

WASHINGTON DEFENDER ASSOCIATION STANDARDS FOR PUBLIC DEFENSE SERVICES

Objectives and minimum requirements for providing legal representation to poor persons accused of crimes or facing Juvenile or Civil Commitment proceedings in Washington State

October 1989

ENDORSEMENT

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INTRODUCTION

These Standards represent the efforts of the Washington Defender Association to address the problems of providing legal representation to poor persons accused of crimes, or facing Juvenile or Civil Commitment proceedings. Drawing on the practical experience of defense attorneys around the state and on existing national standards which set forth the objectives and minimum requirements for public defender and assigned counsel programs, the Standards are intended to help government establish public defense systems which operate efficiently and meet the constitutional requirements for effective assistance of counsel.

Public agencies and officials responsible for administering public defense programs should view these standards as a practical document, one which provides a means of evaluating existing programs and of setting priorities and goals to improve future ones. The Standards are not based on a conception of the ideal public defense system; rather, they represent the minimum acceptable qualities of a workable and efficient public defense program.

A recent survey by the Washington Defender Association found that there are many different approaches to providing public defense services in Washington and that there have been substantial questions about the adequacy of service in some counties. These standards are designed to ensure that all accused persons receive effective assistance of counsel, regardless of the place or system under which they may be tried. Effective assistance of counsel is a constitutional right, not a luxury to be provided only to a few.

These Standards originally were developed in 1984. In 1988, the State Indigent Defense Task Force was formed and prepared a report to the Legislature with the assistance of the Spangenberg Group. In 1989, the Washington Legislature passed a law requiring local governments to adopt standards for the delivery of public defense services, covering 16 areas. The law states: "The standards endorsed by the Washington State Bar Association for the provision of public defense services may serve as guidelines to contracting authorities." [RCW 10.101.030](#).

The Washington Defender Association prepared these amended standards and the Washington State Bar Association endorsed them in January, 1990. The Standards draw on several national sources, most notably the American Bar Association Standards for Criminal Justice and the National Legal Aid and Defender Association Standards for Defense Services. The full text of relevant standards is provided in the appendix. All commentary on the standards was prepared by the Washington Defender Association, a non-profit organization representing more than 400 public defenders and assigned counsel in 30 Washington counties.

The Washington Defender Association is indebted to its past Executive Director, Lynn Thompson, who drafted the amended standards and helped to present them to the State Bar before her resignation in 1989.

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STANDARDS FOR PUBLIC DEFENSE SERVICES

STANDARD ONE: Compensation

Standard:

Public defense attorneys and staff should be compensated at a rate commensurate with their training and experience. To attract and retain qualified personnel, compensation and benefit levels should be comparable to those of attorneys and staff in prosecutorial offices in the area.

For assigned counsel, reasonable compensation should be provided. Compensation should reflect the time and labor required to be spent by the attorney and the degree of professional experience demanded by the case. Assigned counsel should be compensated for out-of-pocket expenses.

Contracts should provide for extraordinary compensation over and above the normal contract terms for cases which require an extraordinary amount of time and preparation, including, but not limited to, death penalty cases. Services which require extraordinary fees should be defined in the contract.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, 5-2.4 and 5-3.1.

American Bar Association, **Guidelines for the Appointment and Performance in Death Penalty Cases**, 1988, Standard 10-1.

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standards 13.7 and 13.11.

National Legal Aid and Defender Association, **Standards for Defender Services**, Standard IV-4.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Legal Defense Contracts**, 1984, Standard III-10 and III-11.¹

Seattle-King County Bar Association Indigent Defense Services Task Force, **Guidelines for Accreditation of Defender Agencies**, 1982, Guideline No. 6.

Commentary:²

The report on public defense commissioned by the 1988 legislature found that salaries for public defenders in Washington are lower than in other states. Further, the report said, there are no state standards which assume parity in salary and job classification between public defenders and prosecuting attorneys. (The Spangenberg Group, **Indigent Defense Services in Washington**, 1989, p. ii.)

The ability to attract and retain qualified lawyers in criminal defense programs is extremely difficult when the compensation is inadequate. Many of the most skilled attorneys quickly move on, creating defender offices where inexperienced attorneys handle the bulk of the cases. Lawyers who know they will not receive compensation which reflects the time and effort they have put into a case may fail to do all within their power to vigorously defend their client. The resulting cynicism of clients toward their attorneys or of the attorneys themselves toward the system can only undermine the public's confidence in the judicial system and the integrity of the fact-finding process. No other members of the criminal justice system are asked to work for patently inadequate wages, and yet public defense attorneys routinely represent clients at a fraction of the rate which private attorneys would receive.

The American Bar Association's **Standards for Criminal Justice** (5-3.1) suggests that defender salaries be "comparable to that provided their counterparts in the prosecutorial offices" so that the quality of the defense bar remains high and so that public defenders might have the same career opportunities as prosecutors.

Parity between public defense attorneys and staff and those in prosecutorial offices should not be limited to salary. Rather, the total compensation package, including medical, sick leave, insurance, and retirement benefits, should be equal. An attorney's "counterpart" in a prosecutor's office should be determined based upon professional experience and the type of case each lawyer is qualified to handle.

The 1988 report on public defense also found that the fees paid to assigned counsel in Washington were frequently inadequate. Judges cited the difficulty in securing competent counsel, particularly in serious felony cases, because of the low level of compensation. Experienced attorneys were withdrawing their names from assigned counsel lists rather than accept payment which in no way reflected the time and professional experience demanded by the appointment. In King County, for example, assigned counsel receive \$22 per hour, a rate unchanged in a decade.

