of years and be subject to renewal. Neither the chief defender nor staff should be removed except upon a showing of good cause. Selection of the chief defender and staff by judges should be prohibited."²²

The ABA Commentary adds: "Selection of the chief defender and staff should not be based on political considerations or on any other factors unrelated to the ability of persons to discharge their employment obligations. Hiring and promotion should be based on merit and the defender program should encourage opportunities for career service."²³

Nationally, virtually all defender state commissions appoint the chief defender. Kentucky and West Virginia are the current exceptions.²⁴

States, counties, cities have implemented governing boards that advance independence

There are state, county and city structures that promote political and professional independence of the chief defender and the defender program by implementing an independent Governing Board that appoints the chief defender to a term which is renewable and allow removal only for good cause with process.

²¹ National Study Commission on Defense Services' (NSC) [Guidelines for Legal Defense Systems in the United States \(1976\)](#), *Guideline 2.10 (The Defender Commission)* states that "a special Defender Commission should be established for every defender system, whether public or private," and that the primary consideration of appointing authorities should be "ensuring the independence of the Defender Director." NSC Guideline 2.11 states that the "primary function of the Defender Commission should be to select the State Defender Director." The *Guidelines* were created in consultation with the United States Department of Justice (DOJ) under a DOJ Law Enforcement Assistance Administration (LEAA) grant.

²² The American Bar Association Standards for Criminal Justice *Providing Defense Services* (3d ed. 1992), Standard 5-4.1, Chief defender and staff.

²³ Commentary to the American Bar Association Standards for Criminal Justice *Providing Defense Services* (3d ed. 1992), Standard 5-4.1, Chief defender and staff.

²⁴ See WV Code 29-21-5; KRS 31.015(6)(a).

About half of the states have a statewide Governing Board. Most all state Governing Boards appoint the public defender to a term of years which is renewable and subject to removal only for good cause.²⁵

Structure of Independent Governing Board

Governing boards must be structured to authentically advance independence.²⁶ The Governing Board:

- Should not include active prosecutors or judges²⁷
- Have as primary function to support and protect the independence of the defense services program²⁸
- Have the power to establish general policy for the operation of defender programs
- Be precluded from interfering in the conduct of particular cases
- Have a majority be members of the bar admitted to practice in the jurisdiction
- Should appoint a chief defender who serves a term of years that is renewable and not be removable except for cause with process.

Any provision that a chief defender shall serve at the total discretion of the Appointing Authority is on its face problematic because a primary role of a chief defender is to be an adversary against the government when it is seeking to take the liberty or life of a client. The institutional legal and ethical conflict is ever-present under this system.

State, county, city governments have established Governing Boards or contracted with nonprofits which have Governing Boards that advance independent public defender representation and have functioned over the years in many ways that have allowed the independent delivery of services. Numerous Governing Boards have some but not all of the necessary features that national standards identify as essential. The more of the national features, the more independence emerges.

²⁵ See, e.g. Missouri, Mo. Rev. St. § 600.015, § 600.019. See Sixth Amendment Center at:

<http://sixthamendment.org/know-your-state/>

²⁶ The ABA Criminal Justice Standards, *Providing Defense Services, Standard 5-1.3 Professional independence* (3d ed. 1992), **states:** “(b) An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board. Provisions for size and manner of selection of boards of trustees should assure their independence.”

²⁷ The Commentary to ABA Criminal Justice Standards, *Providing Defense Services Standard 5- 1.3 states:* “Members of governing boards should not include prosecutors and judges. This restriction is necessary in order to remove any implication that defenders are subject to the control of those who appear as their adversaries or before whom they must appear in the representation of defendants, except for the general disciplinary supervision which judges maintain over all members of the bar.”

²⁸ Footnotes to ABA *Ten Principles of a Public Defense Delivery System* (2002) *Principle 1* refer to National Study Commission on Defense Services’ (NSC) [Guidelines for Legal Defense Systems in the United States \(1976\)](#). The *Guidelines* were created in consultation with the United States Department of Justice (DOJ) under a DOJ Law Enforcement Assistance Administration (LEAA) grant. NSC *Guideline 2.10 (The Defender Commission)* states that “a special Defender Commission should be established for every defender system, whether public or private,” and that the primary consideration of appointing authorities should be “ensuring the independence of the Defender Director.” NSC *Guideline 2.11* states that the “primary function of the Defender Commission should be to select the State Defender Director.”

