

## ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

August 2023

### **PRINCIPLE 1: Independence**

Public Defense Providers<sup>1</sup> and their lawyers should be independent of political influence and subject to judicial authority and review only in the same manner and to the same extent as retained counsel and the prosecuting agency and its lawyers.<sup>2</sup> To safeguard independence and promote effective<sup>3</sup> and competent<sup>4</sup> representation, a nonpartisan board or commission should oversee the Public Defense Provider.<sup>5</sup> The selection of the head of the Public Defense Provider, as

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<sup>1</sup> The term “Public Defense Providers” refers to public defender agencies and to programs that furnish assigned lawyers and contract lawyers who provide defense services at public expense. The term “Public Defense Providers” is also used in the *ABA Eight Guidelines of Public Defense Related to Excessive Workloads* (2009).

<sup>2</sup> Independence should extend to the selection, funding, and payment of Public Defense Providers and lawyers. “The selection of lawyers for specific cases should not be made by the judiciary or elected officials but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs.” *ABA Standards for Criminal Justice: Providing Defense Services*, Standard 5-1.3(a) (3<sup>rd</sup> edition, 1992). See also Nat’l Ass’n for Public Defense, *Statement on the Importance of Judicial Independence*, July 1, 2016, <https://www.publicdefenders.us/positionpapersstatements>. Establishing independence from political and judicial influence is also critically important to effective public defense at the federal level. See Ad Hoc Committee to Review the Criminal Justice Act, *2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act* (2017); Nat’l Ass’n of Criminal Defense Lawyers, *Federal Indigent Defense 2015: The Independence Imperative* (2015), <https://www.nacdl.org/Document/FederalIndigentDefense2015IndependenceImperative>.

<sup>3</sup> The Sixth Amendment right to counsel requires “reasonably effective assistance of counsel pursuant to prevailing professional norms of practice.” See *Strickland v. Washington*, 466 U.S. 668, 688 (1984). In *Strickland*, the U.S. Supreme Court noted that the ABA Criminal Justice Standards on Defense Function are guides to determining what is reasonably effective. A quarter of a century later, the Court described these standards as “valuable measures of the prevailing professional norms of effective representation.” *Padilla v. Kentucky*, 559 U.S. 356 (2010). The Court has also held that criminal cases must be subject to “meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 658-59 (1984).

<sup>4</sup> Under the ethical rules, lawyers are required to provide clients “competent” representation. *ABA Model Rules of Professional Conduct*, Rule 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”). These rules have been adopted by every state throughout the country.

<sup>5</sup> The board’s mission should be to advocate for and provide high-quality, well-funded public defense that ensures effective assistance of counsel for all eligible defendants. The selection process for members of the board or commission should ensure the independence of the Public Defense Provider. Appointments of members should be divided among the different branches of government and may also include appointments from interested organizations such as bar organizations, law schools, and organizations representing the client community. No members should be judges, prosecutors, law enforcement officials or current Public Defense Providers.

well as lawyers and staff, should be based on relevant qualifications and should prioritize diversity and inclusion to ensure that public defense staff are as diverse as the communities they serve.<sup>6</sup> Public Defender Providers should have recruitment and retention plans in place to ensure diverse staff at all levels of the organization.<sup>7</sup> Neither the chief defender nor staff should be removed absent a showing of good cause.<sup>8</sup>

## **PRINCIPLE 2: Funding, Structure, and Oversight**

For state criminal charges, the responsibility to provide public defense representation rests with the state;<sup>9</sup> accordingly, there should be adequate state funding and oversight of Public Defense Providers. Where the caseloads allow, public defense should be a mixed system: primarily dedicated public defense offices,<sup>10</sup> augmented by additional Public Defense Providers<sup>11</sup> to handle overflow

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Members should serve staggered terms to ensure continuity. See National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976); National Legal Aid and Defender Association, *Standards for the Administration of Assigned Counsel Systems*, Standard 3.2.1 (1989). The structure of board oversight may be adjusted based upon the organization of Public Defense Providers. It may consist of a single board or multiple separate boards requiring separate governing bodies. See *ABA Standards for Criminal Justice: Providing Defense Services*, Standard 5-1.3(b) (3<sup>rd</sup> edition, 1992) (“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 for defender systems should be governed by such a component. Board of Trustees should not include prosecutors or judges. The primary function of Boards of Trustees is to support and protect the independence of the defense services program.”).