One measure of whether compensation for defense attorneys is adequate is to compare the fees paid to assigned counsel, contract, or public defense attorneys to those paid to privately retained counsel in the same jurisdiction for performing the same type of work. The NLADA Guidelines note that compensation should reflect "the customary compensation in the community for similar services rendered by privately retained counsel to a non-indigent client or by government or other publicly-paid attorneys to a public client...."

Extraordinary compensation should be provided for those cases which demand exceptional amounts of time and labor, as well as an unusually high degree of professional ability. Counsel in death penalty cases have duties and functions significantly different than those of counsel in ordinary criminal cases. Death penalty cases now involve two "trials", the trial phase and the penalty proceeding at which the decision to take or spare the client's life is made. The length, complexity, and extreme pressure of death penalty representation must be reflected in the compensation.

Extraordinary compensation is also warranted in those cases in which unusually large number of counts have been filed against one defendant, or when the government has had several years to develop its case or has retained an unusually high number of specified experts. Each of these situations is likely to produce exceptional amounts of evidence, much of it highly specialized, and will demand extraordinary amounts of attorney time.

These exceptional cases can seldom be predicted either by the attorney or the contracting authority and there is no reason why the financial burden of such cases should fall upon the defense attorney. Contracts which do not make some provision for such cases will discourage qualified attorneys from participating or will invite contract padding to protect the attorney against the unforeseen financially disastrous case.

STANDARD TWO: Duties and Responsibilities of Counsel

Standard:

The legal representation plan shall require that defense services be provided to all clients in a professional, skilled manner consistent with minimum standards set forth by the American Bar Association, applicable state bar association standards, the Rules of Professional Conduct, case law and applicable court rules defining the duties of counsel and the rights of defendants in criminal cases. Counsel's primary and most fundamental responsibility is to promote and protect the best interests of the client.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, 4-1.1, 5-5.1 and 5-1.1.

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standards 13.1.

National Legal Aid and Defender Association, **Standards for Defender Services**, Standard II-2.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Defense Contracts**, 1984, Guideline III-18.

Commentary:

Just as in other professions, law has rules of professional conduct and ethical canons governing the actions of its members. These rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. These rules include truthfulness in representation of matters before the court, the disclosure to clients of potential conflicts of interest, the confidentiality of all client communications, and many other matters.

In addition to these professional standards, the federal and state courts, in their rulings on criminal cases, have defined the constitutional obligation of the states to provide counsel to the accused and the level of legal assistance which that obligation entails. The Arizona Supreme Court in 1984 found an entire county public defense system unconstitutional because high attorney caseloads made effective assistance of counsel impossible. *Arizona v. Smith*, 681 P.2d 1374 (1984). The U.S. Supreme Court in *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed.2d 53, 105 S.Ct. 1087 (1985), ruled that the state's failure to provide psychiatric experts to the defense deprived the defendant of a fair trial.

Convictions may be reversed, or an entire program be held unconstitutional if the county or city, through its contracts with defense attorneys, does not ensure that legal and ethical obligations can be met.

The role of the criminal defense attorney set forth in the **ABA Standards** is that of a "zealous advocate" whose "basic duty" is to "serve as the accused's counselor and advocate with courage, devotion, and to the utmost of his or her learning and ability and according to law." It is inappropriate for the courts or contracting authorities to limit defense counsel's zeal in the pursuit of the client's interests unless the advocacy violates specific standards of professional conduct. The commentary on the standard notes that the adversary system "requires defense counsel's presence and zealous advocacy just as it requires the presence and zealous advocacy of the prosecutor and the constant neutrality of the judge."

Among the duties required of defense counsel in each case are investigation of the facts, research of relevant law, communication with the client, review of possible motions, review of plea alternatives, review of dispositional alternatives, trial preparation, and vigorous representation in court.

STANDARD THREE: Caseload Limits and Types of Cases

Standard:

The contract or other employment agreement shall specify the types of cases for which representation shall be provided and the maximum number of cases which each attorney shall be

expected to handle. The caseload of public defense attorneys should allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation.

The caseload of a full-time public defense attorney or assigned counsel shall not exceed the following:

150 Felonies per attorney per year; or
300 Misdemeanors per attorney per year; or
250 Juvenile Offender cases per attorney per year; or
60 Juvenile dependency clients per attorney per year; or³
250 Civil Commitment cases per attorney per year; or
25 Appeals to appellate court hearing a case on the record and briefs per attorney per year.

A case is defined by the Office of the Administrator for the Courts as: A filing of a document with the court naming a person as defendant or respondent.

Caseload limits should be determined by the number and type of cases being accepted and on the local prosecutor's charging and plea bargaining practices. In jurisdictions where assigned counsel or contract attorneys also maintain private law practices, the contracting agency should ensure that attorneys not accept more cases than they can reasonably discharge. In these situations, the caseload ceiling should be based on the percentage of time the lawyer devotes to public defense.

Related and Source Standards:

American Bar Association, **Standards for Criminal Justice**, 4-1.2, 5-4.3.

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standard 13.12.

American Bar Association Disciplinary Rule 6-101.

National Legal Aid and Defender Association, **Standards for Defender Services**, Standard IV-I.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Defense Contracts**, 1984, Standard III-6 and III-12.

Seattle-King County Bar Association Indigent Defense Services Task Force, **Guidelines for Accreditation of Defender Agencies**, 1982, Guideline Number 1.

Commentary:

Five years after these standards were first adopted, many public defender and contract defense attorneys are still handling caseloads substantially above the levels recommended by the Washington Defender Association and endorsed by the state bar. Many cities and some counties are still using fixed-price contracts which contain no caseload limitations at all.

Caseload levels are the single biggest predictor of the quality of public defense representation. Not even the most able and industrious lawyers can provide effective representation when their workloads are unmanageable. A warm body with a law degree, able to affix his or her name to a plea agreement, is not an acceptable substitute for the effective advocate envisioned when the Supreme Court extended the right to counsel to all persons facing incarceration.