Examples of state Governing Boards that have strong characteristics of independence include North Carolina Office of Indigent Defense Services Commission²⁹ and Kentucky Public Advocacy Commission³⁰ which have members appointed from diverse authorities. The Massachusetts Committee for Public Counsel Services has an important range of powers of authority.³¹ The Michigan

²⁹ See § 7A-498.4. Establishment of Commission on Indigent Defense Services. “(b) The members of the Commission shall be appointed as follows: (1) The Chief Justice of the North Carolina Supreme Court shall appoint one member, who shall be an active or former member of the North Carolina judiciary. (2) The Governor shall appoint one member, who shall be a nonattorney. (3) The General Assembly shall appoint one member, who shall be an attorney, upon the recommendation of the President Pro Tempore of the Senate. (4) The General Assembly shall appoint one member, who shall be an attorney, upon the recommendation of the Speaker of the House of Representatives. (5) The North Carolina Public Defenders Association shall appoint member, who shall be an attorney. (6) The North Carolina State Bar shall appoint one member, who shall be an attorney. (7) The North Carolina Bar Association shall appoint one member, who shall be an attorney. (8) The North Carolina Academy of Trial Lawyers shall appoint one member, who shall be an attorney. (9) The North Carolina Association of Black Lawyers shall appoint one member, who shall be an attorney. (10) The North Carolina Association of Women Lawyers shall appoint one member, who shall be an attorney. (11) The Commission shall appoint three members, who shall reside in different judicial districts from one another. One appointee shall be a nonattorney, and one appointee may be an active member of the North Carolina judiciary. One appointee shall be Native American. The initial three members satisfying this subdivision shall be appointed as provided in subsection (k) of this section.... (d) Persons appointed to the Commission shall have significant experience in the defense of criminal or other cases subject to this Article or shall have demonstrated a strong commitment to quality representation in indigent defense matters. No active prosecutors or law enforcement officials, or active employees of such persons, may be appointed to or serve on the Commission. No active judicial officials, or active employees of such persons, may be appointed to or serve on the Commission, except as provided in subsection (b) of this section....”

³⁰ See KRS 31.015 Public Advocacy Commission -- Appointment -- Members -- Terms -Compensation -- Duties.

“(1) (a) The Public Advocacy Commission shall consist of the following members, none of whom shall be a prosecutor, law enforcement official, or judge, who shall serve terms of four (4) years, except the initial terms shall be established as hereafter provided: 1. Two (2) members appointed by the Governor; 2. One (1) member appointed by the Governor. This member shall be a child advocate or a person with substantial experience in the representation of children; 3. Two (2) members appointed by the Kentucky Supreme Court; 4. Three (3) members, who are licensed to practice law in Kentucky and have substantial experience in the representation of persons accused of crime, appointed by the Governor from a list of three (3) persons submitted to him or her for each individual vacancy by the board of governors of the Kentucky Bar Association; 5. The dean, ex officio, of each of the law schools in Kentucky or his or her designee; and 6. One (1) member appointed by the Governor from a list of three (3) persons submitted to him or her by the joint advisory boards of the Protection and Advocacy Division of the Department of Public Advocacy.”

³¹ See, e.g., Mass. Gen. Laws ch. 211D, Section 9, “The committee shall establish standards for the public defender division and the private counsel division which shall include but not be limited to:

- (a) vertical or continuous representation at the pre-trial and trial stages by the attorney either assigned or appointed, whenever possible;
- (b) required participation by each attorney in an approved course of training in the fundamentals of criminal trial practice, unless the attorney has a level of ability which makes such participation unnecessary;
- (c) specified caseload limitation levels;
- (d) investigative services;
- (e) a method for the provision of social services or social service referrals;
- (f) availability of expert witnesses to participating counsel;
- (g) clerical assistance, interview facilities, and the availability of a law library and model forms to participating counsel; and
- (h) adequate supervision provided by experienced attorneys who shall be available to less experienced attorneys.
- (i) qualifications for vendors for the services provided in clauses (d), (e) and (f) and a range of rates payable for said services, taking into consideration the rates, qualifications and history of performance; provided, however, that such ranges may be exceeded with approval of the court. Payment of such costs

Indigent Defense Commission has important oversight powers over local systems.³² State systems such as Colorado, Missouri, Minnesota, and Kentucky have Governing Boards that provide structures that have staff who are employees of the program and who are trained and supervised by the program.

Recommendation is for federal system to move to independent structure

There was an extensive study of the federal public defense system which unanimously recommended that “Congress create an independent defender commission within the judicial branch, but outside the jurisdiction of the Judicial Conference and AO.”³³ The Report identified the particular authority of the commission including appointing its director.³⁴ The Report emphasized, “The needed course of action is clear: Congress should create an autonomous entity, not subject to judicial oversight and approval.”³⁵

Appointing Authorities have limits on discharging Chief Defenders

Limits as to how, when, and under what circumstances a Chief Public Defender may be terminated are sometimes outlined by applicable state statutes or local ordinances. Some statutes or ordinances give a Chief Public Defender a property right in his or her position, and that Chief cannot be terminated unless given due process. Normally the Appointing Authority would have to demonstrate some level of “good cause” to remove the Chief. However, in some states there either have been, or still are, no laws which convey to the Chief Public Defender any property right in his or her position. See, for example, *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904-05 (9th Cir. 1993) (holding that a public defender did *not* have a property right in his job where city and state law provided that the public defender serves at the will of the Board of Supervisors).

However, when jurisdictions fail to bestow a property interest in the position, Chiefs still have the ability to speak to critical issues impacting clients. All Chief Public

and fees shall be in accordance with the provisions of section twenty-seven A to G, inclusive, of chapter two hundred and sixty-one.”