<sup>6</sup> In Florida and Tennessee, and in some cities in the United States, public defenders are popularly elected. See Ronald F. Wright, *Public Defender Elections and Popular Control over Criminal Justice*, 75 Mo. L. Rev. 803, 814 (2010). The ABA has not endorsed popular election of chief public defenders.

<sup>7</sup> 16AM113 (encouraging “all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys”).

<sup>8</sup> See *ABA Standards for Criminal Justice: Providing Defense Services*, Standard 5-4.1 (3<sup>rd</sup> edition, 1992) (“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.”)

<sup>9</sup> See *Gideon v. Wainwright*, 372 U.S. 353 (1963) (right to counsel in felony cases); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (right to counsel in misdemeanor cases); *In re Gault*, 387 U.S. 1 (1967) (right to counsel in juvenile delinquency cases); *Alabama v. Shelton*, 535 U.S. 654 (2002) (right to counsel attaches to any case in which there is a potential for active jail or prison time, including suspended sentences). For federal criminal charges, the responsibility for adequate funding and oversight rests with the federal government. Local governments should also provide funding and resources as needed or constitutionally required.

<sup>10</sup> Full-time public defenders, working in a fully staffed office, develop valuable expertise in handling criminal cases and working with persons charged with crimes. See, e.g., *ABA Criminal Justice Standards: Providing Defense Services*, Standard 5-1.2 (“When adequately funded and staffed, defender organizations employing full-time personnel are capable of providing excellent

and conflict of interest cases.<sup>12</sup> The compensation for lawyers working for Public Defense Providers should be appropriate for and comparable to other publicly funded lawyers. Full-time public defender salaries and benefits should be no less than the salaries and benefits for full-time prosecutors.<sup>13</sup> Other provider attorneys should be paid a reasonable fee that reflects the cost of overhead and other office expenses, as well as payment for work.<sup>14</sup> Investigators, social workers, experts, and other staff and service providers necessary to public defense should also be funded and compensated in a manner consistent with this Principle.<sup>15</sup> There should be at least parity of resources between public defense counsel and prosecution.<sup>16</sup>

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defense services. By devoting all of their efforts to legal representation, defender programs ordinarily are able to develop unusual expertise in handling various kinds of criminal cases. Moreover, defender offices frequently are in the best position to supply counsel soon after an accused is arrested. By virtue of their experience, full-time defenders also are able to work for changes in laws and procedures aimed at benefiting defendants and the criminal justice system.”)

<sup>11</sup> These additional Public Defense Providers may be a second public defender office for handling conflict cases and/or assigned counsel operating pursuant to a defense service contract. The appointment process for assigned counsel should be according to a coordinated plan directed by a lawyer-administrator familiar with private lawyers, investigators and other vital defense services in the jurisdiction. See, e.g., *ABA Criminal Justice Standards: Providing Defense Services*, Standard 5-1.2 (“The participation should be through a coordinated assigned counsel system and may also include contracts for services.”).

<sup>12</sup> Absent substantial private practitioners to augment the representation of full-time public defenders, public defenders are likely to become overwhelmed with cases. See *id.*, at Commentary to Standard 5-1.2 (“In some cities, where a mixed system has been absent and public defenders have been required to handle all of the cases, . . . [c]aseloads have increased faster than the size of staffs and necessary revenues, making quality legal representation exceedingly difficult.”). In rural areas, it may be appropriate to consider regional Public Defense Providers. Adherence to all of the Principles is critically important to an effective public defense system irrespective of whether a jurisdiction relies on public defender offices or solely on a system of appointed counsel.

<sup>13</sup> Public defense counsel should also receive raises and promotions commensurate with prosecutors and other publicly funded lawyers in order to encourage retention of experienced counsel.

<sup>14</sup> *ABA Criminal Justice Standards: Providing Defense Services*, Standard 5-2.4. The fee rate should be subject to regular increases to ensure the ongoing availability of quality counsel and reviewed regularly. Contract selection should be based on factors such as counsel training and experience in public defense representation and should not merely be awarded to the lowest bidder. Counsel should not be paid on a flat fee basis, as such payment structures reward counsel for doing as little work as possible. See *Wilbur v. Mt. Vernon*, No. C11-1100RSL, U.S.D.C. D. Wash., at 15 (Dec. 4, 2013) (district court finding that a flat fee contract “left the defenders compensated at such a paltry level that even a brief meeting at the outset of the representation would likely make the venture unprofitable.”).