The American Bar Association's **Standards for Criminal Justice** call heavy caseloads "one of the most significant impediments to the furnishing of quality defense services for the poor" and note that lawyers with too many clients may not be able to carry out the basic responsibilities outlined in the Code of Professional Responsibility. The Code admonishes an attorney not to accept "employment...when he is unable to render competent service" or to handle cases "without preparation adequate in the circumstances." The "Defense Function" section of the American Bar Association's **Standards** also urges attorneys not to accept more cases than they can reasonably discharge.

In addition to the risks of an innocent person being unjustly convicted and of accused persons receiving unequal treatment because they are too poor to retain private counsel, these high caseloads have serious consequences to the integrity and efficiency of the judicial system. High caseloads result in correspondingly high turnover among public defenders; inexperienced defenders are less efficient, less able to move cases quickly through the system; and the number of cases which must be retried because of improper defense may increase. Finally, lawyers become vulnerable to malpractice lawsuits when they are unable to meet basic professional responsibilities. Legal research, investigation and the timely presentation of motions become luxuries to the attorney burdened with too many cases.

Other factors, often beyond defense counsel's control, affect the number of cases he or she may effectively dispatch. A prosecutor's refusal to accept plea negotiations, the seriousness and complexity of the types of cases being handled, and, for assigned counsel and some contract attorneys, the number of privately retained cases being accepted, will reduce the total number of cases counsel can discharge.

If the caseload levels being contracted for approach these recommended levels, the attorney undertaking the work should not have a significant number of privately retained cases. The American Bar Association **Standards for Providing Defense Services** state that full-time defense attorneys "should be prohibited from engaging in the private practice of law." The commentary on this standard notes that when part-time defenders are used, clear standards for performance of duties, particularly as to limits on private practice, should be adopted.

The caseload levels recommended here follow closely those caseload guidelines specified by two national studies, the National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, and the National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Legal Defense Contracts** (1984). They are also drawn from the standards approved in 1982 by the King County Bar Association following a Task Force study which found that in the absence of guidelines, public defender offices were being made to accept so many cases that clients' constitutional rights were seriously threatened.

The National Advisory Commission standard recommends 150 felonies per attorney per year and 400 misdemeanors, figures set in 1973, before the full impact of the U.S. Supreme Court's *Argersinger* decision was felt. Recent changes in Washington Law have resulted in substantially more misdemeanor jury trials with a corresponding increase in attorney time per case. For these reasons, we recommend 300 misdemeanors per attorney per year.

One measure of the reasonableness of these figures is to assess the amount of time an attorney would spend on a case under these standards. An accepted national standard for attorneys is to work 1650 billable hours per year. Even under the caseload standards recommended here, an attorney could only spend an average of 11 hours per case if he or she were to complete 150 felonies during a year. One serious case, requiring 40 to 50 hours to bring to trial, limits the time an attorney can devote to his or her remaining cases.

The situation is similar for misdemeanor attorneys. If the recommended standard of 300 cases per year were adopted, an attorney would be able to give roughly 5 hours to each case. The expanded right to jury trial for misdemeanor charges requires a substantial increase in preparation and litigation time. Currently in Washington State, most full-time public defense

attorneys are handling significantly more than these recommended levels and work upwards of 2000 hours each year.

In setting these recommended caseload levels, we assume the attorneys will have adequate investigative and clerical support. Clearly, where these essential services are not available, maximum caseload levels should be set at lower levels. The limits may also have to be adjusted downward in rural areas where attorneys must travel great distances between courts.

STANDARD FOUR: Responsibility for Expert Witnesses

Standard:

Reasonable compensation for expert witnesses necessary to preparation and presentation of the defense case shall be provided. Expert witness fees should be maintained and allocated from funds separate from those provided for defender services. Requests for expert witness fees under Court Rule 3.1 f should be made through an ex parte motion. The defense should be free to retain the expert of its choosing and in no cases should be forced to select experts from a list pre-approved by either the court or the prosecution.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, 5-1.4.

National Legal Aid and Defender Association, **Standards for Defender Services**, Standard IV 2d, 3.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Defense Contracts**, 1983, Standard III-8d.

National Advisory Commission, **Task Force on Courts**, 1973, Standard 13.14.

Commentary:

The availability to the defense of funds for expert witnesses varies greatly from county to county and is often significantly less than the funds available to the prosecution.

Many attorneys contracting for public defense services must pay for expert witnesses crucial to the defense case out of the money they receive for their legal representation. This creates a conflict of interest for attorneys who must choose between their own income and retaining an expert for the defendant.

The ABA **Standards for Providing Defense Services** state that the legal representation plan "should provide for investigatory, expert, and other services necessary to quality legal representation." These services are required not only for an effective defense at trial, but also for "effective participation at every stage of the criminal proceeding." The NLADA **Guidelines** warn against contracts creating conflicts of interest between the defense attorney and the client. "Expenses for investigations, expert witnesses, transcripts and other necessary services for the defense should not substantially decrease the contractor's income or compensation."

In many jurisdictions, defense attorneys must seek court approval for defense experts. This is often done in open court, where the prosecutor is allowed to comment on the appropriateness of the request. The NLADA **Standards for Defense Services** require that funds be provided to

defender programs for the "confidential employment of experts and specialists" which may be of assistance to the defense.

In some jurisdictions in Washington, judges have budget line items for defense services which are inadequate to meet the reasonable requests of defense counsel. The approval of expert funds in one case should not deprive another defendant of his or her ability to mount an effective defense. In other jurisdictions only those experts which have been approved by the prosecuting attorney are available to the defense. This severely compromises the defense's ability to present independent evidence and to seek out those experts who will most effectively represent the client's best interests.