³² See, e.g., Mich. Comp. Laws 780.989, Section 9 MIDC; authority and duties; establishment of minimum standards, rules, and procedures; manual. “(1) The MIDC has the following authority and duties: (a) Developing and overseeing the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are consistently delivered to all indigent adults in this state consistent with the safeguards of the United States constitution, the state constitution of 1963, and this act...”

³³ *2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act* (Revised April 2018), p. 243.

³⁴ “This independent defender commission proposed by our committee above would have powers to: 1. Establish general policies and rules as necessary to carry out the purposes of the CJA; 2. Appoint and fix the salaries and duties of a director and senior staff; 3. Select and appoint federal defenders and determine the length of term; 4. Issue instruction to, monitor the performance of, and ensure payment of defense counsel; 5. Determine, submit, and support annual appropriations requests to Congress; 6. Enter into and perform contracts; 7. Procure as necessary temporary and intermittent services; 8. Compile, collect and analyze data to measure and ensure high quality defense representation throughout the nation; 9. Rely upon other federal agencies to make their services, equipment, personnel, facilities and information available to the greatest practicable extent to the commission in execution of its functions; 1112 and 10. Perform such other functions as required to carry out the purposes of and meet responsibilities under the CJA.” *2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act* (Revised April 2018), p. 244.

³⁵ *2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act* (Revised April 2018), p. X.

Defenders do have a First Amendment right of free speech. Public Defenders who speak out on matters of public concern may file a civil rights suit alleging a violation of their First Amendment right if they are terminated or otherwise suffer an adverse action as a result of that speech. But a Public Defender's public statement will only be protected by the First Amendment when, (1) in making it, the Public Defender spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have 'an adequate justification for treating the Public Defender differently from any other member of the general public as a result of the statement he made. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)).

A Public Defender's First Amendment claims can be defeated if he is unable to prove that he spoke *as a citizen*, because it was actually *part of his job duties to speak out* about concerns. "A public employee does not "speak as a citizen" when he makes a statement pursuant to his "official duties." *Garcetti*, 547 U.S. at 421. "Restricting speech that owes its existence to a public employee's professional responsibilities," the Court reasoned, "does not infringe any liberties the employee might have enjoyed as a private citizen." *Id.* Put another way, the First Amendment does not shield the consequences of "expressions employees make pursuant to their professional duties." *Id.* at 426. Illustrating this principle is *Flora v. County of Luzerne*, 776 F.3d 169, 180-181 (3rd Dist. 2015), where the Court held that a Chief Public Defender, who filed a lack of adequate funding suit and who publicly reported 3000 adjudications had not been expunged as ordered, had adequately alleged that his ordinary job duties did not include taking these actions. Therefore, his First Amendment suit was not dismissed. *Flora v. County of Luzerne*, 776 F.3d 169, 180-181 (3rd Dist. 2015).

Chief Public Defenders may also file suits if they are discharged for political reasons. Such a political discharge would violate their First Amendment freedom of association rights. The Supreme Court held in *Branti v. Finkel*, 445 U.S. 507, 519 (1980), that "it is manifest that the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government. The primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State." I think this should be higher up, too.

It was further held in *Yurchak v. County of Carbon*, 84 Fed. Appx. 218, 220 (3rd Dist. 2002), that the office of public defender had an independent nature and that the defendants failed to show that political affiliation was an appropriate requirement - even for the position of Chief Public Defender. See also *Yurchak v. County of Carbon*, 2007 U.S. App. LEXIS 10880, *3. Therefore, absent a showing that political affiliation is an appropriate requirement, Chief Public Defenders cannot be terminated for political reasons either.

Conclusion

Many public defense systems suffer from persistent excessive workloads, understaffing, and practices that do not ensure constitutional representation to all clients.

A public defense system that lacks independence and is under resourced will result in the diminution of the adversary process to the detriment of clients because the

regular manner of processing cases is done by persons who are blind to the “ordinary injustice”³⁶ that becomes routine.

In order 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). For the criminal legal system to “advance the public interest in truth and fairness,” a defense lawyer must serve “the undivided interests of his client.”³⁷

State, county and city governments must honor the independence of public defense systems and must create a Public Defense Governing Board that:

- Oversees the delivery of defender services;
- Does not interfere with the individual representation of clients;
- Does not include active prosecutors or judges;
- Has appointees who have staggered terms made by multiple appointing authorities;
- Has the majority of its members who are practicing attorneys and organizations concerned with the problems of the client community;
- Appoints the Chief Defender to a term of years which is renewable with the Chief Defender subject to removal only for good cause after being afforded due process;
- Is nonpartisan.

Bar leaders, judges, and prosecutors who are desirous of a constitutional legal system have legal and ethical responsibilities to support public defense independence and creation of nonpartisan Governing Boards constructed to ensure the independence of the public defense program and the independent representation of individual clients.



³⁶ See Amy Bach, *Ordinary Injustice: How America Holds Court* (2009).

³⁷ *Polk County* at 318-19 (1981) (quoting *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979)).