<sup>15</sup> The importance of these providers is discussed in more detail in Principle 9.

<sup>16</sup> In determining appropriate funding and resources, jurisdictions should consider that while prosecutors can often draw upon separately funded resources for investigations such as police departments and state crime labs, Public Defense Providers normally must pay for investigative

### **PRINCIPLE 3: Control of Workloads**

The workloads of Public Defense Providers should be regularly monitored and controlled to ensure effective and competent representation.<sup>17</sup> Workloads should never be so large as to interfere with the rendering of quality representation or to lead to the breach of ethical obligations.<sup>18</sup> Workload standards should ensure compliance with recognized practice and ethical standards and should be derived from a reliable data-based methodology. Jurisdiction-specific workload standards may be employed when developed appropriately,<sup>19</sup> but national workload standards should never be exceeded.<sup>20</sup> If workloads become excessive, Public

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and other ancillary services. In many jurisdictions, defender offices face a significant funding gap with prosecutors despite this distinction. Bryan Furst, *A Fair Fight: Achieving Indigent Defense Resource Parity* 9 (Brennan Center for Justice, Sept. 9, 2019), <https://www.brennancenter.org/our-work/research-reports/fair-fight> (discussing the lack of investigators and other support staff in public defender offices as compared prosecutorial investigatory resources).

<sup>17</sup> Excessive caseloads impinge upon a lawyer’s ability to provide competent and effective representation to all clients. See *ABA Eight Guidelines of Public Defense Related to Excessive Workloads*, Commentary to Guideline 1 (“[A]n excessive number of cases create[s] a concurrent conflict of interest, as a lawyer is forced to choose among the interests of various clients, depriving at least some, if not all clients, of competent and diligent defense services.”) (citations omitted). Those who provide public defense services, no less than those who represent persons with financial means, are duty bound not to accept a representation when doing so would impinge upon their ability to provide competent and effective representation. See ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-441, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation* (2006). The National Association for Public Defense has concluded that public defenders “can no longer operate in a system without meaningful workload standards” and has “encourage[d] public defense providers in every jurisdiction to develop, adopt, and institutionalize meaningful, evidence-based workload standards in their jurisdictions.” Nat’l Ass’n for Public Defense, *Statement on the Necessity of Meaningful Workload Standards for Public Defense Delivery Systems*, Mar. 19, 2015, <https://www.publicdefenders.us/positionpapersstatements>.

<sup>18</sup> See *ABA Eight Guidelines of Public Defense Related to Excessive Workloads*; Formal Ethics Opinion 06-441.

<sup>19</sup> The ABA’s Standing Committee on Legal Aid and Indigent Defense (ABA SCLAID) partnered with national data analysis firms to complete workload studies for seven jurisdictions. See, e.g., Moss Adams and ABA SCLAID, *The New Mexico Project* (2022). These workload studies are available through the ABA SCLAID website, [www.indigentdefense.org](http://www.indigentdefense.org).

<sup>20</sup> Notably, in 2023, new National Public Defense Workload Standards (NPDWS) were published by The RAND CORPORATION, ABA SCLAID, The National Center for State Courts, and Stephen F. Hanlon. The NPDWS are grounded in a rigorous study of 17 prior jurisdiction-specific workload studies conducted between 2005 and 2022 and use the Model Rules and ABA Criminal Justice Section standards as the reference for reasonably effective assistance of counsel. The NPDWS then used the Delphi Method to obtain a reliable professional consensus of criminal defense experts, both public and private, from across the nation. These new national standards are intended to replace the 1973 NAC Standards. See National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, *Chapter 13, The Defense* (1973). The

Defense Providers are obligated to take steps necessary to address excessive workload, which can include notifying the court or other appointing authority that the Provider is unavailable to accept additional appointments, and if necessary, seeking to withdraw from current cases.<sup>21</sup>

#### **PRINCIPLE 4: Data Collection and Transparency**

To ensure proper funding and compliance with these Principles, states should, in a manner consistent with protecting client confidentiality, collect reliable data on public defense, regularly review such data, and implement necessary improvements.<sup>22</sup> Public Defense Providers should collect reliable data on caseloads and workloads,<sup>23</sup> as well as data on major case events,<sup>24</sup> use of investigators, experts, social workers and other support services, case outcomes, and all monetary expenditures.<sup>25</sup> Public Defense Providers should also collect

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NPDWS reflect the changes in defense practice that have occurred in the fifty years since the creation of the NAC Standards, including the significant role of digital evidence from body-worn cameras to smart phone data and forensics in modern defense practice, as well as the expanded role of defense attorneys.