STANDARD FIVE: Administrative Expenses

Standard:

Contracts for public defense services should include the administrative costs associated with providing legal representation. These costs may include travel, telephones, law library, financial accounting, case management systems, the reporting requirements imposed by these standards, and other costs necessarily incurred in the day to day management of the contract.

Related Standards:

American Bar Association, **Standards for Criminal Justice, Providing Defense Services.**

National Study Commission on Defense Services, **Guidelines for Legal Defense Systems in the United States**, (1976), Guideline 3.4.

National Legal Aid and Defender Association, **Standards for Defender Services**, 1976 I-3, IV 2a-e, IV 5.

Commentary:

The amount of compensation paid to public defense or contract attorneys must not only cover the amount of time the attorney devotes to a case, but also those expenses necessary to support the attorney's public defense practice. The prosecutors and courts, as branches of local government, have operating budgets which permit the efficient organization and delivery of their legal services. The defense should have facilities, equipment and resources no less than those provided to prosecuting attorneys and judges.

Including these funds in the contracting agreement helps to assure that administrative and business management functions will be performed effectively and on a timely basis. Conversely, the failure to provide these essential funds could lead to poor administrative practices and erratic case management.

The NLADA Standards note that the state "has the responsibility to insure adequate funding of defender offices and appointed counsel programs."

STANDARD SIX: Investigators

Standard:

Public defender offices, assigned counsel, and private law firms holding contracts to provide representation for poor people accused of crimes should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every four attorneys.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, 4-4.1 and 5-1.14.

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standard 13.14.

National Legal Aid and Defender Association, **Standards for Defender Services**, Standard IV-3.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Defense Contracts**, 1984, Standard III-9.

Seattle-King County Bar Association Indigent Defense Services Task Force, **Guidelines for Accreditation of Defender Agencies**, 1982, Guideline Number 8.

Commentary:

Criminal investigation is an essential element of criminal defense; indeed, the failure to provide adequate pre-trial investigation may be grounds for a finding of ineffective assistance of counsel. All too often it is neglected because attorneys lack the time to conduct their own investigation of the facts of a case or because their office does not employ an investigator.

If the defense attorney must personally conduct factual investigations, the financial costs to the system are likely to be greater. When an attorney personally interviews witnesses, the attorney may be placed in the untenable position of withdrawing from the case in order to take the stand to challenge the witnesses' credibility if their testimony conflicts with statements previously made.

When the defense conducts an independent investigation of the facts, the results can be dramatic -- missing witnesses may be brought to the attention of the police, new evidence may be uncovered, and an innocent person may be cleared of charges. In nationally publicized cases, citizens have been wrongfully convicted and imprisoned because the defense did not adequately investigate the circumstances surrounding the case against the client.

Effective pre-trial investigation may benefit the criminal justice system by eliciting information which makes a costly courtroom confrontation unnecessary.

STANDARD SEVEN: Support Services

Standard:

The legal representation plan should provide for adequate numbers of investigators, secretaries, paralegals, social work staff, mental health professionals and other support services. These professionals are essential to ensure the effective performance of defense counsel during trial preparation, in the preparation of dispositional plans, and at sentencing.

1. Secretaries - At least one full-time secretary should be employed for every four staff attorneys. Fewer secretaries may be necessary, however, if the agency has access to word processing or overload secretaries, or other additional staff performing clerical work.
2. Social Work Staff - Social work staff should be available to assist in developing release, treatment, and dispositional alternatives.
3. Mental Health Professionals - Each agency should have access to mental health professionals to perform mental health evaluations.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, 4-8.1 and 5-1.4.

National Advisory Committee on Criminal Justice Standards and Goals, **Task Force on Courts**, Standard 13.14.

National Legal Aid and Defender Association, **Standards for Defender Services**, Standard IV-3.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Defense Contracts**, 1984, Standard III-8.

Seattle-King County Bar Association Indigent Defense Services Task Force, **Guidelines for Accreditation of Defender Agencies**, 1982, Guideline Number 7.

Commentary:

An effective defense cannot be undertaken without adequate support staff services. These services include not only those needed for trial preparation, but also those required for effective defense participation in every phase of the defense. Secretaries with legal training are clearly essential to the efficient preparation of pre-trial motions and affidavits. Social service personnel are necessary to defense counsel at the sentencing stage when the judge may consider a range of sentencing alternatives. The pre-sentence reports prepared by defense social workers may be decisive in the court's selection of the term of incarceration or use of alternatives to incarceration. Mental health professionals, in their evaluation and treatment recommendations for clients, also play an important part in the trial preparation and sentencing phase of a case. The defense at trial may be based on the accused's mental state at the time of an incident; the court's disposition at sentencing may turn on mitigating factors presented by a psychological evaluation.

STANDARD EIGHT: Reports of Attorney Activity and Vouchers

Standard:

The legal representation plan shall require that the defense attorney or office maintain a case-reporting and management information system which includes number and type of cases, attorney hours and disposition. This information shall be provided regularly to the Contracting Authority and shall also be made available to the Office of the Administrator of the Courts. Any such system shall be maintained independently from client files so as to disclose no privileged information.

A standardized voucher form shall be used by assigned counsel attorneys seeking payment upon completion of a case. For attorneys under contract, payment should be made monthly, or at times agreed to by the parties, without regard to the number of cases closed in the period.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, 5-3.3. (b) xii, The Report to the Criminal Justice Section Council from the Criminal Justice Standards Committee, 1989.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Defense Contracts**, 1984 Standard III-22.

National Study Commission on Defense Services, **Guidelines for Legal Defense Systems in the United States**, 1976, Guideline 3.4, 4.1, and 5.2.