<sup>21</sup> See Formal Opinion 06-441; *ABA Eight Guidelines of Public Defense Related to Excessive Workloads* (August 2009). Failure to take steps to reduce an excessive caseload can result in bar discipline. See, e.g., [In re: Karl William Hinkebein](#), No. SC96089 (Mo. Sup. Ct. Sept. 12, 2017) (suspending the public defender's license indefinitely but staying that suspension and placing him on probation for one year). Courts should not order public defenders to take a case, if doing so would result in an excessive caseload. See *State ex rel. Missouri Public Defender Commission v. Waters*, 370 S.W.3d 592 (Mo. 2012) (holding that a trial judge exceeded his authority in appointing a public defender after the public defender office had declared unavailability due to an excessive caseload); *c.f. Lavalley v. Justices in the Hampden Superior Court*, 442 Mass. 228 (Sup. J. Ct. Mass. 2004) (rejecting a judge's appointment of public defenders despite an assertion by the Public Defense Provider that the public defenders had reached caseload limits).

<sup>22</sup> Data collection is essential to proper oversight at every level. A state's duty to fully fund the public defense function, as outlined in Principle 2, includes a duty to fully fund data collection. Florida has adopted a statute mandating the collection of extensive data throughout the criminal justice system. See Florida Statutes, Title 47, § 900.05 – Criminal Justice Data Collection. The Texas Indigent Defense Commission collects data on public defense from each county and publishes the data on a portal. See [Indigent Defense Data for Texas](#), TIDC (visited Mar. 21, 2023).

<sup>23</sup> Such data should include the number and types of cases assigned to each Public Defense Provider. As noted in Principle 3, caseloads and workloads must be regularly monitored and controlled to ensure ability to comply with ethical and practice standards.

<sup>24</sup> Such data should include eligibility determinations and decisions, initial appearance outcomes including pretrial detention and conditions of release, motions filed, use of services such as translators, investigators, social workers, and experts, and case outcomes. Effective data collection may require the hiring of specific staff to focus on the collection, verification and presentation of data. The ABA has endorsed similar data collection responsibilities for prosecutors. [2021A504](#). An effective way to collect such data is through regular timekeeping.

<sup>25</sup> Case data is most often collected using timekeeping and/or standardized case opening and closing forms. The ABA has recognized the Los Angeles Independent Juvenile Defender

demographic data on lawyers and other employees.<sup>26</sup> Providers should also seek to collect demographic data from their clients to ensure they are meeting the needs of a diverse clientele.<sup>27</sup> Aggregated data should be shared with other relevant entities and made publicly available in accordance with best practices.<sup>28</sup>

### **PRINCIPLE 5: Eligibility and Fees for Public Defense**

Public defense should be provided at no cost to any person who is financially unable to obtain adequate representation without substantial burden or undue hardship.<sup>29</sup> Persons<sup>30</sup> should be screened for eligibility in a manner that ensures information provided remains confidential.<sup>31</sup> The process of applying for public

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Program, which requires attorneys to complete case intake and resolution forms, for its effective case data collection system. ABA SCLAID, *Exemplary Defense: A Study of Three Groundbreaking Projects in Public Defense* 44-45, Oct. 2018.

<sup>26</sup> The ABA has endorsed collecting demographic data on all judges and government lawyers to promote and track progress toward improving diversity in the legal profession and increasing trust in the justice system. [2021A605](#).

<sup>27</sup> 2021A504 (urging prosecutor offices to similarly collect and publish outcomes by demographic data); see, e.g., [Ramsey County Attorney's Office Public Data Portal](#) (visited Mar. 21, 2023)(showing case outcomes by race and gender). Such data should be collected from clients voluntarily and in accordance with best practices. These best practices are evolving; accordingly, data collection and reporting practices should be regularly reviewed and updated. See, e.g., [A Vision for Equitable Data: Recommendations from the White House Equitable Data Working Group](#) (Apr. 2022). Absent such data, Public Defense Providers cannot identify, assess, and seek to address disparate impact. See, e.g., [Guidelines for data collection on race and ethnicity](#), Utah Dept. of Health and Human Services, Office of Health Equity (Oct. 2022).

<sup>28</sup> See *id.* Sensitive data should be made public in an aggregated format that protects the privacy of individuals. See 2021A605 (discussing best practices of aggregating data for privacy). Individual client data should be carefully guarded. See, e.g., *ABA Model Rules of Professional Conduct*, Rule 1.6 (providing that a lawyer may not, generally, “reveal information relating to the representation of a client unless the client gives informed consent” and that a lawyer “shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client”).

<sup>29</sup> *ABA Criminal Justice Standards: Providing Defense Services*, §5-7.1 (“Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship.”); Eligibility consideration should consider the prevailing fee for the charge(s) faced by the person in the jurisdiction. See Brennan Center for Justice, *Eligible for Justice: Guidelines for Appointing Defense Counsel*, at 13 (2008) (“In determining whether someone can afford counsel, jurisdictions should take into account the actual cost of obtaining counsel.”), <https://www.brennancenter.org/publication/eligible-justice-guidelines-appointing-defense-counsel>. Jurisdictions should also consider how the type and nature of the charged offense would affect the cost of an effective defense.

<sup>30</sup> Persons refers to any person arrested or detained or seeking the assistance of indigent defense counsel.

<sup>31</sup> *ABA Criminal Justice Standards: Providing Defense Services*, §5-7.3 (“Determination of eligibility should be made by defenders, contractors for services, assigned counsel, a neutral screening agency or by the court.”); *ABA Model Rules of Professional Conduct*, Rule 1.6.

defense services should not be complicated or burdensome, and persons in custody or receiving public assistance should be deemed eligible for public defense services absent contrary evidence.<sup>32</sup> Jurisdictions should not charge an application fee for public defense services, nor should persons who qualify for public defense services be required to contribute to or reimburse defense services.<sup>33</sup>

### **PRINCIPLE 6: Early and Confidential Access to Counsel**

Counsel should be appointed immediately after arrest, detention, or upon request. Prior to a client's first court appearance, counsel should confer with the client and prepare to address pretrial release and, if possible, probable cause.<sup>34</sup> Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information.<sup>35</sup> Waiver of the right to counsel and waiver of the person's right to court appearance should never be coerced or encouraged.<sup>36</sup> Before a person may waive counsel, they must be provided a

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Eligibility screening should not be conducted by the presiding judge. See also Brennan Center for Justice, *Eligible for Justice: Guidelines for Appointing Defense Counsel*, at 11 (2008). Eligibility information should be disclosed only to the extent required by applicable Rules of Professional Conduct or other law.

<sup>32</sup> A person should never be discouraged from or punished for applying for public defense services. See National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel*, at 85-87 (2009) (observing how defendants can be pressured to waive counsel rather seek public defense because "a defendant who wants . . . counsel must wait several days for counsel to be appointed and possibly several more days for appointed counsel . . . to make contact.").

<sup>33</sup> Public defense user fees should be eliminated. See *ABA Ten Guidelines on Court Fines and Fees*, Commentary to Guideline 1 (2018) (recommending the elimination of user fees "because the justice system serves the entire public and should be entirely and sufficiently funded by general government revenue.").

<sup>34</sup> Pleas of guilty to criminal charges at first appearance or arraignment are disfavored. See *ABA Criminal Justice Standards: Defense Function*, Standard 4-6.1(b), (2015) ("In every criminal matter, defense counsel . . . should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed . . . Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest.")

<sup>35</sup> To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where clients confer with defense counsel. See, e.g., *Williams v. Birkett*, 697 F. Supp. 2d 716 (U.S. Dist. Ct., E.D. Mich. 2010) ("To ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions between counsel and accused.")