Commentary:

The ABA Standards for Providing Defense Services call for all contracts to provide for an appropriate system of case management and reporting. Unfortunately, the 1989 report to the legislature on defense services in Washington found that in many jurisdictions, there is no management information system in place for collecting and maintaining reliable data on costs, caseloads, and attorney activity.

Contracting authorities have an obligation to the public to show how its funds are being spent. Without standardized reports of attorney activities and uniform requests for payment, government has no way to review defense expenditures or to anticipate future costs. The attorneys under contract cannot be held accountable for their work if the oversight agency has no record of what has been done.

The maintenance of records of hours spent on a case, the costs incurred, and the amounts billed are standard business practices in the legal field. Defense attorneys receiving public funds likewise have a responsibility to maintain professional records and to be accountable to the funding agency.

Some attorneys may protest that keeping accurate time records will only take time away from clients; but these records can be of great value to the lawyer who wants to document caseload levels or present an argument for adequate funds. Defense attorneys may also be better able to anticipate workloads if they are able to calculate the average amount of time spent on a particular class of case. Case management and accounting functions are a part of any well-run legal practice.

The specification of regular payments to attorneys under contract is meant to assure them a steady income flow so they can meet regular and necessary business expenses. It is not intended to prohibit a payment system or schedule which reasonably assures the contracting authority that the conditions of the contract, which may include acceptance of a specific number of cases in a given time period, are being met.

STANDARD NINE: Training

Standard:

Attorneys providing public defense services should participate in regular training programs on criminal defense law, including a minimum of seven hours of continuing legal education annually in areas relating to their public defense practice.

In offices of more than seven attorneys, an orientation and training program for new attorneys and legal interns should be held to inform them of office procedure and policy. All attorneys should be required to attend regular in-house training programs on developments in criminal law, criminal procedure and the forensic sciences. Attorneys in civil commitment and dependency

practices should attend training programs in these areas. Offices should also develop manuals to inform new attorneys of the rules and procedures of the courts within their jurisdiction.

Every attorney providing counsel to indigent accused should have the opportunity to attend courses that foster trial advocacy skills and to review professional publications and tapes.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, 5-1.4.

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standard 13.16.

National Legal Aid and Defender Association, **Standards for Defender Services**, Standard V.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Legal Defense Contracts**, 1984, Standard III-17.

Seattle-King County Bar Association Indigent Defense Services Task Force, **Guidelines for Accreditation of Defender Agencies**, 1982, Guideline Number 3.

National Legal Aid and Defender Association, **Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases**, 1988, Standard 9.1.

Commentary:

The American Bar Association **Standards for Criminal Justice** (5-1.4) describes training programs as "crucial to the delivery of effective defense services." Criminal law is a complex and difficult legal area, and trial practice skills must be carefully developed. Moreover, the consequences of mistakes in defense representation may be substantial, including wrongful conviction and loss of liberty.

Former Chief Justice Warren Burger has estimated that fifty percent of trial lawyers in this country are so lacking in training that their incompetence contributes to the backlog of cases pending in our courts. Lawyers who are poorly prepared in trial techniques hamper the judicial system. Lack of precision in written documents, fumbling oral presentations, the inability to weed out useless motions and the lack of skill in selecting and focusing on key issues all contribute to costly bottlenecks in what should be an orderly and speedy process.

To meet the need for training, programs should be established for both beginning and advanced practitioners, and should emphasize substantive legal subjects as well as effective trial techniques. The National Legal Aid and Defender Association **Guidelines for Negotiating and Awarding Indigent Legal Defense Contracts** (III-15) urge that the training provided to defenders be no less than is provided to prosecutors and judges in their jurisdiction, and should include continuing legal education programs and the opportunity to review professional publications and tapes.

STANDARD TEN: Supervision

Standard:

Each agency or firm providing public defense services should provide one full-time supervisor for every ten staff lawyers or one half-time supervisor for every five lawyers. Supervisors should be chosen from among those lawyers in the office qualified under these guidelines to try Class A

felonies. Supervisors should serve on a rotating basis, and except when supervising fewer than ten lawyers, should not carry caseloads.

Related Standards:

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standard 13.9.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Legal Defense Contract**, 1984, Standard III-16.

Seattle-King County Bar Association Indigent Defense Services Task Force, **Guidelines for Accreditation of Defender Agencies**, 1982, Guideline Number 4.

Commentary:

The most important function of supervisors is ensuring effective representation. Defender offices are not simply confederations of individual attorneys, but organizations whose effectiveness is measured, in part, by their ability to introduce young attorneys to the practice of criminal law. Many new defenders lack experience and need close supervision as they gain familiarity with specific courts and procedures and work toward developing effective trial advocacy skills. The mere granting of a law degree and admission to the bar do not automatically qualify a lawyer to represent a client in criminal matters.

Supervision is also essential to evaluate the performance of staff attorneys in order to make recommendations regarding promotions or termination and to help coordinate services and ensure that office policies are understood and followed.

STANDARD ELEVEN: Monitoring and Evaluation of Attorneys

Standard:

The plan for public defense services should establish a procedure for systematic monitoring and evaluation of attorney performance based upon publicized criteria. Supervision and evaluation efforts should include review of time and caseload records, review and inspection of transcripts, in-court observations, and periodic conferences.

Performance evaluations made by a supervising attorney should be supplemented by comments from judges, prosecutors, other defense lawyers and clients. Attorneys should be evaluated on their skill and effectiveness as criminal lawyers or as dependency or civil commitment advocates.

Related Standards:

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Defense Contracts**, 1984, Standard III-16.

National Study Commission on Defense Services, **Guidelines for Legal Defense Systems in the United States**, 1976, Recommendations 5.4 and 5.5.

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standard 13.9.

Commentary:

Regular performance evaluations are important to assure the highest quality of public defender services and to give timely notice to attorneys whose performance can be improved.

Public defense attorneys, by the very necessity of protecting those charged with crime, may be unpopular in the eyes of the police or courts in the exact proportion to their diligence in protecting clients' rights. For this reason, the evaluation of attorneys is most appropriately made by a supervising attorney with full understanding of the constitutional role played by defense counsel in the justice system. Comments from a range of court personnel and professional colleagues who have seen the attorney in action should supplement regular review.

Many contracting authorities do not now provide for monitoring of the fulfillment of contractual responsibilities. In some jurisdictions, payment is made to public defense attorneys without even requiring attorneys to report the number of cases accepted or closed during that period. Contracting authorities should become familiar with the elements which constitute effective defense representation and should systematically review programs to determine whether public funds are being usefully spent.

STANDARD TWELVE: Substitution of Attorneys or Assignment of Contract

Standard:

The attorney engaged by local government to provide public defense services should not sub-contract with another firm or attorney to provide representation and should remain directly involved in the provision of representation. If the contract is with a firm or office, the contracting authority should request the names and experience levels of those attorneys who will actually be providing the services, to ensure they meet minimum qualifications. The employment agreement shall address the procedures for continuing representation of clients upon the conclusion of the agreement.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, Standard 5-5.2.

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standard 13.1.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Defense Contracts**, 1984, Guideline III-23.

Commentary:

Problems have arisen in some Washington counties when local government contracts for defense services with one attorney only to have that attorney sub-contract part of the work to a second attorney whose credentials were not subject to public review.

In responding to government requests for proposals, prospective contract attorneys should include the names, education and criminal defense experience of all lawyers who will represent indigent clients under the contract. Firms should also meet the supervision and training provisions of these standards for all attorneys they employ.

When the defense contract ends and a new defense provider is chosen, provision must be made for those cases opened but not yet completed by the former contractor.

Both the ABA and NLADA standards emphasize the importance of continuous representation of clients. The ABA **Standards** state that "counsel initially provided should continue to represent the defendant throughout the trial court proceedings." The NLADA **Guidelines** note that local governments would be poorly served by a system in which a contractor could simply walk away from uncompleted cases at the end of the contract. The NLADA recommends that cases open at the termination of a contract be handled to completion by the attorney initially assigned. In turn, the contract needs to address the terms by which the attorney will be paid for these cases.

It may be more practical for attorneys under contract to seek court approval to transfer to the new contractor those cases for which no significant work has yet been undertaken. In these situations, the attorney transferring the cases must provide thorough and accurate information about the case to the new defense lawyer so the latter can become familiar with the pending deadlines and legal issues in the case.

STANDARD THIRTEEN: Limitations on Private Practice of Contract Attorneys

Standard:

Contracts for public defense representation with private attorneys or firms shall set limits on the amount of privately retained work which can be accepted by the contracting attorney. These limits shall be based on the percentage of a full-time caseload which the public defense cases represent.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, 4-1.2(d), 5-3.2.

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standard 13.7.

National Legal Aid and Defender Association, **Standards for Defender Services**, Standard III-3 and IV-1.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Legal Defense Contracts**, 1984, Guideline III-6.

Commentary:

The potential for conflict of interest exists if public defense attorneys also maintain private law practices. Where part-time private practice is permitted, the attorneys may be tempted to increase their total income by devoting their energies to private practice at the expense of their non-paying clients.

Where rural settings or small caseloads make full-time public defense impractical, the contracting authority should set clear standards for the performance of duties and should limit the total number of cases assigned. The caseload limit should be based on the percentage of time the lawyer devotes to public defense.

STANDARD FOURTEEN: Qualifications of Attorneys

Standard:

1. In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services should meet the following minimum professional qualifications:
 - A. Satisfy the minimum requirements for practicing law in Washington as determined by the Washington Supreme Court; and
 - B. Complete seven hours of continuing legal education within each calendar year in courses relating to their public defense practice.
2. **Trial attorneys' qualifications according to severity or type of case:**
 - A. **Death Penalty Representation.** Each attorney acting as lead counsel in a death penalty case shall meet the following requirements:
 - i. The minimum requirements set forth in Section 1; and
 - ii. at least five years criminal trial experience; and
 - iii. have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion; and
 - iv. have served as lead or co-counsel in at least one jury trial in which the death penalty was sought; and
 - v. have completed at least one death penalty defense seminar within the previous two years.
 - B. **Adult Felony Cases - Class A.** Each staff attorney representing a defendant accused of a Class A felony as defined in RCW 9A.20.020 shall meet the following requirements:
 - i. Minimum requirements set forth in Section 1, and
 - ii. Either:
 - a. has served two years as a prosecutor; or
 - b. has served two years as a public defender; or
 - c. has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in five felony cases that have been submitted to a jury.
 - C. **Adult Felony Cases - Class B Violent Offense or Sexual Offense.** Each attorney representing a defendant accused of a Class B violent offense or sexual offense as defined in RCW 9A.20.020 shall meet the following requirements:
 - i. Minimum requirements set forth in section 1, and
 - ii. Either:
 - a. has served one year as prosecutor; or
 - b. has served one year as public defender; and
 - c. has been trial counsel alone or with other counsel and handled a significant portion of the trial in two Class C felony cases that have been submitted to a jury.
 - D. **Adult Felony Cases - All other Class B Felonies, Class C Felonies, Probation or Parole Revocation.** Each staff attorney representing a defendant accused of a Class B felony not defined in c above or a Class C felony, as defined in RCW 9A.20.020, or involved in a probation or parole revocation hearing shall meet the following requirements:
 - i. Minimum requirements set forth in section 1, and
 - ii. Either:
 - a. Has served one year as a prosecutor; or
 - b. Has served one year as a public defender; or
 - c. has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in two criminal cases that have been submitted to a jury; and
 - iii. Each attorney shall be accompanied at his or her first felony trial by a supervisor.