<sup>36</sup> See *ABA Criminal Justice Standards: Defense Function*, Standard 5-8.2(a) (2017) ("The accused's failure to request counsel or an announced intention to plead guilty should not of itself be construed to constitute a waiver of counsel in court. An accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed before a judge and a thorough inquiry into the accused's comprehension of the offer and capacity to make the choice intelligently and understandingly has been made. No waiver of

meaningful opportunity to confer with a defense lawyer who can explain the dangers and disadvantages of proceeding without counsel and, if relevant, the implications of pleading guilty, including the direct and collateral consequences of a conviction.<sup>37</sup>

### **PRINCIPLE 7: Experience, Training and Supervision**

A Public Defense Provider's plan for the assignment of lawyers should ensure that the experience, training, and supervision of the lawyer matches the complexity of the case.<sup>38</sup> Public Defense Providers should regularly supervise and systematically evaluate their lawyers to ensure the delivery of effective and competent representation free from discrimination or bias. In conducting evaluations, national, state, and local standards, including ethical obligations, should be considered. Lawyers and staff should be required to attend continuing education programs or other training to enhance their knowledge and skills. Public Defense Providers should provide training at no cost to attorneys, as well as to other staff.<sup>39</sup>

Public Defense Providers should ensure that attorneys and other staff have the necessary training, skills, knowledge, and awareness to effectively represent clients affected by poverty, racism, and other forms of discrimination in a

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counsel should occur unless the accused understands the right and knowingly and intelligently relinquishes it. No waiver should be found to have been made where it appears that the accused is unable to make an intelligent and understanding choice because of mental condition, age, education, experience, the nature or complexity of the case, or other factors. A waiver of counsel should not be accepted unless it is in writing and of record.”)

<sup>37</sup> See *ABA Ten Guidelines on Court Fines and Fees*, Guideline 8 (“Waiver of counsel must not be permitted unless the waiver is knowing, voluntary, and intelligent. In addition, the individual first has been offered a meaningful opportunity to confer with counsel capable of explaining the implications of pleading guilty, including collateral consequences.”). See also *Faretta v. California*, 422 U.S. 806 (1975) (“Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’”) (citations omitted); *Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding that counsel must advise their client on the potential immigration consequences of a criminal conviction).

<sup>38</sup> If the defense lawyer lacks the requisite experience or training for the case, the lawyer cannot provide effective and competent representation and is obligated to refuse appointment. See *ABA Model Rules of Professional Conduct*, Commentary to Rule 1.1 (“In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.”); *ABA Eight Guidelines of Public Defense Related to Excessive Workloads*.

<sup>39</sup> As with other aspects of an effective Public Defense System, and as described in Principle 2, Public Defense Providers should be adequately funded to provide such training.



culturally competent manner.<sup>40</sup> Public defense counsel should be specifically trained in raising legal challenges based on racial and other forms of discrimination.<sup>41</sup> Public defense counsel and other staff should also be trained to recognize biases within a diverse workplace.<sup>42</sup>

### **PRINCIPLE 8: Vertical Representation**

To develop and maintain a relationship of trust, the same defense lawyer should continuously represent the client from assignment<sup>43</sup> through disposition and sentencing in the trial court, which is known as “vertical” representation. Representation by the defense lawyer may be supplemented by specialty counsel, such as counsel with special expertise in forensic evidence, immigration, or mental health issues, as appropriate to the case.<sup>44</sup> The defense lawyer assigned to a direct appeal should represent the client throughout the direct appeal.

### **PRINCIPLE 9: Essential Components of Effective Representation**

Public Defense Providers should adopt a client-centered approach to representation based around understanding a client’s needs and working with them to achieve their goals.<sup>45</sup> Public Defense Providers should have the assistance of investigators, social workers, mitigation specialists, experts, and

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<sup>40</sup> The ABA has endorsed similar requirements for attorneys providing civil legal aid services, Standards for the Provision of Civil Legal Aid 4.4, as well as for law students. 2022M300 (“A law school shall provide education to law students on bias, cross-cultural competency and racism[.]”).

<sup>41</sup> For instance, all counsel should be trained to effectively raise objections under *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>42</sup> See, e.g., 2020A116G (urging that all legal and medical professionals “receive periodic training regarding implicit biases.”); The [ABA’s Diversity, Equity and Inclusion Center](#) has a number of resources and trainings available.

<sup>43</sup> In some jurisdictions, to facilitate prompt initial appearance, a specially trained duty lawyer or bail lawyer may represent an individual from arrest through initial appearance. Before or at initial appearance, defense counsel should be assigned. Procedures should be in place to ensure continuous representation and proper transition from initial appearance counsel to defense counsel.