- E. **Juvenile Cases - Class A** - Each attorney representing a juvenile accused of a Class A felony shall meet the following requirements:
 - i. Minimum requirements set forth in section 1, and
 - ii. Either:
 - a. has served one year as a prosecutor; or
 - b. has served one year as a public defender; or
 - c. has been trial counsel alone of record in five juvenile Class B and C felony trials; and
 - iii. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor.
- F. **Juvenile Cases - Classes B and C**. Each attorney representing a juvenile accused of a Class B or C felony shall meet the following requirements:
 - i. Minimum requirements set forth in Section 1; and
 - ii. Either:
 - a. has served one year as a prosecutor; or
 - b. has served one year as a public defender; or
 - c. has been trial counsel alone in five misdemeanor cases brought to a final resolution; and
 - iii. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor
- G. **Misdemeanor Cases**. Each attorney representing a defendant involved in a matter concerning a gross misdemeanor or condition of confinement, shall meet the requirements as outlined in Section 1.
- H. **Dependency Cases**. Each attorney representing a client in a dependency matter shall meet the following requirements:
 - i. The minimum requirements as outlined in Section; and
 - ii. Attorneys handling termination hearings shall have six months dependency experience or have significant experience in handling complex litigation.
- I. **Civil Commitment Cases**. Each attorney representing a respondent shall meet the following requirements:
 - i. Minimum requirements set forth in Section 1; and
 - ii. Each staff attorney shall be accompanied at his or her first 90 or 180 day commitment hearing by a supervisor; and
 - iii. Shall not represent a respondent in a 90 or 180 day commitment hearing unless he or she has either:
 - a. served one year as a prosecutor, or
 - b. served one year as a public defender, or
 - c. been trial counsel in five civil commitment probable cause hearings.
- J. In order to advance from one qualification category to the next, an attorney must participate in a supervised trial of the next higher category.
- 3. **Appellate Representation**. Each attorney who is counsel for a case on appeal to the Washington Supreme Court or to the Washington Court of Appeals shall meet the following requirements:
 - A. The minimum requirements as outlined in Section 1; and
 - B. Either:
 - i. has filed a brief with the Washington Supreme Court or any Washington Court of Appeals in at least one criminal case within the past two years; or
 - ii. has equivalent appellate experience, including filing appellate briefs in other jurisdictions, at least one year as an appellate court or federal court clerk, extensive trial level briefing or other comparable work.
 - iii. Attorneys with primary responsibility for handling a death penalty appeal shall have at least five years' criminal experience, preferably including at least one homicide trial and at least six appeals from felony convictions.
- 4. **Legal Interns**.
 - A. Legal interns must meet the requirements set out in APR 9.

- B. Legal interns shall receive training pursuant to APR 9 and Standard Nine, Training.

Related Standards:

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, Standard 13.15.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Public Defense Contracts**, 1984, Standard III-7.

National Legal Aid and Defender Association, **Standards for the Appointment and Performance of Counsel in Death Penalty Cases**, 1987, Standard 5.1.

Commentary:

Effective representation can only be provided by attorneys experienced in the type of case in which they appear. The standard assigns the most difficult cases to those attorneys with the most experience and skill in trial advocacy while at the same time establishing the method for less experienced attorneys to become qualified for more serious cases.

Inexperienced attorneys cannot only deprive their clients of their right to effective counsel, they also create problems for the criminal justice system itself. Inexperienced attorneys are less able to effectively negotiate with prosecutors, thus lengthening the time needed to resolve pre-trial issues. They are less efficient in bringing cases to resolution and may burden the court with irrelevant issues.

The practice of criminal law has become highly specialized in recent years. Only attorneys who possess effective trial advocacy skills and have a thorough knowledge of substantive and procedural law can be expected to competently represent persons accused of crime. Less experienced attorneys benefit from training under the direction of more experienced attorneys, acquiring theoretical and practical knowledge before they assume sole responsibility for a criminal defense.

STANDARD FIFTEEN: Disposition of Client Complaints

Standard:

The legal representation plan shall include a method to respond promptly to client complaints. Complaints should first be directed to the attorney, firm or agency which provided representation. If the client feels that he or she has not received an adequate response, the contracting authority or public defense administrator should designate a person or agency to evaluate the legitimacy of complaints and to follow up meritorious ones. The complaining client should be informed as to the disposition of his or her complaint within one week.

Related Standards:

The American Bar Association, **Standards for Criminal Justice**, 4-5.1 and 4-5.2.

Commentary:

The nature of public defense work may give rise to client complaints about the attorney's handling of the case. Defendants are often in extreme circumstances, sometimes awaiting trial in jail; their

employment and family lives have been severely disrupted, and their expectations of what legal counsel can accomplish may not be realistic.

It is essential that local governments develop a means to respond to client complaints promptly and to investigate and act on meritorious complaints. Many complaints may be unfounded or minor, but clients deserve a respectful hearing and a prompt response. The follow up on client complaints may also alert contracting authorities to persistent problems with a particular attorney or firm or a problem in the system of delivering services.

Under the ABA Standards for Criminal Justice, defense attorneys have the professional obligation to keep clients advised at all stages of the legal proceeding. Unfortunately, the high level of caseloads handled by public defense attorneys often limits the frequency of attorney-client contacts. Studies on client satisfaction have shown that indigent clients can have a significant lack of trust in their attorneys, in large part because they were not kept fully informed about developments in their case. Local jurisdictions investigating client complaints need to be sensitive to the special nature of the attorney-client relationship and to be aware of the workload demands faced by public defense attorneys. Funding levels which permit adequate communication with clients will help reduce the number of complaints.

STANDARD SIXTEEN: Cause for Termination of Removal of Attorney

Standard:

Contracts for defense services shall include the grounds for termination of the contract by the parties. Termination of an attorney's contract should only be for cause. Good cause shall include the failure of the attorney to render adequate representation to clients; the willful disregard of the rights and best interests of the client; and the willful disregard of the standards herein addressed.

The representation in an individual case establishes an inviolable attorney-client relationship. Removal of counsel from representation therefore normally should not occur over the objection of the attorney and the client.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, Standard 5-1.3, 5-5.3.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Defense Contracts**, 1984, Guideline III-5.

National Study Commission on Defense Services, **Guidelines for Legal Defense Systems in the United States**, 1976, Recommendations 2.12 and 2.14.

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standard 13.8.

Commentary:

The intent of this standard is to assure contracting attorneys' independence and stability by insulating them from arbitrary removal or termination. The adversarial and frequently high-profile nature of criminal defense work invites criticism and sometimes the inappropriate interference of politicians. The ABA standards say clearly that public defense lawyers "should be free from political influence and should be subject to judicial supervision only in the same manner and to

the same extent as are lawyers in private practice." Vigorous representation of an unpopular client is not grounds for discipline or removal.

Actions which do merit termination of employment could include the attorney's failure to protect client interests and to meet professional standards.

The NLADA Guidelines' commentary notes that the power to discipline attorneys for conduct or inaction in a single case lies with the state bar and the judiciary.

STANDARD SEVENTEEN: Non-Discrimination

Standard:

Neither the Contracting Authority, in its selection of an attorney, firm or agency to provide public defense representation, nor the attorneys selected, in their hiring practices or in their representation of clients, shall discriminate on the grounds of race, color, religion, national origin, age, marital status, sex, sexual orientation or handicap. Both the contracting authority and the contractor shall comply with all federal, state, and local non-discrimination requirements.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, Providing Defense Services, Standard 5-3.1.

National Legal Aid and Defender Association, **Standards for Defender Services**, 1976, Standard III-8.

Commentary:

This standard addresses both the concern about non-discrimination in client representation and in the selection of public defenders and their staffs.

The American Bar Association standard emphasizes the importance of recruiting attorney candidates "from minority groups which are substantially represented in the defender program's client populations." An office or attorney who is perceived as racially biased will not enjoy the confidence of clients or the courts.

Local governments and attorneys providing services must be sensitive to the potential for discrimination. All legal requirements on hiring and on the treatment of clients must be met.

STANDARD EIGHTEEN: Guidelines for Awarding Defense Contracts

Standard:

The county or city should award contracts for public defense services only after determining that the attorney or firm chosen can meet accepted professional standards. Under no circumstances should a contract be awarded on the basis of cost alone. Attorneys or firms bidding for contracts must demonstrate their ability to meet these standards.

Contracts should only be awarded to a) attorneys who have at least one year's criminal trial experience in the jurisdiction covered by the contract (i.e., City and District Courts, Superior Court or Juvenile Court), or b) to a firm where at least one attorney has one year's trial experience.

City attorneys, county prosecutors, and law enforcement officers should not select the attorneys who will provide indigent defense services.

Related Standards:

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Legal Defense Contracts**, 1984, Standard IV-3.

King County Bar Association Indigent Defense Services Task Force, **Guidelines for Accreditation of Defender Agencies**, 1982, Statement of Purpose.

Commentary:

Currently in Washington State, some counties award contracts for public defense on the basis of competitive bidding, without consideration of the quality of representation that will be provided by the contracting attorney or firm. Contracts which do not address the issues raised in these standards -- reasonable caseloads, adequate support staff and minimum experience levels, to name just three -- cannot be expected to deliver the effective representation mandated by the state and federal constitutions.

Government has a responsibility to contain costs for public defense programs, but cost alone is no guarantee of efficiency. Poorly organized, understaffed, short-term defender programs may be more costly in the long run and may open counties to lawsuits for their failure to ensure effective representation of indigent accused citizens. By the same token, adopting these standards without providing the funds necessary to implement them only defeats their purpose. Our legal system is based on the premise that justice will emerge from the clash between equal adversaries, but this ideal is little more than a pretense if one of the adversaries is denied all but the most meager resources. The vigorous representation to which all accused citizens are entitled simply cannot be purchased at a discount.

Inexperienced attorneys with no office overhead or very young attorneys with no family obligations may indeed be able to submit lower bids than their more experienced colleagues, but if the guarantee of effective counsel is to have any meaning, attorneys receiving contracts for public defense must have adequate experience. Although the minimum experience standards here, by themselves, cannot guarantee that the defendant will be adequately represented, they provide certain assurances that the counsel has developed fundamental abilities and knowledge as well as advocacy skills which will enable him or her to conduct the defense in a competent manner.

¹The NLADA Guidelines were approved by the American Bar Association House of Delegates in 1985.

²All commentary was provided by the Washington Defender Association.

³Because one dependency case may involve multiple hearings over several years - shelter care hearings, review hearings, fact-finding hearings and, in some cases, termination hearings - this standard is based on total number of clients per year.

RCW 10.101.030 Standards for Public Defense services.

Each county or city under this chapter shall adopt standards for the delivery of public defense services, whether those services are provided by contract, assigned counsel, or a public defender office. Standards shall include the following: Compensation of counsel, duties and responsibilities

of counsel, case load limits and types of cases, responsibility for expert witness fees and other costs associated with representation, administration expenses, support services, reports of attorney activity and vouchers, training, supervision, monitoring and evaluation of attorneys, substitution of attorneys or assignment of contracts, limitations on private practice of contract attorneys, qualifications of attorneys, disposition of client complaints, cause for termination of contract or removal of attorney, and nondiscrimination. The standards endorsed by the Washington State Bar Association for the provision of public defense services may serve as guidelines to contracting authorities.

[1989 c 409 § 4.]