<sup>44</sup> For instance, some public defense offices have established distinct units of attorneys with specialized skills to advise non-U.S. citizen clients on immigration matters relevant to their cases. See Carlos J. Martinez, George C. Palaidis & Sarah Wood Borak, *You Are the Last Lawyer They Will Ever See Before Exile: Padilla v. Kentucky and One Indigent Defender Office’s Account of Creating a Systematic Approach to Providing Immigration Advice in Times of Tight Budgets and High Caseloads*, 39 Fordham Urb. L.J. 121 (2012).

<sup>45</sup> See James M. Anderson, Maya Buenaventura & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 Harv. L. Rev. 819 (Jan. 2019) (assessing the benefits of a client-centered defense model in reducing the length of sentences).

other specialized professionals necessary to meet public defense needs.<sup>46</sup> Such services should be provided and controlled by Public Defense Providers.<sup>47</sup> Additional contingency funding should be made available to support access to these services as needed.<sup>48</sup> Public Defense Providers should address civil and non-legal issues that are relevant to their clients' cases.<sup>49</sup> Public Defense Providers can offer direct assistance with such issues or establish collaborations with, or provide referrals to civil legal services organizations, social services providers, and other lawyers and non-lawyer professionals.<sup>50</sup>

### **PRINCIPLE 10: Public Defense as Legal System Partners**

Public Defense Providers should be included as equal participants in the legal system. Public Defense Providers are in a unique position to identify and challenge unlawful or harmful conditions adversely impacting their clients. Legislative or organizational changes or other legal system reforms should not be

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<sup>46</sup> See Nat'l Ass'n for Public Defense, *Policy Statement on Public Defense Staffing*, May 2020, <https://www.publicdefenders.us/positionpapersstatements>.

<sup>47</sup> Under no circumstances should defense counsel be required to bear the cost of experts and other professionals. See *Wash. R. Professional Conduct* 1.8 (“A lawyer shall not . . . make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm . . . to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law firm personnel.”).

<sup>48</sup> In Florida, for example, state funds, sometimes referred to as “due process funds for the defense,” are available for various defense services, such as investigators, experts, and other specialized public defense needs in addition to contingency funding. The funds also cover prosecution services. See *Florida Statutes* § 29.006, § 29.015, and § 29.018 (2018).

<sup>49</sup> In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the U.S. Supreme Court held that, in order to provide effective assistance of counsel, an attorney must provide advice on the potential immigration consequences of a client’s criminal charge. Following *Padilla*, several courts have held that advice on other potential civil consequences of a criminal case is also required. See, e.g., *Bauder v. Department of Corrections*, 619 F.3d 1272, 1275 (11th Cir. 2010) (holding that the requirement of advice on non-criminal consequences extended beyond immigration to include civil commitment). Understanding a client’s non-criminal legal issues, may be critical to understanding relevant arguments regarding sentencing, including the appropriateness of diversion or other programs available through the criminal case.

<sup>50</sup> See [2012AM107C](https://www.americanbar.org/groups/legal_aid_indigent_defendants/indigent_defense_systems_improvement/standards-and-policies/policies-and-guidelines/) (urging defender organizations and criminal defense lawyers to create “linkages and collaborations with civil practitioners, civil legal services organizations, social service program providers and other non-lawyer professionals who can serve, or assist in serving, clients in criminal cases with civil legal and non-legal problems related to their criminal cases, including the hiring of such professionals as experts, or where infrastructure allows, as staff.”) [https://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/indigent\\_defense\\_systems\\_improvement/standards-and-policies/policies-and-guidelines/](https://www.americanbar.org/groups/legal_aid_indigent_defendants/indigent_defense_systems_improvement/standards-and-policies/policies-and-guidelines/). For over 40 years, scholars have recognized the importance of having social workers in defender offices. See, e.g., Charles Silberman, *Criminal Violence, Criminal Justice* (New York: Random House, 1978).

considered without soliciting input from representatives of the defense function and evaluating the impact of such changes on Public Defense Providers and their clients. To the extent any changes result in an increase in defender workload or responsibilities, adequate funding should be provided to Public Defense Providers to accommodate such changes.